STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of TACOMA SCHOOL DISTRICT NO. 10 for clarification of an existing bargaining unit of employees represented by TACOMA ASSOCIATION OF CLASSROOM TEACHERS (TACT)	Case No. 2082-C-79-97 (Originally part of Case No.260-CLW-172) Decision No. 655-EDUC ORDER CLARIFYING BARGAINING UNIT

Appearances:

Elvin J. Vandeberg, attorney at law, for the employer

Symone B. Scales, attorney at law, for the employee organization

Tacoma School District No. 10 is organized and operated under the provisions of Title 28A RCW. The district has recognized the Tacoma Association of Classroom Teachers (TACT) and its predecessor as the exclusive bargaining representative of non-supervisory certificated employees of the district. Case No. 260-CLW-172 was initiated in April, 1976 by a petition of another employee organization for certification as the exclusive bargaining representative of supervisors employed by the district. TACT intervened in that proceeding to oppose the claimed "supervisor" identifications, and the employer raised issues concerning "confidential" employees.

The employer amended its position in Case No. 260-CLW-172 on September 10, 1972, altering the list of positions which it desired to have excluded

from the coverage of the Act. At the same time, the employer requested a ruling on the status of substitute teachers. The "substitutes" issue was thus made a part of Case No. 260-CLW-172.

These proceedings were initiated during the formative months of the agency, prior to the adoption of its present docketing system. On review of the procedural history of the case, the identities of the parties involved, and the divergent appeals processes provided for representation and clarification cases under the Commission's rules, it is concluded that the "substitute teacher" issue should have been docketed as a separate case. That docketing error has been corrected by the opening of this new file for the "substitutes" case. Although the hearings on "confidential", "supervisor" and "substitutes" issues in Case No. 260-CLW-172 were nominally consolidated, the hearing and briefing on the substitutes issue was in fact separate from that on the confidential and supervisor issues. The record made under the caption of Case No. 260-CLW-172 on the substitutes has been transferred to this case file and will constitute the basis for the instant decision subject to Commission review under WAC 391-30-300, et.seq. A separate order is being issued in Case No. 260-CLW-172 directing an election in a "supervisor" bargaining unit and disposing of the confidential and supervisor determinations.

The hearing on substitutes was held at Tacoma, Washington on March 31, 1978 and May 24, 1978 before Rex L. Lacy, Hearing Officer. Briefs were filed in the matter until November 27, 1978.

POSITIONS OF THE PARTIES

The employer contends that "daily" substitute certificated employees are casual employees who, according to the precedents of the National Labor Relations Board (NLRB) and the Public Employment Relations Commission (PERC) are excluded from collective bargaining units. The employer relies heavily on the decision of the Executive Director in Everett School District. Decision 268 (EDUC, 1977).

The TACT contends that all substitute certificated employees are "employees" within the meaning of RCW 41.59.020(4); that they are all currently within the bargaining unit represented by TACT; that they had historically been represented by TACT under repealed RCW 28A.72; and that they should all be included in the TACT bargaining unit in the future.

STATUTORY AUTHORITY

RCW 41.59.020(4) defines "employee" and "educational employee" to mean any certificated employee of a school district except the chief executive officer of the employer, the chief administrative officers of the employer, confidential employees, supervisors and principals. RCW 41.59.020(8) defines "non-supervisory" employees as meaning all educational employees other than principals, assistant principals and supervisors.

RCW 41.59.080 controls unit determination under the Act:

> "41.59.080 - Determination of bargaining unit--Standards. The Commission, upon proper application for certification as an exclusive bargaining representative or upon petition for change of unit definition by the employer or any employee organization within the time limits specified in RCW 41.59.070(3) and after hearing upon reasonable notice, shall determine the unit appropriate for the purpose of collective bargaining. In determining, modifying or combining the bargaining unit, the commission shall consider the duties, skills, and working conditions of the educational employees; the history of collective bargaining; the extent of organization among the educational employees; and the desire of the educational employees; except that:
>
> (1) A unit including non-supervisory educational employees shall not be considered appropriate unless it includes all such non-supervisory educational employees of the employer; ..."

