STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

| | |
|---|---|
| In the matter of the petition of:<br><br>COLUMBIA EDUCATION ASSOCIATION<br><br>For clarification of an existing bargaining unit of employees employed by<br><br>COLUMBIA SCHOOL DISTRICT NO. 400 | CASE NO. 2543-C-80-110 |
| In the matter of the petition of:<br><br>FINLEY EDUCATION ASSOCIATION<br><br>For clarification of an existing bargaining unit of employees employed by<br><br>FINLEY SCHOOL DISTRICT NO. 53 | CASE NO. 2544-C-80-111 |
| In the matter of the petition of:<br><br>KENNEWICK EDUCATION ASSOCIATION<br><br>For clarification of an existing bargaining unit of employees employed by<br><br>KENNEWICK SCHOOL DISTRICT NO. 17 | CASE NO. 2545-C-80-112 |
| In the matter of the petition of:<br><br>KIONA-BENTON EDUCATION ASSOCIATION<br><br>For clarification of an existing bargaining unit of employees employed by<br><br>KIONA-BENTON CITY SCHOOL DISTRICT NO. 52 | CASE NO. 2546-C-80-113 |
| In the matter of the petition of:<br><br>PASCO ASSOCIATION OF EDUCATORS<br><br>For clarification of an existing bargaining unit of employees employed by<br><br>PASCO SCHOOL DISTRICT NO. 1 | CASE NO. 2547-C-80-114 |

| | |
|---|---|
| In the matter of the petition of: | |
| RICHLAND EDUCATION ASSOCIATION | |
| For clarification of an existing bargaining unit of employees employed by | CASE NO. 2548-C-80-115 |
| RICHLAND SCHOOL DISTRICT NO. 400 | DECISION NO. 1189-A - EDUC |
| | DECISION OF COMMISSION |

Faith Hanna, Staff Representative, Washington Education Association, appeared on behalf of the petitioners.

Bruce Bischof, Attorney at Law, appeared on behalf of the employers.

INTRODUCTION:

This case requires the Commission, for the first time, to directly review a determination of the Executive Director with respect to the inclusion of some, but not all, substitute teachers in a bargaining unit of contracted full-time and part-time teachers.

The collective bargaining agents, local affiliates of the Washington Education Association (WEA), petitioned for determinations of appropriate bargaining units for substitute teachers in six school districts. The petition in each case seeks:

> To add all non-casual substitute teachers employed by the named school district for more than 30 days of work within any 12-month period ending during the current or immediately preceding school year and who continued to be available for employment; to add those substitute certificated employees employed by named school district who replace members of the bargaining unit absent from regular assignment for a period in excess of 20 consecutive work days.

The school districts opposed the petitions, contending that no substitute teacher, regardless of time of service in any calendar or school year, should be included in a bargaining unit.

The proceedings were consolidated and submitted for decision on a stipulated record. The Executive Director ruled, consistent with his prior decisions in Spokane School District No. 81, Decision No. 874 (EDUC, 1980); Tacoma School District No. 10, Decision 655 (EDUC, 1979); and Everett School District, Decision No. 268 (EDUC, 1978), substantially in favor of the WEA's petition. The employers have petitioned for review.

The Executive Director's decision sets out in detail the facts of this case. To summarize: Each school district recognized the local WEA affiliate as the

exclusive bargaining representative for all contracted full-time and part-time teachers. All six school districts have generally similar rules and practices pertaining to substitute teachers, although there are some differences. All six school districts pay substitute teachers on a per diem basis, as opposed to the annual salaries paid to their contracted full and part-time teachers. All six school districts pay substitutes who work only occasionally a significantly lesser amount than contracted teachers. All six school districts, however, pay substitutes who work more than 20 (10 in the Richland School District) consecutive days in the same teaching assignment the compensation, pro-rated, that he or she would receive as a contracted employee. In addition, those substitute teachers working more than 20 consecutive days in the same assignment, receive the same fringe benefits as a contracted employee.

