STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

REDWOOD CITY ELEMENTARY SCHOOL DISTRICT, Employer, and REDWOOD CITY TEACHERS ASSOCIATION, CTA/NEA, Employee Organization	Case No. SF-R-122(579) PERB Decision No. 107 October 23, 1979

Appearances: Daniel C. Cassidy, Attorney (Paterson & Taggart) for Redwood City Elementary School District; Rubin Tepper, Attorney for Redwood City Teachers Association, CTA/NEA.

Before Gluck, Chairperson; Moore and Gonzales, Members.

DECISION

The Redwood City Elementary School District (hereafter District) has excepted from a Public Employment Relations Board (hereafter PERB or Board) hearing officer's proposed decision holding that summer school teachers are employees for the purposes of the Educational Employment Relations Act (hereafter EERA or Act),[1] and that they constitute an appropriate negotiating unit. The Board affirms the hearing officer's

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

determination that summer school teachers are "employees" for the purposes of the Act.[2] On the unique facts of this case, however, we construe the Redwood City Teachers Association's (hereafter Association) petition for recognition[3] as a petition for unit modification[4] to add the described summer school positions to the Association's existing certificated unit. This petition we grant.

PROCEDURAL HISTORY AND FACTS

On May 26, 1976, the District recognized the Association as the exclusive representative of "regular full-time certificated and regular part-time certificated teachers."[5] During

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[2]Section 3540.1(j) defines "employee" as "any person employed by any public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees, and confidential employees."

[3]Pursuant to section 3544, the Association requested recognition as the exclusive representative of a unit of "/r/egular full-time certificated and regular part-time certificated summer school teachers."

[4]8 Cal. Admin. Code sec. 33260.

[5]An administrative body may take official notice of its records. California Administrative Code, title 8, section 33190(a) provides that the employer shall file with the Board a description of the unit it has voluntarily recognized. The unit of academic year certificated personnel includes "regular full-time certificated and regular part-time certificated teachers" including the audiometrist, visually handicapped teachers, home teachers, speech therapists, nurses, children's center teachers, resource teachers, rapid learning center teachers, preschool teachers, counselors, librarians, E.S.L. teachers, instrumental music teachers, hard of hearing

initial contract negotiations the parties discussed summer school salaries. But after Belmont Elementary School District[6] issued, holding that summer school teachers lacked a community of interest with regular academic year teachers, the District took the position that the Association did not represent summer school teachers.

On June 28, 1977, the Association filed the instant petition requesting District recognition of a unit of certificated summer school employees. The petition was accompanied by proof of majority support. After a hearing on October 12, 1977, the attached hearing officer's proposed decision issued on January 24, 1978, awarding the Association the unit it requested. In addition to the facts recounted here, the Board adopts the hearing officer's findings of fact.

(FN. 5 con't.)

teachers, special education teachers, E.M.R. teachers, learning disability teachers, and E.H. teachers, and excludes management, supervisory, and confidential employees. Specifically excluded from the unit are: the superintendent, assistant superintendent for personnel, assistant superintendent for instruction, director of pupil personnel services, all full-time District level positions having the title of coordinator, director or area administrator, all principals, all full-time vice principals, administrative assistants, assistant superintendent for business, director of building, grounds and transportation, supervisor of custodians, guidance consultant, welfare and attendance officer, and psychologists.

[6] (12/30/76) EERB Decision No. 7.

The District filed timely exceptions to the hearing officer's decision on February 2, 1978.

While this case was pending, the Board decided Peralta Community College District (11/17/78) PERB Decision No. 77, holding that section 3545(b)(1)[7] requires PERB to place all instructional personnel in the same negotiating unit absent a finding that they lack a community of interest.

DISCUSSION

From the record in this case, it appears that the Association intended its original request for recognition to cover summer school teachers as well as academic year teachers. This is evident from the fact that the Association and District's early negotiations included summer school salaries. After the Belmont decision issued, however, the District declined further negotiations on summer school issues.

The Association's options at that time were limited. Challenging the District's refusal to negotiate summer school salaries might have clarified the scope of the Association's representation of academic year teachers, including those

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

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

teachers who also teach summer school, but would not have resolved questions concerning the status and correct unit placement of summer school teachers, including those teachers who only teach summer school. In view of Belmont, a petition for a change in unit determination (former Board rule 33260) probably would have been futile. Petitioning for a separate unit undoubtedly seemed the surest way to gain representation for certificated summer school personnel.

Were the Board to apply the policy established in Peralta Community College School District (11/17/78) PERB Decision No. 77, there would be a rebuttable presumption that summer school teachers would not belong in a unit separate from other District instructional personnel. The Board has held, however, that the Peralta presumption "should only have a prospective effect in situations where a retrospective application would cause disruption and instability." (Palo Alto Unified School District (1/9/79) PERB Decision No. 84 at p. 8.) For example, in the consolidated cases of Palo Alto Unified School District and Jefferson Union High School, supra, the Board declined to apply the Peralta presumption when units already in place were covered by negotiated agreements that specifically excluded the employees sought for representation in a separate unit. Instead, separate teacher units were awarded to employees who were not previously represented. (But see Oakland Unified School District (9 /20/79) PERB Decision No. 102 , in which the Board did not establish separate units.)

