STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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

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

John T. Slater, Attorney at Law, appeared on behalf of the employer.

PROCEDURAL BACKGROUND:

On February 25, 1981, Public School Employees of Washington (union) filed a petition requesting clarification of an existing bargaining unit of employees of Sedro Woolley School District No. 101 (employer). At issue was the bargaining unit status of "substitute" classified employees. A hearing was conducted on June 8, 1981, before Kenneth J. Latsch, Hearing Officer.

In Decision 1351 (PECB, 1982), issued on March 30, 1982, it was determined that the union had not filed its unit clarification petition in conformity with principles set forth in Toppenish School District, Decision 1143-A (PECB, 1981). Not reflected in the record at the time was the fact that, after the hearing but before the decision was issued, the parties negotiated an extension of their collective bargaining agreement. Among the terms of the extension, the parties expressly acknowledged that the issue of bargaining unit status of substitute employees had been submitted to the Public Employment Relations Commission for determination.

On April 13, 1982, the union filed a motion and supporting affidavits, requesting that the hearing be reopened in light of the negotiations and the parties' agreement to be bound by the commission's decision about substitutes. In Decision 1351-A (PECB, 1982), issued April 23, 1982, Decision 1351, supra, was set aside pending review of the union's motion. In Decision 1351-B (PECB, 1982), the union's motion to reopen the record was granted, and the record was amended to reflect that the parties' had notice of the clarification issue when they concluded their negotiations on the contract extension.

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 181 day instructional year, while custodians and maintenance employees work twelve months a 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. 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 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 for work as aides or maintenance employees are also interviewed by the building principal. By contrast, 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 subsitute 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, and they work varying hours depending on the vacancy to be filled. In practice, these hours correspond to those of 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). Substitutes perform the same duties as regular employees and work under the direction of the same supervisors. Substitute bus drivers are eligible for extra assignments for field trips or athletic events if scheduled drivers are unavailable.

The district hires employees who normally worked only during the instructional year to perform temporary custodial and maintenance work during the summer, and substitutes hired during the summer have sometimes been allowed to continue employment 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. The collective bargaining agreement contains a wage progression program applied to regularly scheduled employees. 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.

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.

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.

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

Gail Ewing was hired as a substitute bus driver in April, 1980. Ewing's employment was continuous during the 1980-1981 instructional year, with monthly hours varying from 20 hours in September, 1980 to 110 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 regularly scheduled employees. Each of them previously worked as a substitute, but the time worked as substitute employees was not credited for purposes of seniority under the collective bargaining agreement.

The union never sought to represent substitute employees in collective bargaining negotiations prior to those conducted in 1981, nor have the substitutes ever petitioned to form a separate bargaining unit. The union approached the employer early in 1980 to discuss the status of certain employees classified as substitutes. The initial conversation occurred in 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 provided:

> "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, 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:

This case presents two issues: Should a separate bargaining unit of substitute employees be established; and what is the appropriate threshold at which a substitute can be considered an employee for bargaining unit inclusion? The contractual rights of any "substitute" who may be included in the bargaining unit by an order clarifying bargaining unit are not at issue in this proceeding. A duty to bargain would exist between the parties to establish the wages, hours and working conditions of such employees.

Separate Bargaining Unit

If a separate bargaining unit of substitute classified employees is a possibility under RCW 41.56, then the potential for a question concerning representation would exist and it would follow that an accretion of substitutes would not be available through unit clarification procedures. See WAC 391-35-010, which limits the availability of unit clarification procedures to situations where no question concerning representation is in existence. See also: Columbia School District, et al., Decision 1189-A (EDUC, 1981), wherein the Commission noted the potential for existence of a separate community of interest, and separate bargaining unit for employees excluded from a "full time" employee unit.

As was noted in Decision 1351, supra, RCW 41.56 differs from RCW 41.59 in terms of unit determination requirements. RCW 41.59.080(1) mandates that all nonsupervisory certificated employees must be included in a bargaining unit for that unit to be considered appropriate. RCW 41.56.060, containing unit determination criteria for public employees' bargaining units, does not have similar restrictions. The difference, however, does not require an opposite result.

