

P.E.R.C. NO. 84-118

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ROXBURY TOWNSHIP BOARD OF
EDUCATION,

Petitioner,

-and-

Docket No. CU-83-18

ROXBURY EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission, adopting the recommendation of a Hearing Officer, clarifies a unit of certified personnel employed by the Roxbury Township Board of Education and represented by the Roxbury Education Association to exclude the position of long-term substitute teacher. The Commission notes that the Association, although the majority representative of certified personnel during the last nine years, never attempted to represent long-term substitutes or to negotiate on their behalf prior to the filing of a grievance which precipitated the unit clarification petition.

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Appearances:

For the Petitioner, Rand & Algeier, Esqs.
(Robert M. Tosti, of Counsel)

For the Respondent, John W. Davis, Representative
NJEA UniServ Regional Office

DECISION AND ORDER

On October 20, 1982, the Roxbury Township Board of Education ("Board") filed a clarification of unit petition. The Board seeks to have an existing unit consisting of certain "certified personnel employed by the [Board]" and represented by the Roxbury Education Association ("Association") clarified to exclude substitute teachers. The Association asserts that "long term substitutes" teaching more than five consecutive days are part of the unit since they perform essentially all the functions of regular classroom teachers.^{1/}

On March 10, 1983, the Director of Representation issued a notice of hearing.

^{1/} This petition followed the filing of a grievance by a long-term substitute claiming entitlement to certain benefits under the Association's contract with the Board.

On June 22, 1983, Hearing Officer Marc F. Stuart conducted a hearing. The parties examined witnesses and submitted exhibits. At the conclusion of the hearing, the Association made a motion to dismiss which was denied. Both parties filed post-hearing briefs.

On January 12, 1984, the Hearing Officer issued his report and recommended decision. H.O. No. 84-10, 10 NJPER ____ (¶ ____ 1984). He found that the Association had waived any claim to represent substitute teachers as part of the existing unit in light of a negotiations history since 1974 revealing no previous attempt to represent these employees.

On January 27, 1984, the Association filed its exceptions. It contends principally that since substitute teachers replace classroom teachers, they should become unit members. It relies on Deptford Board of Education, P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980), aff'd, App. Div. Docket No. A-1818-80T1 (May 24, 1982).

On February 6, 1984, the Board filed its response. It contends that the Association, throughout the course of its negotiations history with the Board, has not sought to represent long-term substitutes and has therefore waived any claim to represent these employees in this unit now.

We have reviewed the record. The Hearing Officer's findings of fact (pp. 3-5) are accurate. We adopt and incorporate them here.

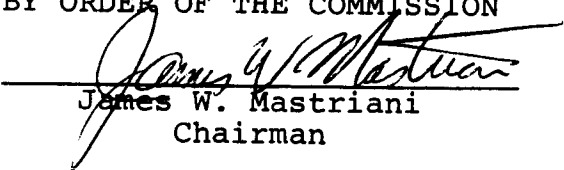
We agree with the Hearing Officer that the existing unit should be clarified to exclude long-term substitutes.

There is simply no evidence that the Association, although the majority representative during the last nine years, ever attempted to represent long-term substitutes or to negotiate on their behalf prior to the filing of the grievance which precipitated this petition. Given these facts and all the other circumstances of this case, we cannot sustain the Association's claim to represent long-term substitutes in the unit as defined in the existing contract. Wayne Board of Education, P.E.R.C. No. 80-94, 6 NJPER 54 (¶11029 1980). See also In re Bergen Pines Hospital, D.R. No. 80-20, 6 NJPER 61 (¶11034 1980); City of Plainfield, D.R. No. 82-39, 8 NJPER 156 (¶13068 1982).^{2/}

ORDER

The Roxbury Education Association's negotiations unit is clarified to exclude the position of long-term substitute teacher.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Wenzler, Suskin and Butch voted for this decision. Commissioners Hipp and Newbaker abstained. None opposed. Commissioner Graves was not present.