Palo Alto/Jefferson did not establish the sole factual situation in which the Board will decline to apply the Peralta presumption. The instant case also presents facts on which it would be inequitable to apply the Peralta presumption and dismiss the Association's petition. It is clear that what the Association has really wanted from the beginning is a comprehensive unit of both summer school and academic year teachers. It is further apparent that it is PERB's varied policies--and not the Association's error--that has obstructed it from reaching that goal.

Unit modification is the only means by which the Association can now add summer school teachers to its established unit of academic year teachers. But since the Board's unit modification rules require a showing of majority support to add new classifications to an existing unit,[8] and since the signatures gathered in support of the Associaion's

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[8]Board rule 33030(c) (8 Cal. Admin. Code sec. 33030(c)) provides:

> (c) Each form of proof, excluding a notarized membership list, shall indicate the date on which each signature was obtained. A signature which is undated or which indicates that it was obtained earlier than one calendar year prior to the filing of the request or intervention with the employer shall be invalid for the purpose of calculating proof of support. In the case of a notarized membership list, the list shall be dated not earlier than one calendar year prior to the date of filing and shall be certificated as accurate.

petition herein are now stale,[9] if the Board were to dismiss this case with leave to the Association to bring a unit modification petition, the Association would have to gather signatures a third time in order to become the representative of the summer school teachers it thought were included in its original request for recognition. This would be inequitable to both the organization and to summer school certificated personnel.

Just as the equities in the case before us preclude dismissal, they demand that the Board resolve the questions presented by the Distict's exceptions in a manner that gives weight to the summer school teachers' interest in obtaining representation rights and to the Association's interest in avoiding further organizing hurdles. The Board therefore construes the instant petition as a unit modification petition to add summer school certificated personnel to the established academic year unit. (See sections 3541.3(a)and (n).)[10]

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[9]Section 3545(b)(1) is quoted supra at note 5.

[10]Section 3541.3 empowers the Board:

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

The parties did not specifically litigate the appropriateness of a unit comprised of both summer school and academic year certificated employees. Nevertheless, there is ample evidence in the record to sustain our finding that these employees appropriately belong in the same negotiating unit. Both summer school and academic year teachers are credentialed personnel who deal directly with and educate children. In the summer session, as well as during the academic year, the class schedule includes traditional academic subjects such as reading, writing, and arithmetic. Summer school teachers prepare lesson plans, instruct, and participate in extra curricular activities such as back-to-school night. The qualifications required of summer school teachers are the same as those required of academic year teachers and, in fact, the District hires the majority of its summer school teachers from its academic year certificated staff. Disparities between the wage rates and fringe benefits of summer school and academic year teachers do not persuade us that they lack a community of interest, since for all practical purposes the hours, wages, and other terms and conditions of summer school employment are wholly within the District's control.[11]

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[11]We note that the District has adopted the Association's suggestions on sick leave and wage increases for summer school teachers.

The District argues that establishing a fourth negotiating unit would impair the efficiency of its operations. While this Board will not avoid establishing additional negotiating units if that is necessary to extend representation to employees who are properly excluded from existing units, in this case summer school and academic year teachers belong in the same unit and can be merged without upsetting an existing negotiating relationship.

Because only one employee organization is involved, because it has consistently pursued its quest to represent both summer school and academic year teachers, and because it is PERB's decision-making processes and not the Association's error that caused it to petition for a separate unit of summer school teachers, on the unique facts of this case we construe the Association's petition as one to modify its existing unit to add summer school teachers. (Board rule 33260 et seq.)[12] We note that the Association's petition is in substantial compliance with the Board's unit modification rules: it is timely filed (Board rule 33261(a)(1)),[13] and accompanied by

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[12]Cal. Admin. Code sec. 33260 et seq.

[13]Cal. Admin. Code sec. 33261(a)(1). Board rule 33261(a)(1) provides:

> (a) A recognized or certified employee organization may file with the Regional Office a petition for a change in unit

the requisite showing of majority support among the classifications to be added to the established unit. (Board rule 33261(f).)[14] No election is necessary in this case. (Board rule 33265(c).)[15] Therefore, Board certification of

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(FN. 13 con't)

> determinations pursuant to section 3541.3(e) of the Act.
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> > (1) To add to the unit classifications which existed prior to the recognition or certification of the current exclusive representative of the unit, provided such petition is filed at least 12 months after the date of said recognition or certification[.]

[14]Cal. Admin. Code sec. 33261(f). Board rule 33261(f) provides:

> (f) If the petition requests the <u>addition</u> of classification(s) or position(s) to an established unit pursuant to section (a)(1) above, it must be accompanied by proof of majority support of persons employed in the classification(s) or position(s) to be added. Such support shall indicate desire (1) to be included in the established unit and (2) to be represented by the current exclusive representative of the established unit. [Emphasis in the original.]

