STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DIXIE ELEMENTARY SCHOOL DISTRICT, Employer, and DIXIE TEACHERS ASSOCIATION, CTA/NEA, Employee Organization.	Case No. SF-UM-87 (R- 362) PERB Decision No. 171 August 11, 1981

Appearances: Diana K. Smith, Attorney (Breon, Galgani and Godino) for the Dixie Elementary School District; Kirsten L. Zerger, Attorney for the Dixie Teachers Association, CTA/NEA.

Before Jaeger, Moore, and Tovar, Members.

DECISION

The Dixie Elementary School District (hereafter District) has excepted to a Public Employment Relations Board (hereafter PERB or Board) hearing officer's proposed decision holding a unit containing full-time, temporary and substitute teachers appropriate under the Educational Employment Relations Act (hereafter EERA or Act).[1] The Board itself affirms the hearing officer's decision.

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[1]Government Code sections 3540 et seq. All statutory references are to the California Government Code unless otherwise specified.

PROCEDURAL HISTORY AND FACTS

The hearing officer's statement of the procedural history and findings of fact in this case, attached hereto, are free from prejudicial error and are adopted by the Board itself.

DISCUSSION

This case involves an amended petition for unit modification filed by the Dixie Teachers Association CTA/NEA (hereafter DTA). The petition seeks to add certain day-to-day substitute teachers and certain temporary teachers to DTA's existing unit of regular full-time, substitute and temporary teachers.[2] The unit has heretofore included all regular, full-time teachers, temporary teachers employed for more than 75 percent of the school year, substitute teachers employed for more than 75 percent of the prior school year, and temporary and substitute teachers on layoff with re-employment rights.

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[2]Specifically, the August 9, 1979 petition seeks: "The addition to the existing unit of (all) substitute teachers in the Dixie School District employed to fill positions of regularly employed persons absent from service, except those who serve 75% or more of the days school was in session during the preceding school year or who have re-employment rights under the Education Code, and have worked for the District in such capacity for at least two (2) days during any school year." (Emphasis in original.) The Association amended this petition by letter, on May 23, 1980, to include personnel termed "temporary."

The District has challenged the appropriateness of the unit sought. It argues that no community of interest exists between the petitioned-for substitutes and those other teachers currently represented in the established unit and, further, that such a configuration would be "disruptive to the efficient operation of the District." The District does not take exception to inclusion of temporaries in the existing unit.

The Board has interpreted the statutory provisions concerning determination of appropriate units[3] to set up a rebuttable presumption that all classroom teachers be contained

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[3]Sections 3545(a) and (b) set forth the standards for determination of an appropriate unit. Subsection (a) provides:

> (a) In each case where the appropriateness of the unit is an issue, the Board shall decide the question on the basis of the community of interest between and among the employees and their established practices including, among other things, the extent to which such employees belong to the same employee organization, and the effect of the size of the unit on the efficient operation of the school district. (Emphasis added.)

Subsection (b)(1) provides:

> (b) In all cases:
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> (1) A negotiating unit that includes classroom teachers shall not be appropriate unless it at least includes all of the classroom teachers employed by the public school employer, except management employees, supervisory employees, and confidential employees.

in a single unit. Peralta Community College District (11/17/78) PERB Decision No. 77.

The District, in its attempt to rebut the Peralta presumption, first asserts that substitutes do not perform the same work as the regular classroom teachers. However, as evidenced by the record herein, substitutes do perform many of the same functions of the regular teachers. They carry out lesson plans, administer tests, prepare bulletin boards, evaluate students, participate in disciplinary conferences with children and parents, accompany students on field trips, and supervise instructional aides and parent volunteers. Although they are not required to do so, they often attend open house, participate in curriculum planning and attend faculty meetings.

Substitute and regular teachers frequently consult one another regarding students, work closely together, share the same work locations and perform basically the same job functions. The substitute's primary responsibility is to carry forth with the plans and goals of the teacher he/she is replacing. Phone contact is often made on a daily basis between the substitute and such teacher. We therefore conclude that the petitioned-for substitutes do perform work substantially similar to the regular classroom teachers.

The District also argues that day-to-day substitutes do not have the requisite expectancy of continued employment. The

Board finds, however, that it is reasonable for substitute teachers as a class to expect future employment given that the school employer repeatedly employs substitutes as a regular and integral part of the work force. The record below reflects that the District hires from a pool of substitutes who have been listed as eligible and continually available for hire as substitutes and have been employed in that capacity for over three and, in some instances, as many as thirteen years.