DATED: Trenton, New Jersey
April 12, 1984

ISSUED: April 13, 1984

^{2/} The Association's reliance on Deptford Board of Education, P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980) aff'd, App. Div. Docket No. A-1818-80T1 (decided May 24, 1982) does not support a contrary conclusion. That case, arising in the context of an unfair practice, involved a Board's unilateral alteration of terms and conditions of employment of an employee performing unit work. However, in this case, a long-term substitute's work has never been considered to be "unit work."

STATE OF NEW JERSEY
BEFORE A HEARING OFFICER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ROXBURY TOWNSHIP BOARD OF EDUCATION,

Public Employer-Petitioner,

- and -

Docket No. CU-83-18

ROXBURY EDUCATION ASSOCIATION,

Public Employee Representative-Respondent.

SYNOPSIS

A Hearing Officer of the Public Employment Relations Commission recommends that a unit of certified personnel be clarified to exclude long-term substitute teachers. The Association has been in existence, and the Board has been employing substitute teachers on a long-term basis, both for a period of at least nine years. The parties have negotiated, executed and fully implemented at least two collective negotiations agreements during this period. Thus, the Association has effectively waived its right to incorporate long-term substitute teachers into its unit by way of the clarification of unit procedure. In re Bergen Pines Hospital, D.R. No. 80-20, 6 NJPER 61 (¶ 11034 1980).

A Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Report and Recommendations, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Officer's findings of fact and/or conclusions of law.

STATE OF NEW JERSEY
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Appearances:

For the Public Employer-Petitioner
Rand & Algeier
(Robert M. Tosti of counsel)

For the Public Employee Representative-Respondent
John W. Davis, UniServ Representative

HEARING OFFICER'S REPORT
AND RECOMMENDATIONS

On October 20, 1982, the Roxbury Township Board of Education ("Board") filed a clarification of unit petition in which it sought to clarify the status of "long-term substitute" teachers ^{1/} as excluded from the unit of certified personnel. The petition named the Roxbury Education Association ("Association") as the current employee representative of this unit.

This matter arose when on June 16, 1982, the Association filed a grievance with the Superintendent of Schools seeking to have a substitute teacher's salary adjusted to the regular teachers' salary guide. The Superintendent denied the grievance based on the fact

1/ The term "long-term substitute" is construed to represent one serving in that capacity for more than five consecutive days. The term "substitute" is construed to represent one serving in that capacity for a period of five consecutive days or less. (T-35).

that, although this substitute filled a single vacancy lasting approximately 2-1/2 months, she was hired as a substitute teacher, and hence was not a member of the Association's unit entitled to utilization of the grievance procedure.

Thereafter, On August 30, 1982, the Association advanced the grievance to the Board level asserting that since the substitute teacher's "...responsibilities and job functions were those of a teacher from April 1 to June 30, 1982...she was, therefore, a teacher." The Association, on September 24, 1982, further requested that if the Board did not grant the Association's request for a grievance hearing, that it advance the grievance to third party review.

On October 12, 1982, in response to the Association's requests, the Board, by way of the Superintendent, determined to hold any third party review in abeyance pending the outcome of the instant petition.

On March 10, 1983, the Director of Representation issued a Notice of Hearing (C-1). ^{2/}

On June 22, 1983, the undersigned conducted a hearing, affording all parties an opportunity to examine witnesses, present evidence and argue orally. ^{3/}

On August 5, 1983, the Association filed its post-hearing brief. On November 14, 1983, the Board filed its post-hearing brief. ^{4/}

In light of the semantic controversy concerning the title in issue, the undersigned shall not be overly concerned with the Board's characterization of the title as that of a substitute teacher. Rather, it shall be noted that the Board employs individuals on a temporary basis

^{2/} Exhibit designations are as follows: Commission ("C"); Joint ("J"); Petitioner ("P"); Respondent ("R").

^{3/} Prior to the close of the hearing, the hearing officer denied the Association's motion to dismiss the Board's petition.

^{4/} The Board, with the Association's consent, was granted two extensions to file its brief.

as substitute teachers, and it is in this framework that the undersigned shall address the dispositive issues herein.