[15]Cal. Admin. Code sec. 33265(c). Board rule 33265(c) provides:

(c) The Regional Director may request additional showing of support <u>or order an election</u> among unrepresented employees to be added to a unit, <u>if classifications found appropriate to be added to the unit do not include all classifications originally petitioned for</u>. [Emphasis added.]

the Association's modified unit shall issue forthwith. (Board rule 33265(d).)[16]

ORDER

The Public Employment Relations Board ORDERS that:

(1) The hearing officer's determination that summer school teachers are "employees" within the meaning of the Educational Employment Relations Act is AFFIRMED;

(2) The petition of the Redwood City Teachers Association, CTA/NEA, for recognition as the exclusive representative of a unit of summer school certificated personnel, which we construe as a petition to modify the existing certificated unit to include summer school teachers, is granted;

(3) The Association shall be certified as the exclusive representative of a unit including all regular full-time certificated and regular part-time certificated teachers, including summer school teachers, including visually

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[16]Cal. Admin. Code sec. 33265(d). Board rule 33265(d) provides:

> (d) Board Certification of a Unit Modification.
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> (1) The Board shall issue a certification of unit modification whenever the disposition of a petition filed under this Article results in the modification of a unit.
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> (2) Such certification shall not be considered to be a new certification for the purpose of computing time limits pursuant to regulation 33250(b).

handicapped teachers, home teachers, speech therapists, nurses, children's center teachers, resource teachers, rapid learning center teachers, preschool teachers, counselors, librarians, E.S.L. teachers, instrumental music teachers, hard of hearing teachers, special education teachers, E.M.R. teachers, learning disability teachers, E.H. teachers, and excluding: only those school District employees, considered management, supervisory and confidential as excluded by the Act as outlined by PERB. Certificated management positions are superintendent, assistant superintendent for personnel, assistant superintendent for instruction, director of pupil personnel services, all full-time district level positions having the title of coordinator, director, or area administrator, all principals, all full-time vice principals, administrative assistants, assistant superintendent for business, director of building, grounds, and transportation, supervisor of custodians, and further excluding: guidance consultant, welfare and attendance officer, and psychologists.

By: Barbara D. Moore, Member

Harry Gluck, Chairperson

Raymond J. Gonzales, Member, dissenting:

I dissent from the majority's decision to place summer school certificated employees in the already established unit

of regular certificated employees. I continue to adhere to my position, set forth in Belmont Elementary School District (12/16/76) EERB Decision No. 7, Petaluma City Elementary and High School Districts (2/22/77) EERB Decision No. 9, and New Haven Unified School District (3/22/77) EERB Decision No. 14, that summer school teachers do not share a community of interest with regular school-year teachers.

The summer school program is separate and distinct from the regular program, and summer school teachers have different terms of employment than regular teachers. Summer school teachers have different salaries and fringe benefits, shorter hours, and no formal evaluation procedures. They are not entitled to a formal hearing if they are removed. Employment as a summer school teacher is short-term and tenuous--teachers have no guarantee of being rehired in subsequent summers. Summer school teachers receive no credit towards retirement in the State Teachers Retirement System and time spent teaching summer school does not count towards achieving permanent status.[1]

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[1]As will be developed further below, the parties did not litigate the issue of whether summer school teachers should be included in the same unit with regular-year teachers. Therefore, there are probably other significant differences between the two groups which are not part of the record in this case.

The majority discounts these differences in terms and conditions of employment by noting that they are within the District's control. I fail to see the relevance of this. PERB has consistently considered terms and conditions of employment to be among the criteria used in determining community of interest and making unit decisions.[2] The fact that before units are in place and exclusive representatives selected, terms and conditions of employment are generally within the control of the employer, has not prevented us from according significance to these criteria in other cases; it should not in this case.

Thus, I continue to believe that summer school teachers do not share a sufficient community of interest with regular-year teachers and should not be included in the same unit.

Even if I agreed that summer school teachers should be placed in the established unit of regular-year teachers, I could not concur in this decision; the majority's action in construing an unambiguous representation petition as a unit modification petition stretches this Board's powers far beyond what is proper.

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[2]PERB has consistently cited the community of interest criteria used in Kalamazoo Paper Box Corp. (1962) 136 NLRB 134 [49 LRRM 1715]. See, e.g., Antioch Unified School District (11/7/77) EERB Decision No. 37, Office of the Santa Clara County Superintendent of Schools (7/19/78) PERB Decision No. 59. These criteria include such terms of employment as method of compensation, wages, hours, and employment benefits.

There is no basis for the majority's action in PERB regulations or precedent; it seems to me to be a clear example of result-oriented decisionmaking in which the end justifies any necessary means. By switching procedures and thus changing the entire focus of the case, the majority has demonstrated that PERB procedures can be relied upon only so long as those procedures enable a majority to reach the result it wants.

The majority justifies its unique interpretation of the case before it by its claim to be helping the Association. However, we do not know that the Association wishes to represent summer school teachers in the same unit with regular teachers; the majority has assumed this on the basis of events from three years ago in order to justify its own wish to combine the two groups. Even if the majority's decision does aid the Assocation, the employee organization's interests are not the only ones entitled to consideration in unit proceedings.

