STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition:	
PUBLIC SCHOOL EMPLOYEES OF WASHINGTON	CASE NO. 3325-C-81-157
For clarification of an existing bargaining unit of employees of:	DECISION NO. 1351 - PECB
SEDRO WOOLLEY SCHOOL DISTRICT NO. 101	ORDER CLARIFYING BARGAINING UNIT

Edward A. Hemphill, Attorney at Law, appeared on behalf of the petitioner.

Chuck Foster, Labor Relations Specialist, Washington State School Directors Association, appeared on behalf of the employer.

By a petition filed February 25, 1981, Public School Employees of Washington (union) requested the Public Employment Relations Commission to clarify an existing bargaining unit of classified employees employed by Sedro Woolley School District No. 101 (employer) with respect to the bargaining unit status of "substitute" classified employees. A hearing was conducted on June 8, 1981 before Kenneth J. Latsch, Hearing Officer. The parties submitted post-hearing briefs.

BACKGROUND:

Sedro Woolley School District No. 101 employs approximately 103 classified employees. Public School Employees of Washington has been recognized as exclusive bargaining representative of a bargaining unit described in the parties' September 1, 1980 through August 31, 1982 collective bargaining agreement as:

> "...all classified employees in the following general job classifications: Aides, Transportation, Custodial, Building Maintenance, Ground Maintenance, and Food Service."

The aides, school bus drivers and food service employees work only during the instructional year, which is normally 181 days. Custodians and maintenance employees nominally work twelve months a year, but rarely work a full 2,080 hour year. Approximately 75% of the bargaining unit works less than "full-time", if that term is used in the conventional "40 hours per week, year

around" sense of the term. The district hires substitute employees to fill vacancies when regularly scheduled employees are absent, and it is the bargaining unit status of those substitute employees which is at issue in these proceedings.

The district posts position announcements for vacant regularly scheduled classified positions. Applicants for regularly scheduled jobs are initially screened by the assistant superintendent and the director of auxillary services. After the initial screening, applicants are interviewed by the director of a particular program (such as food services or transportation) or by the building principal (in the case of custodians, aides or maintenance employees). Successful applicants are recommended for employment to the Sedro Woolley School Board. The screening process differs for substitute work. Applicants for substitute work are interviewed only by the assistant superintendent and are then placed on substitute lists which are maintained for each general job classification. The district has not had experience with substitutes on its lists also being employed as substitutes in neighboring school districts, but certain of its substitutes are on two or more of its separate general classification lists (e.g. substitute hired as an aide has also worked as a substitute custodian). If a permanent position opens during the course of the work year, substitutes are not given any preferential treatment in filling the position. The district posts the vacant position, and substitute employees are screened with all other applicants.

Whether hired as a scheduled or a substitute employee, successful applicants are expected to possess certain skills, depending upon the particular job. Scheduled school bus drivers must have a state certification before they are hired, and they must continue safety training once they are employed. Substitute drivers must either have state certification or must go through a 21-day training program run by the district.

Substitutes are not hired for any fixed period. Substitutes perform the same duties as regular employees and work under the direction of the same supervisors. The substitutes work varying hours, depending on the position to be filled. In practice, these hours correspond to the scheduled employee replaced and range from two hours a day (in the case of certain aides and drivers) to eight hours a day (in the case of custodians). In addition, substitute bus drivers are not eligible for extra assignments for field trips or athletic events unless scheduled drivers are unavailable. While several substitutes have filled the same position for almost a complete work year, the district does not distinguish between "short term" and "long term" substitutes for the purposes of salary improvement, seniority or benefit coverage. The district hired employees who normally worked only during the instructional year to perform temporary custodial and maintenance work during the summer. Substitutes hired during the summer have sometimes been allowed to continue employement after the instructional year began. However, the employees' status as substitutes remained unchanged.