The Legislature provided the Commission with the following guidance when the Educational Employment Relations Act was enacted:

> "41.59.110 - Commission, Rules and Regulations of--Federal Precedents as Standard. (1) The commission shall promulgate, revise or rescind, in the manner prescribed by the administrative procedure act, chapter 34.04 RCW, such rules

and regulations as it may deem necessary and appropriate to administer the provisions of this chapter, in conformity with the intent and purpose of this chapter, and consistent with the best standards of labor-management relations.

(2) The rules, precedents, and practices of the national labor relations board, provided they are consistent with this chapter, shall be considered by the commission in its interpretation of this chapter, and prior to adoption of any aforesaid commission rules and regulations." (Emphasis supplied).

BACKGROUND AND ANALYSIS

Tacoma School District No. 10 has approximately 35,000 students in its kindergarten - twelfth grade program, and somewhat in excess of 1700 certificated employees. In addition to the certificated employees employed for the full 182 day school year under individual employment contracts, the district maintains a roster of more than 500 persons who are available to it for work as "substitute" teachers.

The hiring process for substitute teachers varies considerably from the hiring process used for contracted certificated employees. Applicants for contracted positions complete a formal application, interview with the personnel office, specialists and administrators, and are the subject of specific hiring recommendations to the Superintendent and ultimately to the Board of Directors. The signed contract which results can mature into statutory continuing contract rights. By contrast, applicants for substitute employment follow a less formal procedure limited to interviews by the Administrative Assistant for Personnel or the Assistant Superintendent for Personnel, verification of education and certification, routine blanket approval by the Board of Directors and placement on the substitutes roster. Although educator certification by the State Superintendent of Public Instruction is required for work as a substitute teacher, the certification requirements are different from those applicable to other certificated employees. See: Chapter 28A.67 RCW and WAC 180-80-250.

Members of the contracted staff are generally assigned to a specific classroom, subject matter schedule or task for significant time periods such as an academic quarter or semester; and they are generally employed under contracts running for one full academic year at a time. Once so assigned, they report to and leave their assignments each day at the prescribed times, they prepare lesson plans, they attend staff meetings, they often have extra-curricular assignments, and they are transferred or re-assigned only in accordance with the TACT collective bargaining agreement. By contrast, persons on the substitute roster are subject to

assignment on a day-to-day basis to any building in the district which has a vacancy, they have no responsibilities with respect to building staff meetings, they are not required to prepare lesson plans, they are not required to fulfill extra-curricular assignments of the contracted employees they replace, and they have no transfer or assignment rights under the collective bargaining agreement.

Members of the contracted staff were compensated during the 1977-78 school year in accordance with a salary schedule, contained in the collective bargaining agreement, which recognizes differences in both training and experience. That schedule provided compensation, ranging from $58.93 to $120.80 per day, based on the 182 day work year. In addition, those employees receive employer-paid fringe benefits including medical insurance, dental insurance, liability insurance and paid leaves of absence. Those paid leave provisions, which include emergency leave, sick leave, bereavement leave, family illness leave, military service leave, jury duty and subpoena leave, professional leave and sabbatical leave, provide many of the work opportunities for the substitute teachers. There is little or no evidence of a practice of transfers or re-scheduling of contracted staff to cover such short-term vacancies. Instead, a substitute teacher is hired. During 1977-78, substitute teachers were paid a flat rate of $39.87 per day, regardless of their training or experience, and recieved none of the employer-paid fringe benefits. An exception is made for substitutes working 21 or more consecutive days in the same assignment, under which such persons are paid at the salary schedule rates and assume a broader range of responsibilities. The employer concedes that those "long term substitutes" become part of the non-supervisory certificated employee bargaining unit under the Everett decision.

Substitute teachers acquire no tenure or seniority rights with the district, and have no guarantee of the number of days they will work annually. In the absence of any offer of "permanent" employment (at least by comparison to the highly formalized tenure rights of the contracted staff), most of the persons on the Tacoma substitutes roster also work as substitute teachers for other school districts in the Tacoma vicinity. Substitute teachers are informed at the outset that working for the Tacoma district in a substitute capacity does not provide an employment preference in the event a permanent position becomes available. The district has an established procedure under which contracted staff members report their anticipated absence to a "substitutes" secretary. Calls are then placed to persons on the substitute roster until a replacement is found. Persons on the substitutes roster can refuse any call to work, and are not removed from the roster unless requested by the substitute himself/herself.