For example, the majority decision gives summer school teachers no opportunity to state whether or not they wish to be included in the overall unit. If this were a true unit modification petition, the Association would have had to file a showing of support indicating that the summer school teachers not only wanted to be represented by the Association, but also

that they wanted to be included in the established unit.[3] The majority, by construing a representation petition as a unit modification petition, has avoided this requirement; summer school teachers are to be placed in the established unit on the basis of two to three-year-old signatures collected when there was no indication that summer school teachers might be included in a unit with regular-year teachers.

The majority's action also fails to take into account the District's interests. If this were a true unit modification proceeding, the District would have had an opportunity to present evidence and argue against the proposed combined unit. But at the time of the hearing two years ago, the District could not have known that the Board's heretofore consistent precedent excluding summer school teachers from regular-year units would have changed by the time the Board made a decision in this case. It therefore did not know that evidence indicating that a combined unit of summer school and

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[3]PERB rule 33261(f) provides:

> If the petition requests the <u>addition</u> of classification(s) or position(s) to an established unit pursuant to section(a)(1) above, it must be accompanied by proof of majority support of persons employed in the classification(s) or position(s) to be added. Such support shall indicate desire <u>(1) to be included in the established unit</u> and (2) to be represented by the current exclusive representative of the established unit. [Emphasis added.]

regular-year teachers would be relevant and made no particular effort to present such evidence.[4] By construing the representation petition as a unit modification petition and placing the summer school teachers in the regular certificated unit without further proceedings, the majority has denied the District any opportunity to rebut the Peralta "rebuttable presumption" that all teachers should be in the same unit. It appears that the District is being penalized and denied due process merely because the majority in this case wishes to change the precedent created by previous PERB members.[5]

I believe it is inappropriate for this Board to accord so little weight to its rules and procedures. If changes in precedent are necessary, it seems better to make them in cases presenting a proper procedural posture rather than changing the procedural posture of a case to fit the desired change in precedent. Any possible inconvenience to the Association in this case does not, in my view, outweigh the benefits to all

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[4]The majority acknowledges that the parties did not litigate the appropriateness of a unit composed of both summer school and regular-year teachers.

[5]In Belmont, Petaluma, and New Haven, Chairperson Reginald Alleyne and I voted to exclude summer school teachers from the regular-year unit, with Jerilou Cossack Twohey dissenting. The composition of the Board has changed, leading to changes in precedent.

parties of the Board's following standard procedures and evaluating cases on the issues that the parties have addressed.

Raymond J. Gonzales, Member

PUBLIC EMPLOYMENT RELATIONS BOARD

OF THE STATE OF CALIFORNIA

REDWOOD CITY ELEMENTARY SCHOOL DISTRICT, Employer, and REDWOOD CITY TEACHERS ASSOCIATION, CTA/NEA, Employee Organization.	)	Representation Case No. SF-R-579 PROPOSED DECISION (1/24/78)

Appearances: Daniel Cassidy, Attorney (Paterson and Taggart), for Redwood City Elementary School District; Rubin Tepper, Attorney for Redwood City Teachers Association, CTA/NEA.

Before Ronald E. Blubaugh, Hearing Officer.

PROCEDURAL HISTORY

This case presents the issue of whether a separate unit of summer school teachers is an appropriate unit.

On June 28, 1977, the Redwood City Teachers Association, CTA/NEA,[1] filed a request with the Redwood City School District[2] seeking recognition as the exclusive

[1] Hereafter, the Redwood City Teachers Association, CTA/NEA, will be referred to as the "Association."

[2] Hereafter, the Redwood City Elementary School District will be referred to as the "District."

representative of a unit of summer school teachers.[3] The District posted the appropriate notice on July 6, 1977 and on August 2, 1977 the District denied the request, challenging the appropriateness of the proposed summer school unit.

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[3] In its petition, the Association asked to be recognized as the exclusive representative for a unit of regular summer school employees including but not limited to:

> Regular full-time certificated and regular part-time certificated summer school teachers, including audiometrist, visually handicapped teachers, home teachers, speech therapists, nurses, children's center teachers, resource teachers, rapid learning center teachers, preschool teachers, counselors, librarians, E.S.L. teachers, instrumental music teachers, hard of hearing teachers, special education teachers, E.M.R. teachers, learning disability teachers, E.H. teachers,

and excluding:

> only those school District employees, considered management, supervisory and confidential as excluded by the Act as outlined by EERB. Certificated management positions are superintendent, assistant superintendent for personnel, assistant superintendent for instruction, director of pupil personnel services, all full-time district level positions having the title of coordinator, director, or area administrator, all principals, all full-time vice principals, administrative assistants, assistant superintendent for business, director of building, grounds and transportation, supervisor of custodians,

and further excluding:

> guidance consultant, welfare and attendance officer, and psychologists.

A hearing on the matter was held at the District office on October 12, 1977 by a hearing officer for the Educational Employment Relations Board.[4] At the start of the hearing, the District moved to dismiss the request on the grounds of mootness. The District took the position that by the date of the hearing the 1977 summer school session had been concluded and there no longer were any summer school employees. This motion was denied by the hearing officer.

FINDINGS OF FACT

The Redwood City School District is located in San Mateo County. The District has 15 schools and offers classes for students from kindergarten through the eighth grade. During the 1977 summer session there were approximately 4,200 students. The District has approximately 390 regular certificated employees during the academic school year. In 1977, there were 139 summer school teachers.