FINDINGS OF FACT

Based on the entire record in this proceeding, the Hearing Officer makes the following findings of fact:

1. The Roxbury Township Board of Education is a public employer within the meaning of the Act, is subject to its provisions, and is the employer of the employee(s) who is (are) subject to this proceeding. (T-5 - T-6).
2. The Roxbury Education Association is an employee representative within the meaning of the Act and is subject to its provisions. (T-5 - T-6).
3. The Association has been in existence at least since 1974. (T-18 - T-19).
4. The Board and the Association have a collective agreement effective from September 1, 1982, ^{5/} through June 30, 1983 (J-2). The recognition clause contains the following unit description:

The negotiation agent determined by Chapter 123, the Roxbury Education Association, Inc., will represent the following certified personnel employed by the Roxbury Board of Education:

Classroom Teachers
Nurses
Curriculum Coordinators
Department Coordinators
Elementary Science Coordinator
Guidance Counselors
Learning Disabilities Teacher-Consultants
Librarians
Social Workers
Speech Correctionists
Teacher of the Hard of Hearing
Teacher of Socially-Emotionally Handicapped
Teacher of Visually-Perceptually Handicapped
School Psychologists
Athletic Director

^{5/} July 1, 1982, in the case of employees appointed to work one additional month per year.

but will exclude:

Assistant Superintendents
 Administrative Assistant to the Superintendent
 (Media-P.O.B. Director)
 Principals
 Vice Principals
 Assistant Principals
 Curriculum Supervisors
 Director of Special Services
 Subject Department Supervisors
 Guidance Director (J-2)

5. A collective agreement covering the periods September 1, 1980 through June 30, 1981, and September 1, 1981 through June 30, 1982, contains an identical unit description. (J-1).

6. Neither substitute teachers nor long-term substitute teachers are specifically included in nor excluded from the recognition clause (J-2).

7. Audrey Scarpa ("Scarpa") was hired as a substitute teacher to fill a vacancy created by a sixth grade teacher's taking of maternity leave ^{6/} (T-19, T-71 - T-73).

8. Scarpa commenced her employment approximately on April 1, 1982, remaining in this position until approximately June 15, 1982, the end of the school term (T-19).

9. Scarpa's salary was set by the Principal with Scarpa's knowledge and approval, in accordance with established Board policy, at \$30 per day for the first five consecutive days, and \$35 per day thereafter (T-58).

10. Scarpa held a County Substitute Certificate but lacked the certification that would qualify her as a full-time teacher (T-24, T-54, T-59).

^{6/} Although the Association is not given formal notice when a substitute teacher or long-term substitute teacher is hired, neither is it given notice of the hiring of a regular teacher (T-42, T-50). However, in the instant case, it is significant to note that requests for maternity leaves are subject to approval by the Board at public session (T-73).

11. A County Substitute Certificate entitles the holder to teach up to 20 consecutive days at a time (T-54).

12. By utilizing the services of other substitute teachers during the approximately 2-1/2 months of Scarpa's employment, the Board was able to comply with the requirement that the holder of a County Substitute Certificate not teach more than 20 consecutive days at a single time (T-76).

13. During the term of Scarpa's employment, she performed all the functions of a regular teacher with the exception of the following: attending faculty meetings; performing attendant non-teaching duties such as bus duty, cafeteria duty, etc.; and helping to order materials and supplies for the coming year at the end of the school term (T-69 - T-70).

14. Although other long-term substitute teachers have been hired at least since 1974, the Association never asserted representational status over them nor did it attempt to negotiate on their behalf (T-19 - T-21, T-41, T-55 - T-56, T-59).

LEGAL ANALYSIS AND
CONCLUSIONS OF LAW

The Association argues that long-term substitute teachers, such as Scarpa, are included within the language of the recognition clause because substitute teachers who teach for an extensive period (i.e., from April through June), must be considered regular teachers. Stated in a clarification of unit context, the Association raises the issue of the identification of long-term substitute teachers as being encompassed within the inclusionary language of the recognition clause. The clarification of unit procedure is appropriate to such a deter-

mination, and the determination's effect is immediate. In re Clearview Regional High School Board of Education, D.R. No. 78-2, 3 NJPER 248 (1977).