The employer's heavy reliance on the decision in Everett School District, supra, and the "two sub-classes of substitutes" result reached in that case ignores a substantial difference between the record and arguments in that case and the record and arguments made here. The parties in Everett approached the "substitutes" issue from extreme positions, and the record made in that case only supported the identification of two sub-classes. In the instant case, the employer starts from the Everett results, and TACT places the focus of its attention on the approximately 130 substitutes most frequently used by the Tacoma district. The evidence does demonstrate a dissimilarity of wages, hours and working conditions between contracted staff and substitutes such as that noted in Everett. NLRB precedents generally exclude "on call" employees with sporadic employment and no expectation of continuing employment from bargaining units because of their "casual" relationship to the employer. Glynn Campbell, d/b/a/ Piggly Wiggly El Dorado Co., 154 NLRB 445 (1965); G. C. Murphy Co., 128 NLRB 908 (1960). NLRB decisions also indicate that the retention by on call employees of the option to accept or reject offers of work mitigates in favor of a finding that a casual employment relationship exists. Rollo Transit Corp., 110 NLRB 1623 (1954); M. J. Pirolli & Sons, Inc., 194 NLRB 241 (1972). However, when one gets to the bottom line, it becomes clear that the substitutes replace contracted staff in their primary function: teaching children. This record contains detailed evidence concerning the work histories of substitute teachers during the past three years, and that evidence tends to contradict any conclusion that all of the "daily substitutes" have merely a sporadic employment with the district.

Assignments from the district's substitutes roster are not made on a strict rotation basis, and many of the substitute teachers are employed by the district with sufficient regularity to realize a substantial income from the district. 69 of the individuals on the district's substitute roster work only for the Tacoma School District. An additional group of approximately 60 substitutes limited their work to Tacoma and one other district. As of the time of the hearing, at least 37 of the substitutes had worked sufficient time in the same assignment during the 1977-78 year to be classified as "long term" substitutes. During 1976-77 and 1977-78, substitute employment averaged approximately 4% of the contracted work force on a daily basis. In 1976-77 (the last full school year for which records are in evidence), substitutes averaged 32.85 days each. During that year, 170 substitutes were employed in excess of the annual average, and one substitute worked 146 days (or 80.2% of the contracted employee work year) during the year.

The NLRB includes part time employees in a bargaining unit with full time employees whenever the part time employees perform work of the type performed by bargaining unit employees on a regular basis or for a sufficient period of time during each week or other appropriate calendar period to demonstrate that they have a substantial and continuing interest in the wages, hours and working conditions in the bargaining unit. Farmers Insurance Group, 143 NLRB 240, 244-245 (1963). Such employees are described as "regular part time employees" to distinguish them from "casual employees". Thus, in a case involving drivers whose number and identity fluctuated from week to week, but where a substantial number of employees reported and worked fairly regularly over a period of several months and 70 of approximately 120 to 125 drivers worked in 3 or more consecutive weeks during an 8 month period, the NLRB concluded that this was "scarcely the pattern of a temporary, part time or casual work force". Fresno Auto Auction, Inc., 167 NLRB 878 (1967). The Board went on to state:

> "In determining the relative regularity or permanence of the employment in the proposed unit, we believe this fact outweighs those considerations having to do with the individual's freedom to determine his own work schedule or to report for work intermittently." Id at 879. See also: Henry Lee Company, 194 NLRB 1107 (1972).

Following similar principles, the NLRB has included in bargaining units part time employees who worked principally on weekends, Bob's Ambulance Service, 178 NLRB 1 (1969); retail store employees who worked a minimum of 15 days in the calendar quarter preceding an established eligibility date, Scoa, Inc., 140 NLRB 1379 (1963); part time taxi drivers working 1 or 2 days per week, Jat Transportation Corp. 128 NLRB 780 (1960); part time employees who worked at least 8 hours per week, Chester County Beer Distributors Assn., 133 NLRB 771 (1961); and part time employees who averaged 4 hours per week for the last quarter preceding an established eligibility date, Allied Stores of Ohio, Inc., 175 NLRB 966 (1969).

Unlike many other types of employers in both the public and private sectors, school districts such as Tacoma have traditionally refrained from building a reserve of "utility" or "floater" employees into their work force to cover routine and anticipated absences. RCW 28A.58.100 requires the district to provide its certificated employees with at least 10 days of "sick leave" per year, accumulative to 180 days. The substitutes constitute the work force from which the replacements are routinely drawn, and there is no indication in this record that the traditional practice has changed or is about to change. Substitutes are not excluded as a class from the definition of "employee" contained in RCW 41.59.020(4), and to say that daily substitutes have, as a class, no expectancy of continued employment ignores the realities of the industrial setting in which they work.