Since May 26, 1976, the Association has been recognized as the exclusive representative of the certificated employees who teach in the District during the regular school

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[4] By act of the 1977 Legislature, the Educational Employment Relations Board has been renamed as the Public Employment Relations Board; Chapter 1159, Statutes of 1977.

year.[5] This is the only negotiating unit for certificated employees but the District also has two units for its classified employees.

In choosing its summer school teachers, the District follows a detailed policy which was adopted on April 30, 1970. Under the policy persons teaching within the District have the highest priority for summer school assignments. Within this group, those with no previous summer school experience have the first preference followed by those with the least continuous summer school experience. The preferences continue as follows: teachers under contract to begin teaching in the District, substitute teachers, teachers who have terminated their continuing contracts with the District as of the end of the current year and teachers who work in other districts.

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[5]The unit during the regular year includes regular full-time certificated and regular part-time certificated teachers including the audiometrist, visually handicapped teachers, home teachers, speech therapists, nurses, children's center teachers, resource teachers, rapid learning center teachers, preschool teachers, counselors, librarians, E.S.L. teachers, instrumental music teachers, hard of hearing teachers, special education teachers, E.M.R. teachers, learning disability teachers, and E.H. teachers, and excludes management, supervisory, and confidential employees. Specifically excluded from the unit are: the superintendent, assistant superintendent for personnel, assistant superintendent for instruction, director of pupil personnel services, all full-time District level positions having the title of coordinator, director or area administrator, all principals, all full-time vice principals, administrative assistants, assistant superintendent for business, director of building, grounds and transportation, supervisor of custodians, guidance consultant, welfare and attendance officer, and psychologists.

In practice, according to testimony at the hearing, the District first hires members of the regular staff who want summer positions. Applicants for the remaining positions are either substitutes, persons who teach elsewhere or unemployed teachers. Among those remaining applicants, the principal at a school may hire according to a particular need or because a teacher has substituted in that school and the principal is familiar with that substitute teacher's abilities.

Of the 139 summer school teachers in 1977, 77 were regular certificated employees. Even with the District's policy favoring non-repeaters among summer school staff, many of the 1977 summer school teachers had taught in previous years. Of the 139 who taught in 1977, 68 taught in the summer of 1976, and 52 taught in the summer of 1975. Of the 139 summer school teachers who taught in 1977, eight had taught in five previous summer sessions, nine had taught in four previous summer sessions, 17 had taught in three previous summer sessions, 21 had taught in two previous summer sessions and 31 had taught in one previous summer session. The 1977 summer school lasted 24 days.

The salary paid to summer school instructors in recent years was as follows: $700 in 1969; $770 in 1970, 1971, 1972, 1973 and 1974; $877 in 1975; $913 in 1976; and $1,006 in 1977. Beginning in 1976, the summer school teachers were given a percentage pay increase equivalent to the percentage pay increase given to the teachers in the regular school year. The arrangement tying the rate of summer school

pay to that for the regular program was the product of meeting and conferring in 1975 between the District and the certificated employees council under the Winton Act.[6]

Upon its recognition as the exclusive representative in 1976, the Association made salary proposals about summer school teachers. However, following the Belmont[7] decision, the District took the position that summer school teachers were not within the unit and the District refused to bargain about matters relating to summer school. At that time, the Association asked the District for a letter reciting the agreements about summer school which already had been reached and committing the District to continue them in effect. The District did not write the letter but adopted a regulation instead. The regulation, which was adopted on May 5, 1977, set the 1977 summer school rate at $1,006 and established a policy that in subsequent years the summer school pay would be increased "by the same percentage figure" granted in the previous regular year. The policy also set the length of the summer session, provided that all summer school teachers would be eligible to participate in the Social Security program and provided cumulative sick leave of one day per full summer session. Whereas other provisions of the policy merely recorded existing practice, the sick leave policy was new.

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[6] Former Education Code Section 13080 et seq.

[7] EERB Decision No. 7, December 30, 1976.

Whether or not to conduct a summer school program in any given year is up to the wishes of the District board of education because summer school is not a state-mandated program. The decision whether or not to operate a summer program is made each year in February, March or April. It has been the ongoing practice of the District to offer a summer program and there was no evidence presented to indicate that the District contemplates abandoning its summer program.

During summer school the District offers many courses which are taught during the regular academic year. It also offers more outdoor programs and more arts and crafts. The summer session course of study is less rigidly defined than that of the regular year. About 50 percent of the summer offerings are traditional academic subjects such as reading, writing and arithmetic. The remainder are in the arts, crafts, music and similar subjects. There is no fixed class size for summer school.

Summer school teachers must hold valid state teaching credentials. Summer school teachers are required to complete lesson plans and to participate in an extracurricular back-to-school activity. There is no formal evaluation process for summer school teachers and they are entitled to no formal hearing if they are to be removed. Summer school teachers get no credit toward retirement in the state teachers retirement system and summer teaching provides no credit toward tenure. Summer school teachers are not eligible for health insurance.