The District characterizes the substitute who works as few as two days a year as "casual" and asserts that no community of interest exists between such a classroom teacher and a regular teacher working the full school year. The District then advances a related argument: that the proposed unit contains employees whose number-of-days-employment vary and this variation is so substantial as to undermine the existence of a community of interest among them.

The Board notes, with regard to both these objections, that the District is willing to recognize a separate unit of substitute teachers and therefore, by implication, is willing to admit that such a unit possesses a community of interest. The District also does not question the existence of a community of interest between those substitutes contained in the existing unit and the regular full-time teachers in that unit. Yet, both such unit configurations have two

characteristics in common with the petitioned-for unit: each unit contains teachers who perform substitute work as seldom as one or two days a year, and, there is a substantial variation within each unit as to the number of days worked. A separate unit of substitutes could contain persons working as few as one or two days or as much as 74 percent of the school year. The existing unit could contain teachers on layoff performing substitute work for as few as one or two days as well as regular teachers working the total number of school days per year.[4]

The presence of teachers working as few as one or two days per year and the variation as to number-of-days-employment has not given rise to a breakdown within the existing unit, nor has it given rise to an objection that no community of interest exists within a separate unit of substitutes. This leads the Board to conclude that such objections are of little or no significance in determining the appropriateness of the proposed unit. The National Labor Relations Board (NLRB) reached the same conclusion. In Fresno Auto Auction, Inc. (1967) 167 NLRB 878 [66 LRRM 1177], the employer objected to the petitioned-for

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[4]As noted above, the existing unit is defined as containing temporaries employed for more than 75 percent of the year and substitutes who worked over 75 percent of the previous year. A separate unit of substitutes would contain teachers working less than 75 percent of the previous year. The existing unit also contains teachers on layoff performing substitute or temporary work, even though the annual number-of-days-employment may fall considerably below 75 percent of the previous year. See page 2, supra.

unit on the ground that some of the employees worked too few days and had a relationship to the employment that was too attenuated, or "casual", to be allowed therein. The NLRB decided that variations among the employees (inter alia, the number-of-days-employment), did not undermine the evidence of a community of interest within the unit.[5] In its words:

> [The] fact that they are carried on the payroll as part-time workers does not, in our view, alter the character of the work force as a cohesive group of individuals with a strong mutual interest in their working conditions. Fresno Auto Auction, Inc., supra, at p. 879.

This Board finds no indication that the 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 threshhold requirement for inclusion in the unit based on

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[5]In Fresno Auto Auction, Inc., supra, relatively few employees in the proposed unit were employed full time. A large number were free to determine their own work schedule and to report for work intermittently. The irregularly employed persons were recruited generally by telephone from lists of persons who either previously worked for the employer or had applied at the employer's office. Approximately one-third of the employees worked in less than three weekly pay periods preceding the date of the hearing. A majority appeared more or less regularly over a period of several weeks or months. Many employees held regular full-time jobs elswhere. Many were housewives attracted by the opportunity to supplement their family income.

number-of-days-employment would be inevitably arbitrary.[6] 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.

The District also argues that the inclusion of substitutes in the exisiting unit would impair the efficiency of operations of the District. In response, it is important to recognize that substitutes are not new to the collective bargaining in the District.[7] Moreover, while it may be that additional issues now will have to be addressed as part of collective bargaining, such a burden cannot be avoided under the Act. Substitutes and temporary teachers are "employees" under the EERA (Palo Alto Unified School District/Jefferson Union High School District (1/9/79) PERB Decision No 84); it would facilitate the negotiating process to address the interests of these teachers in a combined rather than a separate unit.

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[6]See Eugene School District v. Substitute Teachers Organization (1977) Ct. of App. [97 LRRM 2625] in which the Oregon State Court of Appeals upheld the State Employment Relations Board's finding that a community of interest existed despite there being a variation among unit members with regard to their number-of-days-employment. The Court concluded that it would be arbitrary to condition unit membership upon being employed a specific number of days each year.

[7]See footnote 4, supra.

The Board finds that the District has failed to rebut, by a preponderance of evidence, the presumed appropriateness of the requested unit. The Board, therefore, directs that the unit be modified to include all substitutes in the existing unit.