Substitutes, by the very nature of their work, are employed on an on-call basis. They are theoretically free to accept or decline assignments. Many substitutes work very occasionally in any year, but there are several who devote a significant portion of their time to work as substitute teachers.[1/] Unlike teachers holding semester or school year assignments, subtitutes who put in only a few days in an assignment are not required to attend faculty meetings, parent-teacher meetings, prepare lesson plans, grade papers, or engage in other extracurricular activities. However, it appears that substitutes who are employed for several days or a week or more in any assignment are advised to attend faculty meetings, parent-teacher meetings, grade papers, and prepare lesson plans. See: The Handbook for Substitute Teachers, prepared by the Pasco and Kennewick school districts.

A slightly different qualification standard exists between substitutes and regular teachers. Substitutes, like regular teachers, must have a teaching certificate from the Superintendent of Public Instruction, although substitutes may qualify by receiving a three-year substitute certificate. Presumably, although not stated in the record, a three-year substitute certificate will not suffice to qualify the holder for a contracted teaching position.

ISSUES:

1. Must all substitute teachers who are "employees" within the meaning of Chapter 41.59 RCW be included in the bargaining unit with regular full and part-time teachers?

2. Which substitutes, if any, are "employees" entitled to the protections and benefits of Chapter 41.59 RCW?

---

1/ A number of substitutes in these school districts worked over 100 days in a sample year. The total number who worked more than 30 days were numerous, with the total easily running into the hundreds.

PERTINENT STATUTES:

RCW 41.59.020(4) defines "employee" and "educational employee" as "any certificated employee of a school district" (emphasis added) except the district's chief executive officer, chief administrative officer, confidentials, supervisors, principals and assistant principals. Subsections (d) and (e), however, state that supervisors, principals and assistant principals may be considered "employees" if included within a bargaining unit pursuant to RCW 41.59.080. "Casual" or "part-time" personnel are not mentioned.

RCW 41.59.080 reads:

> "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 nonsupervisory educational employees shall not be considered appropriate unless it includes all such nonsupervisory educational employees of the employer; and
>
> (2) A unit that includes only supervisors may be considered appropriate if a majority of the employees in such category indicate by vote that they desire to be included in such a unit; and
>
> (3) A unit that includes only principals and assistant principals may be considered appropriate if a majority of such employees indicate by vote that they desire to be included in such a unit; and
>
> (4) A unit that includes both principals and assistant principals and other supervisory employees may be considered appropriate if a majority of the employees in each category indicate by vote that they desire to be included in such a unit; and
>
> (5) A unit that includes supervisors and/or principals and assistant principals and nonsupervisory educational employees may be considered appropriate if a majority of the employees in each category indicate by vote that they desire to be included in such a unit; and
>
> (6) A unit that includes only employees in vocational-technical institutes or occupational skill centers may be considered to constitute an appropriate bargaining unit if the history of bargaining in any such school district so justifies; and
>
> (7) Notwithstanding the definition of collective bargaining, a unit that contains only supervisors and/or principals and assistant principals shall be limited in

> scope of bargaining to compensation, hours of work, and the number of days of work in the annual employment contracts." (Emphasis added).

RCW 41.59.110(2) reads:

> "(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."

DISCUSSION:

Unit Determination Issue

The first of the issues stated above is easily answered in the affirmative. RCW 41.59.080(1) plainly states that an appropriate bargaining unit which contains non-supervisory educational employees must contain all such employees. These school districts provide jobs to the substitute teachers at issue, specifying the time, location and task to be performed, and compensate the substitute teachers for the services performed. Any substitute who is determined to be an "employee" within the meaning of the statute must, according to RCW 41.59.080(1), be placed in the same bargaining unit with all other non-supervisory educational employees, i.e., with contracted full-time teachers.