The District's deputy superintendent of personnel testified that it would be inefficient for the District to negotiate and administer a separate summer school unit because of the short length of the summer session. He predicted that the addition of a summer school unit would require the hiring of additional clerical employees and the devotion of more time to negotiations by District administrators.

In addition to the evidence about summer school, the District also presented testimony about substitute teachers. It was demonstrated in this testimony that the District has no formal evaluation process for substitutes. The transfer policy does not apply to substitutes. A substitute teacher can be removed from the list of substitutes without a hearing. Substitute teachers may qualify for the teachers retirement system after they have taught for more than 100 days. Substitute teachers are not required to prepare lesson plans. During the regular year, there are approximately 125 persons on the District substitute teachers list.

LEGAL ISSUE

Is a unit of summer school teachers an appropriate unit?

CONCLUSIONS OF LAW

There are no comfortable solutions to the problems presented by this case. If a separate summer school unit is to be created, the parties will incur numerous difficulties in attempting to conduct an election and bargain on an artifically short timetable. If a separate summer school unit is not to be created, summer school teachers will effectively be removed from the central rights promised by the Educational Employment Relations Act.[8] The third alternative, merger of summer school teachers within the unit of regular teachers, is precluded by EERB decisions.

Before any effort is made to choose which of the two viable alternatives is the least bad, it is helpful to analyze precedent from the National Labor Relations Board and other state public employment relations boards.

The private sector employees with job tenure most closely comparable to summer school teachers are the seasonal workers. Seasonal workers are often employed in the canning and entertainment industries. The nature of those industries requires a large buildup in the work force at certain times of the year. Employees are hired during the heavy work periods and then dismissed during the slack seasons. This build up in work is predictable and follows established patterns year after year.

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[8] Gov. Code Sec. 3540 *et seq*.

In its decisions, the NLRB does not always make clear distinctions between seasonal and temporary employees. However, it would appear that in determining the unit placement of seasonal employees, the NLRB focuses first on whether the seasonal employees have any reasonable expectation of reemployment in subsequent seasons. If the seasonal employees do not have a high rate of return and have no reasonable expectation of reemployment, the NLRB holds that they are casual employees and are not covered by the federal law. Children's Hospital of Pittsburgh 222 NLRB 588, 91 LRRM 1440 (1976); Aquacultural Research Corp. 215 NLRB 1, 87 LRRM 1496 (1974); See's Candy Shops, Inc. 202 NLRB 538, 82 LRRM 1575 (1973). In reaching the decision about whether certain seasonal employees are casual, the NLRB sometimes draws what appear to be arbitrary lines based solely upon regularity of work and length of service. Trans World Airlines, Inc. 211 NLRB 733, 86 LRRM 1434 (1974); See's Candy Shops, Inc., supra.[9]

If the seasonal employees are held not to be casual because they have a reasonable expectation of reemployment, the NLRB next determines whether to place them within the unit of year-round employees or in a separate unit of seasonal workers. This decision appears to be made largely on such

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[9] A court of appeal once implied that the test actually used by the NLRB is not whether the seasonal employees have a reasonable expectation of reemployment but whether or not the union wants them within the unit. Maine Sugar Industries, Inc. 425 F.2d 924, 74 LRRM 2197 (C.A. 1, 1970).

traditional community of interest criteria as commonality of job duties and supervision, Millbrook, Inc. 204 NLRB 1148, 83 LRRM 1482 (1973), Baumer Foods, Inc. 190 NLRB 690, 77 LRRM 1270 (1971); commonality of work and benefits, Sprague, C.H. & Son Co. 428 F.2d 938 (enf. as modif'd 175 NLRB 378), 74 LRRM 2641 (C.A. 1, 1970). Where the seasonal workers have specialized duties which differ from the year-round workers, the seasonal workers are placed in their own unit. Six Flags Over Georgia, Inc. 215 NLRB 809, 88 LRRM 1057 (1974).

The precedent from the public sector in other states favors inclusion of summer employees in the same unit as year-round employees. In Massachusetts, the labor relations commission concluded that the deadlines for local government budgeting would not permit the creation of a separate unit for a city's summer employees. The commission held that summer employees could be represented only in the same unit as full-time employees. City of Gloucester and Gloucester Summer Employees Assn., 1 MLC 1170 (1974). Oregon also has included summer employees in the same unit with year-round workers. International Union of Operating Engineers, Local 701 v. Klamath Irrigation District, 2 PECBR 894 (1976). In New York, the state director of representation placed a group of summer school teachers in a separate unit from the regular-year teachers. Great Neck Board of Education, Union Free School District No. 7, Town of Hempstead and Great Neck Teachers Association, 3 PERB 4022 (1970). Subsequently, however, the Public Employment Relations Board reversed the director and

placed the summer school teachers in the unit with regular-year teachers. Great Neck Board of Education, Union Free School District No. 7, Town of North Hempstead and Great Neck Teachers Association, 4 PERB 3017 (1971). The New York board similarly included seasonal state employees in a unit with year-round state workers. State of New York and New York State Employees Council 50, AFSCME, AFL-CIO and Civil Service Employees Association, Inc. 5 PERB 3022 (1972). In State of New York, the New York board adopted the following standards for distinguishing those seasonal employees who are covered by the New York law from those who are "casual" and thus not covered:

> ....The standards are that employment is casual if '(1) the season is shorter than six weeks a year; or (2) the employees are required to work fewer than 20 hours a week (the Board recognized that this standard might not apply to teachers, especially in institutions of higher education); or (3) fewer than 60 percent of the employees in the title return for at least two sucessive seasons.' 5 PERB 3042.

