

BOSTON SCHOOL COMMITTEE AND BOSTON TEACHERS UNION, MCR-3074 (3/23/81)

- (30 Bargaining Unit Determination)
 34.1 appropriate unit
 34.902 add-on election
 34.91 accretion
 35.11 regular part-time employees
 35.675 substitute teachers

Commissioners participating:

Phillips Axten, Chairman
 Joan G. Dolan, Commissioner
 Gary D. Altman, Commissioner

Appearances:

James T. Grady - Representing the Boston Teachers Union,
 Local 66, AFT, AFL-CIO

Phillips Collins - Representing the Boston School Committee
 Dorothy Q. Nelson

DECISION
Statement of the Case

On May 28, 1980 Boston Teachers Union, Local 66, AFT, AFL-CIO (Union) filed a petition with the Massachusetts Labor Relations Commission (Commission) on behalf of certain persons employed by the Boston School Committee (Employer). The petition, as subsequently amended, sought a unit of all substitute and temporary teachers who have served over 10 consecutive days in an assignment to a specific school.¹

The petition and accompanying notice of hearing were duly served. Pursuant to notice, a formal hearing was conducted on July 15 and August 14, 1980 before Robert B. McCormack, an agent of the Commission. Briefs were submitted and have been considered. Upon the evidence as a whole, we hereby find and rule as follows:

Jurisdiction

1. The City of Boston is a municipal corporation and is a public employer within the meaning of Section 1 of the Law.
2. The School Committee of the City of Boston is the representative of the public employer within the meaning of Section 1 of the Law.
3. The Boston Teachers Union is an employee organization within the meaning of Section 1 of the Law.
4. The Union is the exclusive representative for the purpose of

¹For prior litigation relating to these employees, see Boston School Committee, 6 MLC 2141 (1979).



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collective bargaining of certain employees of the Boston School Committee.

Findings of Fact

Thirteen hundred ninety-nine (1,399) substitute teachers registered with the Boston School Committee in 1979. Of these, 604 actually worked. Five hundred and sixty-nine (569) taught over 10 days in the school system.² Four hundred and five (405) substitute teachers were in their first or second year of service; 97 in their third or fourth year; and 102 had been teaching five years or more.

Substitute teachers must register annually with the Department of Teacher Placement. They are required to fill out various forms, submit two letters of reference, and provide evidence of a bachelor's degree³ and a negative tuberculosis test. Certification is not an absolute necessity, but almost all applicants are certified. Applicants may register various preferences such as geographic area, grade level, day of week, and subject areas which they either wish to teach or to avoid. The Employer does its best to accommodate these preferences.

Assignments are made via a telephone call from the Department of Teacher Placement. Teachers are asked if they are available. A positive answer evokes an assignment to a particular school. Such an assignment is often for one day only. However, long-term assignments are not uncommon. If, for example, a regular teacher is on long-term disability leave, and the substitute is suitably qualified to fill the vacant position, the substitute may be held over at the discretion of the headmaster. However, substitute teachers are not required to work on any given day, and may refuse an assignment. No reason need be given. Refusal of an assignment on one day does not jeopardize the substitute teacher's chance of being called the following day, although refusal of twenty calls might result in transfer to the inactive list. If a substitute does not wish to continue a long-term assignment, there is no obligation to do so. The substitute may "release" his name to the Teacher Placement Department, which will fill the job with another substitute and will continue to call the former individual relative to other opportunities. Although all assignments are made by the Teacher Placement Department, some headmasters have preferences for particular substitutes. These preferences are honored to the extent possible.

The substitutes are annually sent a letter informing them that their past services have been appreciated, and that they have "reasonable assurance of employment as a substitute teacher during the next school year." The primary purpose of the letter is to prevent collection of unemployment benefits, although it appears that there is, in fact, reasonable assurance of employment for all who want it. The Employer relies heavily on its substitute teachers. Many have

²Specifically, 75 active substitute teachers worked between 11 and 30 days; 105 worked 31-60 days; 181 worked 61-100 days; and 208 worked over 100 days. No evidence demonstrates how many worked 10 consecutive days or 10 consecutive days in a particular school.

³Occasionally, senior college students, enrolled in teaching curriculums, are hired as substitute teachers.



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advanced degrees and are employed substantially full-time. By agreement of the parties, a substitute who works 120 days at the same location is entitled to a provisional contract retroactive to the beginning of the school year. In practice, substitutes often work 119 days in a particular school and are told not to report there on the 120th day. Having thus been "released," they often receive a call the next morning to report to another school.

A substitute teacher's chances of receiving a provisional contract are poor due to declining pupil enrollment and others getting first refusal of openings. Excessed permanent teachers get first pick, and approximately 240 such teachers are carried on the rolls. Minority applicants receive preference, as do so-called "residential substitutes," who are excessed permanent teachers on the regular payroll although their positions are not included in the school department budget. Despite the obstacles, approximately 170 substitute teachers received provisional contracts in 1979.