Substitute employees are compensated at the negotiated first step rate specified in the collective bargaining agreement between the parties, but do not receive insurance benefits or vacation benefits, nor do they accrue seniority. While certain substitutes have filled the same position for almost a complete work year, or for substantial work time in successive years, substitute employees never advance beyond the first step of the salary schedule according to the negotiated wage progression program applied to scheduled employees.

The situations of several employees at issue were placed in evidence in this proceeding:

Muriel Young was originally hired as a substitute custodian in 1979. During the 1979-1980 period, she worked 145 days, eight hours a day. Young was hired as a temporary custodial employee working from June 11 through September 1, 1980. Due to the extended illness of a regular custodian, Young was retained during the 1980-1981 instructional year. Young works eight hours a day, five days a week and is responsible for the same duties as those expected of the regular employee she replaced. As of the time of hearing, Young had worked every day in the same assignment. However, she is still considered to be a substiute employee.

Nancy Erickson was originally hired as a substitute bus driver in 1979. During the 1979-1980 instructional year, Erickson worked 67 days, averaging four to four and one-half hours per day. While district records are incomplete as to the hours she worked in the early part of 1980, records kept from September, 1980 through January, 1981 show that Erickson worked an average of approximately 85 hours per month as a substitute bus driver.[1/] As a substitute, Erickson has worked on different bus routes, depending on the absence of regular drivers, and her work has not been continuous. Erickson is called as needed, and she is available to drive on any bus route in the district.

Gail Ewing was hired as a substitute bus driver in April, 1980. Ewing's employment was continuous during the 1980-1981 instructional year, with hours varying from 20 hours per month, in September, 1980, to 110 hours per month, in December, 1980. As in Erickson's case, Ewing worked on various bus routes, depending on the absence of regular drivers.

Barbara True, Judy Hammond, Mike Riddle and Edward Hesseltine, are now considered to be scheduled employees. Each of them worked previously as a substitute, but the time worked as substitute employees was not credited for purposes of seniority under the collective bargaining agreement.

1/ The district did not have complete records available at the time of hearing for the period after January, 1981.

The union has never sought to represent substitute employees in prior collective bargaining negotiations, nor have the substitutes ever petitioned to form a separate bargaining unit. This unit clarification proceeding arose when the union approached the employer to discuss the status of certain employees classifed as substitutes. The initial conversation occurred early in 1980 through a labor/management conference under terms of the then-existing collective bargaining agreement. At issue was interpretation of the contract's provision that seniority and lay-off shall be based on the employee's continuous service in the district. The September 1, 1980 through August 31, 1982 collective bargaining agreement contains the disputed language in Section 10.1 which provides:

> "The seniority of an employee within the bargaining unit shall be established as of the date on which the employee began continuous daily employment (hereinafter "hire date") unless such seniority shall be lost as hereinafter provided..."

The union took the position that, as representative of all classified employees in the district, it had a legitimate basis to question the employer's policy relating to substitute employees. The union contended that the language of Section 10.1 indicates that an employee becomes eligible for coverage under terms of the contract after two days of service, and, therefore, should be entitled to a pro-rated share of benefits. The district contended that it had the right to treat substitutes differently and would not give benefits, although several substitutes worked for the entire instructional year.

The parties could not resolve the issue through the labor/management conference, and the union filed a grievance on October 27, 1980 seeking clarification of the rights of substitute employees under the collective bargaining agreement. The dispute progressed through the grievance procedure until the matter was submitted to grievance mediation in February, 1981. The grievance was not resolved in mediation.

POSITIONS OF THE PARTIES:

Petitioner argues that substitute classified employees who have a reasonable expectancy of continuing employment should be included in the existing bargaining unit. Petitioner contends that substitutes perform the same duties and possess the same skills as regular employees, and that substitutes have often been employed in the same assignment for an entire work year. In determining the threshold for inclusion, petitioner urges the Public Employment Relations Commission to follow standards established for the inclusion of substitute certificated employees under RCW 41.59.