There is no California precedent about a separate unit for summer school teachers. The Public Employment Relations Board has, however, considered whether summer school teachers shall be in the same unit as regular-year teachers and has concluded they should not. Belmont, footnote No. 7. supra; Petaluma City Elementary and High School Districts, EERB Decision No. 9, February 22, 1977; New Haven Unified School District, EERB Decision No. 14, March 22, 1977.

In Belmont, the Board noted that because summer school teachers are hired on a one-summer basis, "a summer school teacher enjoys no expectation of future employment as a summer school teacher." The Board also cited the differences between pay and fringe benefits between summer school and regular year teachers and observed that summer school provides no accrual of rights toward tenure or permanent status. In stating its holding, the principal decision concludes:

> For the above reasons, we find lacking a community of interest between summer school and regular teachers; therefore summer school teachers shall be excluded from the unit of regular teachers.

In Petaluma, the Board considered evidence about pay and benefits and the different nature of the summer school program. The Board again declined to put summer school teachers in the same unit as regular teachers and stated that its decision was based upon the community of interest criterion.

In New Haven, the Board once more considered evidence about pay and benefits and the differing nature of the summer school program. In holding that summer school teachers do not belong in the same unit with the regular-year teachers, the Board explained:

> Because of the tenuous and short-term nature of the employment of summer school teachers and because of the separate nature of the summer school program, we find that the summer school teachers lack a community of interest with the regular teachers and therefore exclude them from the stipulated unit.

It is significant that even though the Board considered the expectation of reemployment in Belmont and the short-term nature of the summer program in Petaluma and New Haven, it specifically based its decisions in all three cases upon community of interest criteria. The Board did not find summer school employees to be "casual." It did not exclude them from protections under the Educational Employment Relations Act.

In the present case, the Association argues that summer school teachers are employees as that term is used in Government Code Section 3540.1(j)[10] and are thus covered by the Educational Employment Relations Act. The Association reasons that exclusions of persons from protection of the statute must be kept to minimum and it argues that summer school teachers are not "casual" employees as that term is defined by the NLRB. Finally, the Association concludes that summer school teachers do share a community of interest and thus comprise an appropriate unit.

The District first argues that summer school teachers are "casual" and thus cannot be placed into a negotiating unit. In the alternative, the District contends that if summer school teachers

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[10] Gov. Code Sec. 3540.1(j) reads as follows:

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

are "employees" as that term is used in the statute, they do not comprise an appropriate unit by themselves. In support of its first position, the District argues that summer school teachers "lack a substantial and continuing employment relationship" with the District. Citing precedent from New York, the District reasons that the definition in Government Code Section 3540.1(j) cannot be all inclusive. The District factually distinguishes the Great Neck decision. As to its alternative position, the District argues that since the Association's petition seeks representation only of summer school teachers any discussion about other groupings of employees would be irrelevant. Finally, the District argues that the creation of a summer school unit would hinder the efficiency of the District's operations.

Initially, it is concluded that summer school teachers are employees as that term is defined under Government Code Section 3540.1(j). The PERB has not yet excluded any school employees as "casual." In fact, the PERB has hesitated in removing any group of employees from the coverage of the Educational Employment Relations Act.[11]

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[11] In Pittsburg Unified School District, EERB Decision No. 3, October 14, 1976, the Board refused to exclude noon duty supervisors from the classified employees unit even though Education Code Sec. 45103 (former Sec. 13581) excludes noon duty supervisors from the classified service. In Lompoc Unified School District, EERB Decision No. 13, March 17, 1977, Member Gonzalez wrote in a concurring opinion that the EERA "indicates an intent to make negotiating rights broadly available." For this reason, he expressed intent to view "narrowly" the exclusion of persons from all rights as management employees. In excluding confidential employees the Board has limited their number to a "small nucleus of individuals." Sierra Sands Unified School District, EERB Decision No. 2, October 14, 1976.

Although the District is under no obligation to operate a summer school program,[12] the Redwood City summer school is an on-going operation and there was no evidence presented to indicate it may be terminated. In spite of the District's effort to spread the summer school work around among the teaching staff, nearly half of the 1977 summer school teachers had taught also during the 1976 summer session. More than half of the District's 1977 summer school teachers (86 of 139) had taught in at least one previous summer session. From these statistics, it would seem that Redwood City summer school teachers have a reasonable expectation of reemployment.

Because Redwood City summer school teachers have a reasonable expectation of reemployment, it is held that the District's summer school teachers are employees within the meaning of Government Code Section 3540.1(j).

This conclusion leads to the ultimate issue in the case, whether the proposed unit of summer school teachers is an appropriate unit.

The criteria for determination of the appropriateness of a unit are spelled out in Government Code Section 3545.[13] It seems

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[12] Summer school is not a mandatory program. Education Code Sections 37229 and 37250.