In City of Seattle, Decision 781 (PECB, 1979), a group of "intermittent" employees petitioned for the creation of a separate bargaining unit. Those employees served as a temporary employment pool, filling in for absent full-time and regular part-time employees and supplementing the regular work force in emergencies or peak activity periods. The affected employees had different hiring and scheduling procedures and received lower wage rates than did regularly scheduled employees, but the temporary employees did not share other common interests. The temporary employees were expected to perform the same jobs as the regular employees they replaced. In addition, the temporary employees worked the same hours and under the same supervision as the regular work force. The intermittent workers had been excluded from bargaining units of regularly scheduled employees represented by several unions. It was noted in the City of Seattle decision:

> "One of the underlying purposes for the existence of RCW 41.56 is improvement of relationships between public employers and their employees. The creation of a bargaining unit structure destined to conflict because of the structure itself would be counter-productive to the overall purpose of obtaining stable and peaceful labor relations.
>
> The existing bargaining structure has encountered difficulty in dealing with intermittent employees. The record indicates a history of mistrust and 'unit work' claims by representatives of existing units which would not be alleviated by the creation of a separate unit composed solely of intermittent employees. Creation of such a unit would exacerbate the situation by leading to jurisdictional disputes between two separate organizations concerning the borderline between units within the same occupational groupings.
>
> The City's present collective bargaining relationships are so extensive that there are few employees who do not participate in collective bargaining. A 'residual' unit composed of all excluded employees may be found to be appropriate under NLRB precedent, but the petitioner has not requested such a unit here. The extent of organization of employees in the involved occupational groupings, and the absence of a showing of a true residual unit, dictate a conclusion that the creation of the separate unit sought by the petitioner would lead to fragmentation of bargaining units, while inclusion of the petitioned-for employees in existing units on the basis of their occupational groupings would avert such fragmentation."

Given those circumstances it was concluded that the intermittent employees were assimilated into the regular full-time work force as to the bulk of their duties, skills and working conditions, and that a separate unit was inappropriate.

In the instant case, substitute classified employees perform the same duties as the regular employees they replace, and they are fully integrated into the work force when they are assigned to a particular job. Substitute bus drivers are required to have the same training expected of regular drivers, and the record reflects that the employer has even offered a form of remedial

program to help substitute drivers pass state tests. The only distinguishing factors are the scheduling of work and the rate of compensation. Given the substantial community of interests shared by regular and substitute classified employees in terms of duties, skills, and working conditions, it would be inappropriate to create a separate bargaining unit composed of substitute employees only.

Inclusion of Substitutes in the Existing Unit

If substitute classified employees could not be placed in an appropriate separate bargaining unit, they must be accreted to the existing unit or will be left stranded and will thereby be deprived of their statutory bargaining rights. See: Oak Harbor School District, Decision 1319 (PECB, 1981). The analysis thus turns to the standards to be imposed for including substitutes in the existing unit.

It is clear that all substitute employees would not be eligible for inclusion, because certain substitutes do not have a sufficient nexus with this employer to indicate a continuing employment relationship. "Casual" employees, who do not have an expectation of continuing employment, do not share a sufficient community of interest with bargaining unit employees. See: Glynn Campbell d/b/a Piggly Wiggly El Dorado Co., 154 NLRB 445 (1965); Scoa, Inc., 140 NLRB 1379 (1963); City of Seattle, Decision 1142 (PECB, 1981).

Certain substitutes do have an expectation of continuing employment. In determining the proper threshold for their inclusion, Commission decisions dealing with substitute certificated employees under RCW 41.59 are instructive. Through a series of decisions, it has been determined that a substitute teacher must be included in a bargaining unit of non-supervisory certificated employees if the substitute works more than 20 consecutive days in the same assignment or more than 30 days in a twelve month period. See: Everett School District, Decision 268 (EDUC, 1977); Tacoma School District, Decision 655 (EDUC, 1979); Spokane School District; Decision 874 (EDUC, 1980); Renton School District, Decision 706-B (EDUC, 1982) and Columbia School District, et. al., Decision 1189-A (EDUC, 1982).