ORDER

Upon the foregoing Decision and the record in this case, the Public Employment Relations Board ORDERS that:

1. An appropriate unit for negotiation in the Dixie Elementary School District shall include all full-time, substitute and temporary classroom teachers.

2. Based on a finding that there has been a sufficient showing of interest, the requisite number of authorization cards being on file herein, the unit, as modified above, shall be certified immediately.

By: John W. Jaeger, Member

Irene Tovar, Member

Barbara D. Moore, Member

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

DIXIE ELEMENTARY SCHOOL DISTRICT, Employer, -and- DIXIE TEACHERS ASSOCIATION, CTA/NEA Employee Organization.	Case No. SF-UM-87 (R- 362) PROPOSED DECISION (10/28/80)

Appearances: Diana K. Smith, Attorney (Breon, Galgani and Godino) for the Dixie Elementary School District; Kirsten L. Zerger, Attorney for the Dixie Teachers Association, CTA/NEA.

Proposed Decision by Jerilyn A. Gelt.

PROCEDURAL HISTORY

On April 1, 1976 the Dixie Teachers Association, CTA/NEA (hereafter DTA) requested recognition as the exclusive representative for a unit of all certificated employees excluding management, supervisory and day-to-day substitutes in the Dixie Elementary School District (hereafter District). On or about September 8, 1976, the District granted recognition to DTA as the exclusive representative of the certificated unit, subject to an Educational Employment Relations Board determination regarding the disposition of certain disputed positions.

On December 16, 1976, the parties entered into a unit clarification agreement which excluded from the regular certificated unit temporary employees employed for less than 75 percent of the school year and substitutes except for those serving 75 percent or more of the days school was in session the preceding school year, excepting those temporaries and substitutes who have re-employment rights under the Education Code.

On April 14, 1977 the Marin County Substitute Teachers' Association (hereafter MCSTA) filed a request for recognition for a separate unit of substitutes. This petition was subsequently dismissed by the Public Employment Relations Board (hereafter PERB or Board) due to a lack of majority support. On August 26, 1977 a new request for recognition for a separate unit of substitutes was filed with the District and PERB by the MCSTA. On October 13, 1977 the District filed a Denial of Recognition and requested that PERB conduct a hearing on the appropriateness of the unit.

The petition was held in abeyance by an agreement of the parties on December 15, 1977 pending the outcome of other substitute cases. On February 2, 1979, subsequent to the issuance of Palo Alto Unified School District/Jefferson Union High School District (1/9/79) PERB Decision No. 84, and new unit modification regulations, a PERB representative held an

informal conference with the parties to explore settlement possibilities. No settlement was reached.

On June 25, 1979 the MCSTA asked that the matter again be held in abeyance in order that the DTA might seek a unit modification to include the substitutes in the regular unit. The MCSTA withdrew its request for recognition on August 8, 1979 "contingent upon and in support of" the unit modification petition accompanied by proof of majority support filed the following day by the DTA requesting the following:

> The addition to the existing unit of all substitute teachers in the Dixie School District employed to fill positions of regularly employed persons absent from service except those who serve 75% or more of the days school was in session during the preceding year or who have re-employment rights under the Education Code and have worked for the District in such capacity for at least two (2) days during any school year.

The District filed its response in opposition to the petition on September 14, 1979.

On October 25, 1979 an informal conference was held by the PERB in an attempt to settle the unit dispute. At this meeting and through a subsequent letter from the District received by the PERB on November 5, 1979, the District indicated its willingness to grant voluntary recognition to DTA in "a separate unit composed of all substitute certificated employees who work more than three days during the school year." However, the District also stated that it was "not willing to agree to joint negotiations with the regular certificated unit."

On November 10, 1979 a letter was received by the PERB in which the DTA indicated that the District's offer was unacceptable and requested that the PERB proceed with the unit modification petition.

On November 16, 1979, the Regional Director sent a letter to both parties in which he requested that they submit briefs supporting their positions and, specifically, addressing the difference between the situation at issue in Dixie School District and the situation in Oakland Unified School District (9/20/79), PERB Decision No. 102. The DTA's brief was received at the PERB office on November 29, 1979 and the District's brief was received on November 30, 1979.

The parties entered into a set of stipulations as to the history of the case on February 26, 1980. On May 23, 1980, subsequent to the scheduling of a formal hearing, DTA amended its unit modification petition to specifically include those temporary teachers not already included in the regular certificated unit.