[13] Gov. Code Sec. 3545 provides as follows:

> (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. (continued)

apparent that summer school teachers comprise a community of interest. Although some teach academic courses while others teach recreational courses, the work of all summer school teachers is to offer instruction to students. All must be certificated. All summer school techers share common benefits and have the common limitations of not receiving credit toward tenure or participation in the state teachers retirement system.

The District contends that even if summer school teachers are employees they do not constitute an appropriate unit. At the hearing, the District suggested that perhaps all temporary employees might be an appropriate unit. Apparently in support of this argument, the District introduced some evidence about substitute teachers. In certain respects substitute teachers do have a relationship with the District that is similar to that of summer school teachers. Neither has the right to a hearing prior to dismissal. Neither is subject to the District's formal evaluation process. There are, however, some differences. For one thing, substitutes teach primarily during the regular year. Summer school teachers teach only in the summer. Substitutes typically are on-call employees. All summer school teachers teach for a fixed

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(b) In all cases:
(1) A negotiating unit that includes classroom teachers shall not be appropriate unless it at least includes all of the classroom teachers employed by the public school employer, except management employees, supervisory employees, and confidential employees.
(2) A negotiating unit of supervisory employees shall not be appropriate unless it includes all supervisory employees employed by the district and shall not be represented by the same employee organization as employees whom the supervisory employees supervise.
(3) Classified employees and certificated employees shall not be included in the same negotiating unit.

length of time. Substitutes are eligible for the State Teachers' Retirement System. Summer school teachers are eligible for Social Security but not the teachers' retirement system.

It is not necessary in the present case to decide whether these differences between summer school teachers and substitute teachers would preclude placement of both groups in the same unit. It might well be that a proper residual unit could be formed with summer school teachers, substitutes and other certificated employees not included in the regular-year unit. But that issue is not presented here because the Association has requested only a unit of summer school teachers. Under the Board's decision in Antioch Unified School District[14] a unit that is appropriate for meeting and negotiating need not be the most appropriate unit. The Board envisions a balancing process among the various criteria in the statute. The District must fail, therefore, in its apparent argument that the summer school unit must be denied because some other possible unit might be more appropriate.

The second statutory criterion -- established practices -- is not easy to apply in the present case. Under the Winton Act, the interests of summer school teachers were represented by the certificated employees council which also represented the interests of regular-year teachers. While this might otherwise support the argument that summer school teachers should be in the same unit as regular-year teachers, the Board has rejected such a unit in

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[14]EERB Decision No. 37, November 7, 1977.

Belmont, Petaluma and New Haven. Moreover, the Board has consistently held that past practices under the Winton Act are to be given little weight.[15] Under this precedent, the hearing officer therefore accords little weight to the history of summer school representation under the Winton Act.

The final criterion -- efficiency of operation -- presents serious problems. The District's 1977 summer session lasted 24 days. That is a very short period of time for an election to be held, an exclusive representative to be certified (if one is successful) and a contract to be negotiated. If the parties are to negotiate the agreement during that short period of time, they will be on a tightly compressed timetable which is hardly conducive to the kind of give-and-take necessary for fruitful negotiations. If the parties cannot negotiate that quickly, it is unclear what happens next. There are numerous unanswered questions about what rights the parties would have after the completion of summer school in any given year.

The alternative, however, is to deny the creation of a summer school unit and thereby deny all the protections and rights of the Educational Employment Relations Act to summer school teachers. The parties have cited no precedent which would allow the denial of rights to employees because inefficiencies inherent in the negotiating unit.

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[15] The Board's rationale is explained fully in Antioch Unified School Distrit, footnote No. 14, supra.

Therefore, for the reasons stated here and on the basis of the entire record in this case, a separate unit of summer school teachers is held to be an appropriate unit.

PROPOSED ORDER

It is the proposed order that summer school teachers are employees as that term is defined in Government Code Section 3540.1(j) and that the following unit is appropriate for meeting and negotiating, provided that an employee organization becomes the exclusive representative:

> Regular full-time certificated and regular part-time certificated summer school teachers, including audiometrist, visually handicapped teachers, home teachers, speech therapists, nurses, children's center teachers, resource teachers, rapid learning center teachers, preschool teachers, counselors, librarians, E.S.L. teachers, instrumental music teachers, hard of hearing teachers, special education teachers, E.M.R. teachers, learning disability teachers, and E.H. teachers, and excluding the superintendent, assistant superintendent for personnel, assistant superintendent for instruction, director of pupil personnel services, all full-time District level positions having the title of coordinator, director or area administrator, all principals, all full-time vice principals, administrative assistants, assistant superintendent for business, director of building, grounds and transportation, supervisor of custodians, guidance consultant, welfare and attendance officer, psychologists and all management, supervisory and confidential employees.

The parties have seven (7) calendar days from receipt of this proposed decision in which to file exceptions in accordance with Section 33380 of the Board's rules and regulations. If no party files timely exceptions, this proposed decision will become final on February 6, 1978, and a Notice of Decision will issue from the Board.

Dated: January 24, 1978

Ronald E. Blubaugh
Hearing Officer