Threshold for "Employee" Status

At this point our analysis turns to the second issue stated above. Statutory or dictionary aides to the meaning of "employee" are of little use here. The statutory definition of "educational employee" found in RCW 41.59.020(4) states that an employee must be "certificated", which substitutes are.[2/] The definition of "educational employee" gives meaning to "non-supervisory" by specification of certain "supervisor" responsibilities, none of which are relevant here. The word "employ" and its derivatives, such as "employee" are commonly understood terms. Ordinarily, "to employ" means "to provide with a job that pays a wage or a salary". See: Webster's Seventh New Collegiate Dictionary (1963), at page 271. Cf. Roberts' Dictionary of Industrial Relations, Revised Edition (1971), at page 117 ("employ: To hire or make use of someone's services; employee: All those who work for a wage or salary and perform services for an employer"). Literal application of the foregoing definitions leads to a result that one could be an "employee" for a

---

2/ The statute does not define "certificated". We interpret the term as a reference to the "certification" procedures of Chapter 28A.70 RCW and assume that the three-year substitute certificate issued pursuant to RCW 28A.70.005, absent indicia to the contrary, qualifies under the statute.

very short period of time. We do not believe, however, that the Legislature, in the context of participation in the collective bargaining process, intended to include persons paid wages by an employer on a very brief and temporary basis. Long before the enactment of RCW 41.59, it was well established under the Railway Labor Act, Conley v. Gibson, 355 U.S. 41, 46 (1957), and under the National Labor Relations Act, J. I. Case v. NLRB, 253 F.2d 149 (7th Cir., 1958), that collective bargaining was a continuing process. The rights and obligations of employers, employees and employee organizations accrue and vary over time. The NLRB generally has excluded from bargaining units persons only occasionally and sporadically employed, that is, on a "casual" basis. Glynn Campbell, d/b/a Piggly Wiggly El Dorado Co., 1454 NLRB 445 (1965); Rollo Transit Corp., 110 NLRB 1623 (1954); M. J. Pirolli & Sons, 194 NLRB 241 (1972). We believe the Legislature intended the term "employee" to apply only to persons who have a reasonable expectancy of an interest in an ongoing employment relationship. We must now quantify this expectancy in terms of time and pattern of service, and we look to NLRB decisions, see RCW 41.59.110(2) and decisions from other states for further guidance.

The issue in the many NLRB (and state) cases we examined appears to be one of determining the appropriate bargaining unit. It is usually not clear whether a determination of "employee" status is implicitly being made also; i.e., whether or not persons excluded from the bargaining unit are theoretically eligible to form a separate bargaining unit. It is necessarily the case, however, that persons included in the bargaining unit are "employees".[3/] Those who are excluded may or may not be "employees", although often as a practical matter, the exclusion of part-time workers from a bargaining unit of full time employees will deny those persons access to the collective bargaining process because, as a group, they are too few in number, disinterested and transient to organize effectively. Even if the threshhold for bargaining unit inclusion were the same as the threshold for "employee" status in those cases, the cases discussed below demonstrate that quantification proposed to us by the union (the 20/30 day rule) is not out of line with the NLRB and other states' view of who should be in a bargaining unit, those persons clearly being "employees" within the meaning of applicable law.

Part-time personnel employed with some degree of regularity and volume so as to demonstrate a substantial and continuing interest in the employment relationship have been included in units of full-time employees, Bob's Ambulance Service, 178 NLRB (1969); Fresno Auto Auction, Inc., 167 NLRB 878

---

3/ Although all persons included in a bargaining unit necessarily are "employees" of an employer, the converse is not true. That is, it is not true that all persons excluded from a bargaining unit are not employees. There may exist situations where excluded personnel, even part-timers, are "employees" notwithstanding their exclusion from the bargaining unit, and therefore entitled to form their own unit.