Substitute teachers who work 10 consecutive days in a particular school are supposed to be evaluated by the headmaster. In practice, the rule is honored more in the breach than by observance. Poor evaluation could result in the headmaster's disapproval of the substitute. That disapproval, if expressed to the Teacher Placement Department, would result in no further assignments to the particular school. It would not, however, affect assignment elsewhere.

Disciplinary proceedings against substitute teachers are practically non-existent. A substitute receiving several complaints might be "spoken to," and an exceedingly bad one might be removed from the list. This occurred only once in the three years prior to this case.

Substitute teachers are expected to do the same work as the teachers they replace. Strict compliance with this expectancy is not always observed. Necessity often compels substitution outside of the assignee's certification. At such times, the substitute merely tries to hold the class together until the permanent teacher returns or a better qualified substitute is found.

Since the 1975-76 school year, substitute teachers have been paid \$36.56 per day with no fringe benefits. This daily salary amounts to \$6,580.80 annually if a full school year of 180 days is worked.

Opinion

That the substitute teachers are "employees" as defined in G.L. Chapter 150E, Section 1 is uncontested. Moreover, the Commission has repeatedly held that individuals other than regular full-time workers are entitled to coverage under the statute. Pittsfield School Committee, 2 MLC 1523 (1976); City of Springfield, 2 MLC 1233 (1975); Town of Lincoln, 1 MLC 1422 (1975); Town of Burlington, 3 MLC 1350 (1977); Town of Marblehead, 4 MLC 1726 (1976). Nevertheless, some individuals employed part-time, while clearly "employees within the meaning of Section 1 of the Law," have been denied collective bargaining rights. Such situations have occurred where, for example, the complexities of municipal law and finance would adversely affect funding of bargaining agreements;⁴ or their inclusion in a bargaining unit

⁴City of Gloucester, 1 MLC 1170, 1171 (1974).



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of full-time employees would dilute the collective bargaining rights of the full-timers;⁵ or the workforce was unstable and the contours of the proposed bargaining unit were poorly defined;⁶ or there was no distinct community of interest to distinguish them from other employees.⁷

The issue of collective bargaining rights for substitute teachers is one of first impression for this Commission. Other state agencies that have considered the question have differed in their decisions. The Board majority in California ruled that, although all substitutes were "employees" under their Act, only those "with an established interest in employment relations with the district" should participate in the choice of a bargaining agent. Voter eligibility was limited to those who had been employed for at least ten percent of the school days in either the immediate past or current school year.⁸ Wisconsin has found that per diem substitutes were "employees" entitled to bargaining rights; that a separate unit was appropriate; and that only those teaching at least thirty days in a school year should be eligible to vote in a representation election.⁹ Oregon has held that all substitute teachers who are actually employed for any period of time during a school year, even one-half day, are "employees" and are entitled to a separate bargaining unit.¹⁰ Minnesota has ruled that substitute teachers hired to fill the permanent positions of absent teachers are "employees" and are entitled to inclusion in the regular teachers' unit regardless of the duration of their employment, but that those hired for a semester to fill new positions created because of a temporary increase in student demand are not "employees."¹¹ Michigan includes substitute teachers in its definition of "employee," but they cannot be included in a unit of regular teachers because their employment relationship is casual and temporary in nature.¹² Finally, New York and Pennsylvania decline to recognize per diem substitutes as "public employees," but afford such status, and give bargaining rights, to long-

⁵ Town of Lincoln, 1 MLC 1422, 1424 (1975); Town of Hamilton, 2 MLC 1512, 1515 (1976).

⁶ Town of Lincoln, *supra*.

⁷ City of Lowell, 3 MLC 1260, *aff'd.* 3 MLC 1510 (1977).

⁸ Palo Alto Unified S.D., 1 NPER D5-10020 (Cal. PERB 1979). It should be noted that in future cases only single, district-wide units comprised of all classroom teachers, regular and substitute, may be established.

⁹ Milwaukee Board of School Directors v. WERC, Case Nos. 127-257 and 435 (Wisc. Cir. Ct. 1970).

¹⁰ Eugene Substitute Teacher Organization v. Eugene S.D., 4-J, 1 PECBR 716 (Ore. PERB 1976), *aff'd.* 31 Ore. App. 1255, 572 P.2d 650 (Ore. Ct. App. 1977).

¹¹ Mounds View Education Assn., Case No. 75-PR-615-A (Mn. PERB 1975).

¹² Waterford School Dist., Case No. R76 D-227 (Mich. ERC 1977). This case overruled the Board's prior decision in Reese Public Schools, 1969 MERC Lab. Op. 253 (Mich. ERC 1969) in which it included substitutes in a teachers unit but found them ineligible to vote.