The employer contends that this clarification proceeding was pursued because the petitioner received an unfavorable recommendation through the grievance

procedure. The employer maintains that this issue should be resolved through negotiations, and that the dispute only concerns the status of those employees considered to be substitutes. The employer further contends that the provisions of RCW 41.56 differ significantly from those found in RCW 41.59, and that substitutes should not be included in the existing bargaining unit if the criteria of RCW 41.56.060 are properly applied.

DISCUSSION:

Unit determination issues involving school classified employees are controlled by RCW 41.56.060 which provides:

> "...In determining, modifying, or combining the bargaining unit, the commission shall consider the duties, skills, and working conditions of the public employees; the history of collective bargaining by the public employees and their bargaining representatives; the extent of organization among the public employees; and the desire of the public employees."

Unit determination criteria found in RCW 41.59.080 are similar in that both statutes require the Commission to examine duties, skills and working conditions; history of bargaining; extent of organization; and desires of employees. However, the employer in its closing brief, correctly notes that RCW 41.59.080 contains more specificity in unit determination questions. Of particular interest in this matter is RCW 41.59.080(1) which provides:

> "A unit including non-supervisory educational employees shall not be considered appropriate unless it includes all such non-supervisory educational employees of the employer..." (Emphasis supplied)

Through a series of decisions, the Commission has established that a substitute teacher working for a particular school district for more than 20 consecutive work days in the same assignment or more than 30 days work during a 12-month period are educational employees who must, because of RCW 41.59.080(1) be included in the same bargaining unit with other non-supervisory certificated employees. See: Everett School District, Decision No. 268 (EDUC, 1977); Tacoma School District No. 10, Decision No. 655 (EDUC, 1979); Spokane School District No. 81, Decision No. 874 (EDUC, 1980); and Columbia School District No. 400, et. al., Decision No. 1189-A (EDUC, 1982); Renton School District No. 403, Decision No. 706-B (EDUC, 1982). The union maintains that the same standard should be applied because most classified employees work during the same time period as certificated employees, and that a common standard for bargaining unit inclusion is desirable.

The decisions under RCW 41.59 are instructive as far as they go, and certainly suggest that at least some of the district's "substitute" employees would be found to be "public employees" covered by RCW 41.56. In

contrast to RCW 41.59, however, neither the National Labor Relations Act nor RCW 41.56.060 requires inclusion of all non-supervisory public employees in the same bargaining unit. The National Labor Relations Board (NLRB) generally excludes from bargaining units "casual" employees who do not have an expectation of continuing employment. See: Glynn Campbell d/b/a Piggly Wiggly El Dorado Co., 154 NLRB 445 (1965). In determining the threshold for inclusion in existing bargaining units, the NLRB has determined that "on call" status may mitigate against inclusion, but if a regular pattern of employment exists, such status is not necessarily determinative. See: M. J. Pirolli and Sons, Inc., 194 NLRB 241 (1972). The critical determination is whether the part-time employees share a substantial and continuing interest in wages, hours and working conditions with regular full-time employees of the employer in the same occupational grouping. Farmers Insurance Group, 143 NLRB 240, 244-245 (1963). As a guideline for including part-time employees in existing bargaining units, the NLRB has sometimes used a standard of 15 days worked in the preceding calendar quarter. See: Scoa, Inc., 140 NLRB 1379 (1963). The Scoa test was utilized in City of Seattle, Decision 1142 (PECB, 1981), where it was requested by the petitioning union and the employer offered no alternative other than total exclusion of "on call" employees from bargaining rights under RCW 41.56. The discussion in City of Seattle and analysis of numerous bargaining unit descriptions framed by the Public Employment Relations Commission readily discloses routine inclusion in bargaining units of "full time and regular part time employees".