Administrative agencies in other states have wrestled with the "substitutes" issue. Many have reached the conclusion that at least some substitutes are employees within the meaning of their respective public sector bargaining laws. Different threshhold levels have been established for inclusion of substitutes with other teachers in bargaining units or for the creation of separate bargaining units composed entirely of substitute teachers.

In Palo Alto Unified School District, 1 NPER 05-10020 (Cal. PERB, 1979), the California Public Employment Relations Board found that substitute teachers were employees within the meaning of their Act, but applied a 10% of school days test for determining "an established interest in employment relations with the district".

In Milwaukee Board of School Directors v. WERC, (Wis. Cir.Ct., 1970), the Court affirmed a determination of the Wisconsin Employment Relations Commission that per diem substitutes were employees rather than independent contractors, subject to a 30 day per school year regularity test.

More recently, in Bridgewater-Raritan Reg. Bd. of Ed., 4 NJPER 4201 (NJ PERC, 1978), the New Jersey PERC ruled that substitute teachers are "public employees" if they can demonstrate a sufficient regularity and continuity of employment, with the test being 30 days of service in one school year and indication of willingness to serve in the succeeding school year.

In Eugene Substitute Teacher Organization v. Eugene School District, 1 PECBR 716 (Ore. PERB, 1976), aff'd 31 Or.App. 1255, 572 P.2d 650 (Ore.Ct.App., 1977), the Oregon agency concluded that substitutes teaching as little as one-half day per year are employees with a reasonable expectation of re-employment in the current school year.

The long-term/short-term dichotomy applied in Everett School District, supra, is similar to results reached by New York's PERB in Weedsport Central School District, 1 NPER 33-13004 (NY PERB, 1979); by Pennsylvania's Labor Relations Board in Millcreek Twp. School District, 1 NPER 39-10049 (Pa. LRB, 1979); and by Indiana's Education Employment Relations Board in Avon Community School Corp., 1 IPER 124 (Ind. EERB (H. Ex.), 1976).

In Waterford School District, Case No. R76 D227 (Mich. ERC. 1977), Michigan's Employment Relations Commission expressly overruled its prior decison in Reese Public Schools, 1969 MERC Lab. Op. 253, 293 GERR B-1 (Mich. ERC, 1969) which had included substitutes in teacher bargaining units but had denied them voting rights in representation elections. Michigan now excludes all substitutes from bargaining units as "casual".

The Everett decision and the New York, Pennsylvania, Indiana and Michigan cases suggest a result which, on this record, would deny regular part time employees their bargaining rights. At the other end of the spectrum, the Oregon approach disregards the many NLRB cases which have established some periodic employment threshold, and the distinction between "regular" and "casual" employment. While any threshold test is subject to criticism as being arbitrary, nevertheless a workable distinction between "regular part time" and "casual" employees necessitates that such a test be established. The NLRB, whose precedents we are bound by statute to consider, has in varying circumstances applied minimum tests ranging from four hours per week (which would translate to 18 days per school year in the education setting) to 15 days per calendar quarter (41.54 days per school year if translated at a rate of 1.154 days per week) or more. A threshold test for regular part time employment based on "days per year" of employment is indicated in this setting. The collective bargaining agreement and the education statutes of this State both indicate a tradition of thinking in terms of "days" of employment and a tradition of employment relationships for one academic "year" at a time. The 30 day test in use in both Wisconsin and New Jersey is reasonable, and is adopted. It provides a round figure to apply which, when considered in the context of a student school year of 180 days, falls well within the threshold parameters set out by the NLRB in its various cases differentiating regular part time employees from casual employees. The 30 day test is also reasonably proximate to the average employment of Tacoma substitutes as established in this record.

One traditional argument against the use of a fixed threshold for "regularity" is a concern that employers would limit assignments so as to prevent substitute teachers from obtaining the necessary number of days of work for bargaining unit status. In the context of a law (RCW 41.59.140(1)(c)) which clearly makes it an unfair labor practice for an employer to discriminate "in regard to hire, tenure of employment, or any term or condition of employment" to encourage or discourage membership in an employee organization, and in the context of a record showing substantial employment histories of persons as substitutes over as much as a 6 year period, any such concerns are deemed an insufficient reason for blocking application of an otherwise reasonable test for determining regularity in employment.