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term substitutes.¹³ Indiana is of similar persuasion.¹⁴

Despite the diversity of approaches among the states, a common thread or basic philosophy underlying the extension of bargaining rights to substitutes remains the same: stability in labor-management relations. Individuals must demonstrate a sufficient continuity in their employment relationship to warrant their classification as "public employees" entitled to bargaining right.

Although some substitute teachers in Boston appear interested only in sporadic employment, most rely upon teaching for a substantial part of their income. It cannot be said, as the Employer would have us hold, that their employment relationship precludes all substitutes from the enjoyment of rights granted under the Law. We disagree that absence of commitment by either the Employer or the substitute teacher is a critical factor. More important is the Union's showing that, with respect to many substitutes, there exists a substantial and continuous employment relationship. See, for example, Fresno Auto Auction, Inc., 167 NLRB 878, 879 (1967); Henry Lee Co., 194 NLRB 1107 (1972). Also see state labor board cases previously cited.

We must therefore draw an appropriate line by which to distinguish substitutes effectively working as regular part-time employees from those who are only sporadically employed. The evidence thus far presented does not demonstrate the wisdom of drawing it where the Union suggests. For example, if a substitute teacher were to serve only ten continuous days in a particular school, she or he would be part of the collective bargaining unit. Conversely, if another taught 120 days in various schools, but not 10 consecutive days in any one, she or he would be excluded. The standard is too nebulous and is prone to be manipulated and abused. Ten work days a year are insufficient to establish a substantial and continuous employment relationship. On the other hand, 120 work days are too many inasmuch as regular full-time teachers commonly work only 180 days a year. We believe the answer lies between those two extremes. We hereby rule that those substitute teachers who work 60 days in a school year--whether or not consecutively and regardless of location--have a sufficient continuity of employment to enjoy collective bargaining rights.

We note that, to the extent that substitute teachers work 120 days in the same school, they are already represented by the Union, although they are denominated "provisional" employees in that instance. Residential substitute teachers are likewise represented. The issue, then, is not whether the substitute teachers should have their own collective bargaining unit, but whether they should be included in the existing teachers' unit. We have regularly declined to establish dual-unit structures, i.e., one unit of part-timers, and another of full-timers, with both performing the same work. Town of Norton, 7 MLC 1072, 1073 (1980); Town of Saugus, 4 MLC 1361, 1364-65 (1977); University of Massachusetts, 4 MLC 1384, 1395 (1977); Town of North Reading, 6 MLC 1556, 1566 (1979). Our concern has been that the negotiation of separate contracts covering the same work would breed competition and

¹³Weedspport Central S.D., 1 NPER 12-3004 (NY PERB 1979); King (Syracuse City) S.D., 6 PERB 3081 (NY PERB 1973); Hillcreek T.W.P. S.D., 1 NPER 39-10049 (Pa. LRB 1979). In the latter case the substitutes were hired to replace regular teachers who were on any kind of leave that would extend beyond 89 days.

¹⁴Avon Community School Corp., 1 IPER 124 (Ind. EERB H.Ex. 1976).



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conflict. The Union previously filed a petition for amendment seeking accretion of the substitutes to the regular teachers' unit. It was properly dismissed on the basis of an examination of the contractual agreements and past dealings between the Union and the School Committee. See Boston School Committee, supra at footnote 1. However, the considerations which prompted dismissal of the earlier petition are distinct from those raised by this representation petition. The current teachers' unit was created by recognition 15 years ago, and the Commission never considered its appropriateness. In the interests of providing for stable and continuing labor relations, of preserving the efficiency of operations and effective dealings, and of safeguarding the rights of employees to effective representation,¹⁵ we believe we should consider the unit's appropriateness now. Our decision in this respect is not without precedent, and we are not bound by the parties' agreements as to unit structure or the previous lawful recognition. Town of Braintree, 5 MLC 1133 (1978); City of Worcester, 5 MLC 1332 (1978).

In appropriate cases, employees may be given the choice of being represented by the incumbent in an existing unit, or not being represented by any union. City of Quincy, 3 MLC 1326 (H.O., 1976), aff'd, 3 MLC 1517 (1977). This case may afford such an instance. In the interest of economizing the time and resources of the Commission and the parties, we will not dismiss the instant petition and force the Union to start anew. Instead, we hereby direct that the parties shall, within thirty (30) days of receipt of this Decision, submit written argument as to whether the Commission should direct an "add-on election" to determine whether those substitute teachers previously described desire to be represented by the Union in the same bargaining unit as the regularly-employed teachers, or instead wish to be represented by no employee organization. Such argument should also cover eligibility standards for an initial election, should one be ordered.

IT IS SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PHILLIPS AXTEN, Chairman
JOAN G. DOLAN, Commissioner
GARY D. ALTMAN, Commissioner

¹⁵See G.L. Chapter 150E, §3.