In marked contrast to the inflexible unit determination provisions of RCW 41.59, it is well established that, while unit determination is not a subject for bargaining in the conventional mandatory/permissive/illegal sense under RCW 41.56, parties may agree on units. City of Richland, Decision 279-A (PECB, 1978); aff'd: 29 Wa.App. 599 (Division III, 1981); cert. den., 96 Wa.2d 1004 (1981). Parties may not take unit determination issues to impasse, Spokane School District, Decision 718 (EDUC, 1979), and the fact that parties have agreed does not indicate that the unit is or will continue to be appropriate, Richland, supra, but they may agree. Both the Commission and the National Labor Relations Board will accept the good faith agreements of parties concerning limitations on the bargaining unit status of part time employees, so long as their agreement does not discriminate on its face or result in the creation of a unit which is statutorily inappropriate. The effect of an agreement has been a recurrent theme in the Commission's unit determination cases whenever one of the parties has sought to alter an agreed unit inclusion or exclusion, and in Toppenish School District, Decision 1143-A (PECB, 1981), the Commission set down its policy concerning the availability of unit classification:

> A mid-term unit clarification is available to exclude individuals from a bargaining unit covered by an existing collective bargaining agreement if:
>
> a) The petitioner can offer specific evidence of substantial changed circumstances that would warrant such an exclusion,

or

b) The petitioner can demonstrate that, although it signed a collective bargaining agreement covering the disputed position, it put the other party on notice that it would contest the inclusion via the unit clarification procedure and filed a petition for unit clarification with the Commission prior to the conclusion of negotiations.

There is no evident reason why the same rule should not be applied, in general and in this case, to an effort by unit clarification to include individuals in a unit. The evidence indicates that there has been no change of circumstances concerning the "substitute" employees. The parties discussed the status of substitutes under the procedures of their previous collective bargaining agreement, without resolution. A new collective bargaining agreement was signed on October 6, 1980. A grievance was processed under the unchanged provisions of the new collective bargaining agreement, and only after a February 6, 1981 rejection of that grievance by management was the unit clarification petition filed to initiate this case, on February 25, 1981. The petition must be denied at this time.

FINDINGS OF FACT

1. Sedro Woolley School District No. 101 is a "public employer" within the meaning of RCW 41.56.030(1).

2. Public School Employees of Washington, a "bargaining representative" within the meaning of RCW 41.56.030(3) represents classified employees employed by Sedro Woolley School District No. 101 in the general job classifications of aides, transportation, custodial, building maintanence, ground maintenance and food service.

3. The classified employees work for varying periods, depending on their job classifications. Aides, transportation employees, and food service employees work during the instructional year while custodians and maintenance employees work year around. The employees work different hours, ranging from several hours a day in the case of some aides to eight hours a day in the case of custodians.

4. Apart from regularly scheduled employees, the district maintains lists of substitute classified employees in the same general job classifications. The substitutes do not work for any specific duration and are used to fill in when scheduled employees are absent. The substitute work force and employment practices have remained consistent over the last several years.

5. Substitutes perform the same duties and are subject to the same

supervision as regular employees. However, substitutes never advance beyond the first step of the salary schedule, do not enjoy seniority rights and do not receive medical, sick leave or vacation benefits.

6. The union has never sought to represent substitute employees in collective brgaining negotiations. Issues arose concerning the rights of substitute employees early in 1980. A collective bargaining agreement executed on October 6, 1980 made no changes concerning the status or rights of substitute employees. A grievance was processed concerning the rights of substitute employees under the terms of the 1980-1981 collective bargaining agreement. The petition initiating this proceeding was not filed until February 25, 1981.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to RCW 41.56.

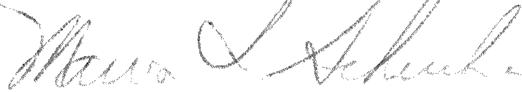
2. The bargaining unit status and the absence of contractual coverage for a substitute classified employee were a matter of agreement between the parties. No change of circumstances has been shown which warrants a change of unit status at this time.

ORDER

The bargaining unit status of substitute classified employees shall remain unchanged as the result of these proceedings.

DATED at Olympia, Washington this 30th day of March, 1982.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARVIN L. SCHURKE, Executive Director