A formal hearing was held on June 4 and 6, 1980 before Michael Tonsing, a hearing officer of the PERB. This matter was reassigned for decision pursuant to California Administrative Code, title 8, section 32168(b).[1] Briefs were filed by both parties with the PERB on August 12, 1980.

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[1]California Administrative Code, title 8, section 32168(b) states:

> A Board agent may be substituted for another

FINDINGS OF FACT

The Dixie Elementary School District has an enrollment of approximately 2,252 students in 4 elementary and 2 intermediate schools.

The District employs approximately 125 regular certificated personnel and maintains an active substitute list numbering close to 80, 8 of whom are laid-off teachers with re-employment rights under the Education Code. This substitute list is gleaned from a larger list maintained by the Marin County Office of Education. No one is hired by the District as a substitute unless they have first registered with the County. All substitute and temporary employees must hold a valid California teaching credential. There is no subsequent interview of the substitute at the District level. Over the past 13 years, a core group of 8-10 substitutes has emerged, upon whom Ms. Elizabeth Ireland, the clerk who has been in charge of calling substitutes for that entire period, relies. The substitutes in this group have substituted in the District for 3 to 6 years, and 3 or 4 of them have subbed there at least 13 years. There is another group of 15-20 substitutes beyond

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Board agent at any time during the proceeding at the discretion of the Chief Administrative Law Judge in unfair practice cases or the Executive Director in representation matters.

that core who consistently remain on the list from one year to the next. They differ from the core group in that they may not remain on the list over several years or may not be as readily available as those in the core group.

When filling a request for a substitute, Ms. Ireland first goes to the list of 8 laid-off teachers, then to the core group of 8-10, then to the remaining substitutes on her active list, next to the group of 15-20 who have had some continuous experience with the District, and, as a last resort, to the county list. Occasionally, she will also refer to the county list if a teacher with a specific specialty is needed. If an absent teacher requests a certain substitute as his/her replacement, that request will be honored, if possible.

Day-to-day substitutes are paid $42.50 per day. Long-term substitutes (those who work 21 days or more on one assignment) are placed on the regular certificated salary schedule on the 21st day of substitution or at the outset of the assignment if it is known at that time that it will be for a duration of 21 days or more.

Day-to-day and long term substitutes receive no sick leave or health and welfare benefits. Separate personnel files are not maintained for each individual substitute, although one general file is maintained for information pertaining to all substitutes.

Day-to day and long-term substitutes are evaluated informally, usually by the observation of a principal or assistant principal. If a substitute is given a negative evaluation, that information is forwarded either orally or by memo to Ms. Ireland. She will then attempt to successfully place the substitute in another school. The substitute is usually not removed from the active list until three or four negative evaluations are received pertaining to him/her.

Substitutes perform basically the same functions in the classroom as the teacher they replace. They carry out lesson plans, administer tests, prepare bulletin boards, evaluate students, participate in disciplinary conferences with children and parents, accompany students on field trips, and supervise instructional aides and parent volunteers. Although they are not required to do so, they often attend open house, participate in curriculum planning and attend faculty meetings. Phone contact is often made on a daily basis between the substitute and the teacher he/she is replacing.

Temporary employees are hired to replace an absent teacher who is on an unpaid leave. Temporaries are under contract with the District and are hired after a screening process and interview. If the temporary has worked as a substitute in the District before, however, the interview may be waived. Laid-off teachers with re-employment rights receive priority for temporary positions. Temporaries are paid on the regular

certificated salary schedule. They receive the same health and welfare benefits and sick leave (on a pro rata basis) as regular certificated personnel. Temporaries are evaluated in the same manner as substitutes, although dismissal of a temporary requires a written evaluation since he/she is under contract. Separate personnel files are kept for each temporary.

Temporaries perform all of the functions of the regular classroom teachers they replace.

ISSUES

Should all substitute and temporary teachers be added to the regular certificated unit?

DISCUSSION

The question of the employee status of substitutes has already been dealt with in previous PERB decisions[2] and was not raised as an issue in this case. In fact, temporary and substitute teachers who work more than 75 percent of the school year and/or are laid-off teachers with re-employment rights are already included in the regular certificated bargaining unit. Rather, the issue is whether or not it is appropriate to add all substitutes and temporaries to the regular certificated unit in light of the standards set forth in Government Code section 3545(a):

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[2] Palo Alto Unified School District/Jefferson Union High School District (1/9/79) PERB Decision No. 84, supra and Oakland Unified School District (9/20/79) PERB Decision No. 102.