(1967), unless various considerations point to a lack of a commonality of interest. New York University, 205 NLRB 4, 83 LRRM 1549 (1973).[4/] NLRB quantifications of time worked needed for bargaining unit status vary according to the industrial setting. For example: Persons working "on-call" three or more consecutive weeks in eight months were deemed employees in the bargaining unit in Fresno Auto Auction, Inc., supra. In Berlitz School of Languages of America, Inc., 231 NLRB 766, 96 LRRM 1644 (1977), on-call teachers teaching only one lesson unit per day for two or more days in a 12-month period were considered employees in the bargaining unit. State labor boards and courts have established somewhat varied thresholds. In California, a 10% of the number of school days test was adopted. Palo Alto Unified School District, 1 NPER 05-10020 (Cal. Perb, 1979). The test is 30 days per year in Wisconsin, Milwaukee Board of School Directors v. WERC (Wisc. Cir. Ct., 1970), and in New Jersey, Bridgewater - Raritan Reg. Bd. of Ed., 4 NJ Per 420 (NJ Perc, 1978). The Oregon Court of Appeals determined that virtually all substitutes are "employees" within the meaning of its collective bargaining laws. Eugene Substitute Teacher Organization v. Eugene School District, 31 Or. App. 1255, 572 P.2d 650 (1977). Contra, Waterford School District, Case No. R76 D227 (Mich. ERC, 1977).

---

4/ The implications of New York University, are hotly debated by the parties in this case. New York University concerned the inclusion of part-time college faculty in a bargaining unit of full-time college faculty. In deciding that case, the Board broke its longstanding policy favoring the inclusion of part-timers in the full-time bargaining units. The Board found particularly significant the pay differentials between the two groups, and the non-teaching functions that the full-timers must perform: for example, research and participation in university government.

We would find that case instructive were we considering a unit determination. That case, however, does not help us search for criteria for determining who is or is not an "employee" under collective bargaining laws. We do not know enough about the employment patterns to do more than speculate about this, or even whether all faculty would be denied NLRA protection under NLRB v. Yeshiva University, 444 U.S. 672 (1980).

Moreover, we note that the decision does not establish per se rules on unit determinations involving part-time teachers. A per se rule was specifically rejected in Kendall College v. NLRB, 570 F.2d 216 (7th Cir., 1978), where the Court cautioned against asserting that:

> "the Board is obsequiously bound to apply its general principles to all unit determinations without recognizing the special circumstances and conditions of a particular segment of industrial life...(Unit) determinations are not to be made on the basis of immutable and inflexible principles..." 570 F.2d at 220.

The Kendall College case also is noteworthy, being subsequent to New York University, because it affirms a Board decision including all part-time faculty employed on the same pay schedule as full-time faculty but excluding other part-timers.

Any quantification is somewhat arbitrary, but the school districts, in taking an all-or-nothing position, have not suggested a more appropriate formulation. We find that the 20/30 day rule is an equitable formula in view of the pattern of employment observed in these cases, and in several other cases: Everett, Tacoma and Spokane, supra, and believe that it will suffice as a definition of "employee" status with state-wide applicability to substitute teachers. It will include those many persons who regularly serve as substitute teachers and who have a legitimate expectancy of continuing to perform that function.

The fundamental test for being an "employee", as we said, is the parties' expectancy of a continuing employment relationship, with the consequential mutual interest in wages, hours and conditions. The 20/30 day rule reflects our belief that if a substitute has been called back by a school district for 20 consecutive days or for 30 days in a one-year period, it is because he or she has demonstrated some desireable employee characteristic. The substitute is justified in recognizing this and inferring therefrom that he or she will continue to be called in as needed. Similarly, the employer develops an expectancy that the person who has been available for the 20 consecutive or 30 nonconsecutive day period will continue to be available as a substitute. This expectancy of a continuing relationship is not affected by the number of days of service required for higher daily pay, nor are bargaining histories or variations in substitutes' duties relevant when determining who is or is not an "employee". Thus, unlike unit determinations where significant variations of fact make a "per se" rule inappropriate (absent a contrary statute), these same fact variations become much less significant when determining who is or is not an employee.

## ORDER

The decision of the Executive Director is affirmed.

DATED this 22nd day of February, 1982.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Jane R. Wilkinson

JANE R. WILKINSON, Chairman

Robert J. Williams

R. J. WILLIAMS, Commissioner

Mark C. Endresen

MARK C. ENDRESEN, Commissioner