The "20 days" portion of the substitute teacher test was first enunciated in the Everett case, based on a record showing a history of a significant change of duties, wages and benefits at that point in time and circumstance. Although the time test has varied from employer to employer, all of the teacher substitute cases have disclosed a wide-spread industry practice distinguishing "long term" substitutes from "daily" substitutes. Long term substitutes typically assume the full professional planning function and peripheral duties of the employee replaced, while daily substitutes merely take over the classroom duties of the employee they replace. In the instant case, there is no similar professional planning function for any of the job classifications involved.

The "30 days" portion of the substitute teacher test originated in the Tacoma case, based on facts comparable to the scheduling, wage and benefit practices applied to the substitute classified employees at issue in the instant case. Although time spent as a long term substitute teacher would also count towards the 30-day test, most of the substitute teachers affected by the 30-day test are identified with the "daily substitutes" subgroup within the class of all substitute teachers. These are persons who do not have any regular assignment, but who work for the same employer a sufficient amount in a "fill in" role that they come to reasonably anticipate such employment as a substantial source of their livelihood, and thus have an expectancy of continued employment. At the same time, substitutes are an ongoing part of the workforce available to the employer for the accomplishment of its functions. The record in the case at hand clearly indicates that several of the "substitute" employees have worked for an entire school year and that others have worked on a very regular basis, although for a lesser period of time. As was noted in Columbia School District, et. al., supra, any threshold is, to some degree, arbitrary, but some test is necessary if order is to be maintained in unit determination matters. It is imperative to establish a threshold for inclusion in existing bargaining units which reflects the nature of the employment relationship and the industry setting in which it occurs. While this record lacks evidence of the unique professional employment facts which gave rise to the "20 days" portion of the test applied to substitute teachers, the classified employees of school districts share the 180 day school year cycle of operations in school districts with the daily substitute teachers hired by those districts. The record indicates that even the "12 month" custodians and maintenance personnel perform different duties during the summer than they perform during the school year. It is therefore concluded that a 30-day test corresponds to the employment practices and is a reasonable threshold for bargaining unit inclusion, given the work assignments and actual time worked by classified employees.[2/]

FINDINGS OF FACT

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

2/ In computing the "30-day" test in a context where many of the regularly scheduled employees work less than "full time", emphasis is to be placed on the work shift of the regular employee replaced. For example, if a substitute employee works the full shift of an employee regularly scheduled to work 4 hours per day, that substitute has worked a "day" for purposes of this test.

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 maintenance, ground maintenance and food service.

3. The regularly scheduled 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 employees in the same general job classifications, who are used to fill in when scheduled employees are absent. The subsitute work force and employment practices have remained consistent over the last several years.

5. Substitutes do not work for any specific time but, when employed, perform the same duties and are subject to the same supervision as regularly scheduled employees. Substitutes are paid at 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 bargaining 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 filed February 25, 1981. Subsequent to the hearing in this matter, the parties negotiated an extension of their collective bargaining agreement.

7. Subsititute classified employees who have not been employed for more than 30 days within a twelve month period are casual employees who do not have an expectation of continuing employment.

8. Substitute classified employees who are associated with Sedro Woolley School District No. 101 for more than thirty (30) days of work within any twelve (12) month period have a reasonable expectancy of continued employment by the district during the remainder of that school year and during the succeeding school year, except where the employment relationship has been expressly terminated.

CONCLUSIONS OF LAW AND ORDER

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to RCW 41.56, and no question concerning representation presently exists.

2. Casual employees are to be excluded from the existing bargaining unit of classified employees, but regular part-time employees, including those described in Finding of Fact 8 above, are to be included in the existing bargaining unit.

ORDER

1. Substitute classified employees employed 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 preceding school year are casual employees who are not included in the existing bargaining unit of classified employees.

2. Substitute classified employees employed for more than 30 days of work within any 12 month period ending during the current or immediately preceding school year, and who continue to be available for employment as substitutes, are regular part-time employees of the district and are included in the existing bargaining unit.

DATED at Olympia, Washington this 18th day of June, 1982.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, Executive Director