> In each case where the appropriateness of the unit is an issue, the board shall decide the question on the basis of the community of interest between and among the employees and their established practices including, among other things, the extent to which such employees belong to the same employee organization, and the effect of the size of the unit on the efficient operation of the school district.

The Board, in Peralta Community College District (11/17/78) PERB Decision No. 77, interpreted the legislative intent of section 3545 to mean that it would "minimize the dispersion of school district faculty into unnecessary negotiating units." Furthermore, in order to reduce the possibilities that "critical negotiation-related differences between groups of teachers might compel unit separation," the Board felt directed by the Legislature "to combine all classroom teachers into a single unit except where an issue of appropriateness is raised and the requirements of subsection (a), which are then invalid, leave the Board with no other option." The Board went on to place the burden of proving the inappropriateness of a comprehensive unit on those opposing it, in this case the Dixie Elementary School District.

The District argues that temporaries and substitutes do not share a sufficient community of interest with the regular teachers to warrant their inclusion in the same unit. Day-to-day substitutes and long-term substitutes are paid on different pay scales from regular certificated personnel, and receive no fringe benefits. Further, the District argues,

their scope of responsibility is more limited than that of a regular teacher who is responsible for the student's progress during the entire school year. However, testimony indicated that subs and regular teachers do, in fact, regularly consult each other regarding students, work closely together, share the same work locations and perform basically the same job functions. The substitute's primary responsibility is to carry forth with the plans and goals of the teacher she is replacing. There is a great deal of contact between the two groups on a day-to-day basis as well as through involvement in long-range planning and projects.

Expectancy of continued employment is another criteria which the District argues that the substitutes fail to meet. In this District, however, such is not the case. The 8-10 substitutes in the "core" group have, for the most part, substituted in the District for over 3 years, and, in several cases, for as many as 13 years. One substitute, who was subsequently hired as a temporary, worked as a substitute in the District for 16 years. An additional group of 15-20 consistently carry over from one year to the next. While one cannot deny that substitutes do not have the expectancy of employment afforded those personnel under contract, it appears evident that the District repeatedly employs substitutes as an integral part of its work force and that those substitutes it

does employ constitute a loyal group who return to the District year after year.

The District argues that the conflict of interest between substitutes and regular teachers is such that it would cause unresolvable discord within the unit. No evidence was offered to support such speculation beyond the fact that a teacher who has exhausted his/her sick leave receives the difference between his/her salary and the substitute's daily rate.

That granting the petition would impair the efficiency of operations of the District by complicating an already long and difficult bargaining relationship was another argument proffered against the proposed unit modification. However, the current contract already includes some temporaries and substitutes. Further, proposals were made by DTA covering substitutes during recent negotiations, although not included in the final agreement which expires in June of 1981. While granting the petition would add another area to the scope of negotiations, it would not sufficiently impair the efficiency of operations of the District to warrant denying substitutes bargaining rights.

Given the history regarding substitutes in the District, denying the petition would leave them without representation in a District which has already denied them a separate unit. As was the case in Oakland, "the District seems to object to any action granting collective negotiating rights to subs rather

than offering factually supported evidence of proliferated units" or of the impairment to its efficiency of operations by one overall unit.

The District has failed to present sufficient evidence to warrant excluding substitute and temporary teachers from the regular certificated unit. Furthermore, no evidence was presented to rebut the threshold minimum of two days employment proposed in the unit modification petition.

PROPOSED ORDER

It is the Proposed Order that the unit modification petition filed by the Dixie Teachers Association, CTA/NEA in the Dixie Elementary School District be granted.

The modified unit description shall include all substitute and temporary teachers in the Dixie Elementary School District employed for at least two days in any school year.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on November 17, 1980 unless a party files a timely statement of exceptions within twenty (20) calendar days following the date of service of the decision. Such statement of exceptions and supporting brief must be actually received by the executive assistant to the Board at the headquarters office in Sacramento before the close of business (5:00 p.m.) on November 17, 1980 in order to be timely filed. (See California Administrative Code, title 8, part III,

section 32135.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. (See Administrative Code, title 8, part III, sections 32300 and 32305, as amended.)

DATED: October 28, 1980

FOR THE REGIONAL DIRECTOR

By

Jerilyn Gelt
Hearing Officer