The history of representation of substitutes by TACT or its affiliates prior to the effective date of RCW 41.59, the extent of organization and the desires of employees can be of little import. Repealed RCW 28A.72, under which TACT represented employees prior to adoption of the Educational Employment Relations Act (RCW 41.59), had completely different definitions

and lacked provision for establishment of bargaining units by an impartial agency or body. Further, RCW 28A.72 did not contain the requirement of RCW 41.59.110 that the best standards of labor-management relations and the rules, practices and precedents of the NLRB be considered in the application of the statute. The 1976-78 collective bargaining agreement between the district and TACT specifically acknowledges the existence of a dispute concerning the status of the substitutes, and the issue was formally submitted to PERC for determination just three days after that agreement was signed. RCW 41.59.080(1) effectively prohibits consideration of establishing a separate unit of substitutes based on their own desires or other unit determination criteria found in RCW 41.59.080.

FINDINGS OF FACT

1. Tacoma School District No. 10 has recognized Tacoma Association of Classroom Teachers as the exclusive bargaining representative of a unit of full time and regular part time non-supervisory certificated employees of Tacoma School District No. 10.

2. A dispute has arisen as to whether certificated non-supervisory employees employed as substitutes are to be included in or excluded from the bargaining unit consisting of full time and regular part time non-supervisory certificated employees of Tacoma School District No. 10.

3. Tacoma School District No. 10 maintains a roster of more than 500 persons available to it for service as substitute teachers. Such employees are subject to classification into three separate and distinct categories. Long term substitute certificated employees have duties, skills and working conditions generally comparable to those of full time and regular part time non-supervisory certificated employees of the district. Certain daily substitute certificated employees are employed to perform the type of work performed by full time and regular part time non-supervisory certificated employees of the district for a substantial number of days each school year, have a continuous employment record from year to year, and have a substantial and continuing interest in the wages, hours and working conditions of non-supervisory certificated employment with the district. The remaining substitute certificated employees are employed sporadically and have no reasonable expectation of substantial and continuing employment with the Tacoma School District.

4. Substitute certificated employees who are associated with the Tacoma School District for more than thirty (30) days of work within any twelve (12) month period have a reasonable expectancy of continued employment

by the Tacoma School District during the remainder of the current school year and during the succeeding school year, except where the employment relationship has been expressly terminated.

5. Positions vacated by a member of the district's contracted certificated staff for a period in excess of twenty (20) consecutive work days have been recognized as calling for the performance, by a long term substitute teacher of most, if not all, of the duties of the regular staff member being replaced, and such positions are regular part time positions.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction to resolve in these proceedings a dispute concerning the scope of the bargaining unit described in paragraph 1 of the foregoing findings of fact.

2. Casual employees are to be excluded from bargaining units, but regular part time employees including those described in paragraphs 4 and 5 of the foregoing findings of fact are to be included in bargaining units created under RCW 41.59.080.

ORDER

1. Substitute certificated employees employed by Tacoma School District No. 10 sporadically on call as needed and who have not worked at least 30 days during a period of 12 months ending during the current or immediately preceeding school year are casual employees who are not included in the appropriate bargaining unit for which Tacoma Association of Classroom Teachers is recognized as the exclusive bargaining representative of employees of Tacoma School District No. 10.

2. Substitute certificated employees employed by Tacoma School District No. 10 for more than 30 days of work within any 12 month period ending during the current or immediately preceeding school year and who continue to be available for employment as substitute teachers are regular part time employees of Tacoma School District No. 10 and are included in the appropriate bargaining unit for which Tacoma Association of Classroom Teachers is recognized as the exclusive bargaining representative.

3. Substitute certificated employees employed by Tacoma School District No. 10 in positions where it is anticipated or comes to pass that a member of the bargaining unit will be absent from his or her regular assignment and will be replaced in such assignment for a period in excess of 20 consecutive work days are regular part time employees of Tacoma School District No. 10 and are included in the appropriate bargaining unit for which Tacoma Association of Classroom Teachers is recognized as the exclusive bargaining representative.

DATED at Olympia, Washington, this 31st day of May 1979.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, Executive Director