In its post-hearing brief, the Association likens this case to Deptford Bd. of Ed. and Deptford Education Assn., P.E.R.C. No. 81-78, 7 NJPER 35 (¶ 12015 1981), aff'd App. Div. No. A-1818-80-T8 (5/24/82), where P.E.R.C., in an unfair practice setting, held that the Board's attempt to establish the new position of part-time "itinerate teacher" as a non-unit position, establishing new terms and conditions of employment for it, constituted a unilateral alteration in the existing terms and conditions and a violation of the Act. This finding was based, in part, on the fact that "...prior to June 1976 all itinerate teachers were full-time teachers who received all the compensation and benefits of full-time staff set forth in the parties' collective negotiations agreement. Moreover, the language of the recognition clause of that agreement was found to cover the position of 'itinerate teacher'." Deptford Bd. of Ed. and Deptford Education Assn., supra, 7 NJPER at 36.

The instant case, however, is not one of an employer assigning unit work to a non-unit employee in an effort to interfere with the formation, existence or administration of an employee organization. Moreover, no such charge has been proffered.

The Association, relying on Deptford, argues that here it is not the particular individual but rather the position that must be considered part of the unit, and that the long-term nature of the substitution transforms it from what would otherwise be a non-unit to a unit position. Deptford, however, is distinguishable from the instant matter in that here, substitute teachers, regardless of the

duration of their assignment, were never treated as part of the unit. ^{7/} Instead the position in question, formerly held by a regular teacher, has been transferred to a substitute teacher on a temporary basis. It is the fact of this temporary basis that distinguishes the character of substitute teachers, long-term or short-term, from that of regular teachers, justifying a separate and distinct status for them. The temporary basis of employment is crucial.

It is the right of a Board of Education to hire teachers as substitute teachers. Biancardi v. Waldwick Bd. of Ed., 139 N.J. Super 175, 179 (App. Div. 1976), aff'd o.b., 73 N.J. 37 (1977). It is inherent in the nature of substitute teaching to fulfill the responsibilities of the regular classroom teacher, in every aspect possible, for the period that the regular teacher is absent. The length of the absence in and of itself does not alter the substantive nature of these responsibilities, negating the fact that the long-term substitute teacher is still a temporary employee. Audrey Scarpa was hired as a substitute teacher to fill the vacancy created by a regular sixth grade teacher's taking of maternity leave. During her employment she performed most, but not all, of the functions of a regular classroom teacher.

The record reveals that the Association has been in existence at least since 1974. Although other long-term substitute teachers have been employed throughout this entire period of time, the Association never asserted representational status over them, nor did it attempt to negotiate on their behalf. The record further reveals that during the period September 1, 1980 through June 30, 1983, two collective negotiations agreements have been negotiated and fully implemented.

^{7/} The Association does not argue that short-term substitute teachers are part of the unit.

In In re Bergen Pines Hospital, D.R. No. 80-20, 6 NJPER 61 (¶ 11034 1980), the Director held

...a representative must exercise due diligence in searching out employees who are within the definitional scope of its collective negotiations unit. ...'[W]aiver' analysis...is premised upon this responsibility. In the State of New Jersey matter [In re State of New Jersey, D.R. No. 80-8 5 NJPER 454 (¶ 10229 1979), aff'd P.E.R.C. No. 80-65, 5 NJPER 538 (¶ 10277 1979)] , the undersigned concluded that the clarification of unit which resulted in the inclusion of the employees in question in the Petitioner's unit was appropriate where the petition was filed shortly after the expiration of the Petitioner's first contractual agreement. Ordinarily, due diligence on the part of a representative during the term of its first collective negotiations agreement with the employer requires searching out and identifying all unit employees who may have been inadvertently overlooked during the initial formation of the unit. ...The representative's execution of a second collective negotiations agreement precludes the representative from later seeking to add employees into its unit through a clarification of unit petition. [6 NJPER at 63].

Accord, In re Wayne Bd. of Ed., D.R. No. 80-6, 5 NJPER 422 (¶ 10221 1979), aff'd in part, modified in part, P.E.R.C. No. 80-94, 6 NJPER 54 (¶ 11029 1980); In re Fair Lawn Bd. of Education, D.R. No. 78-22, 3 NJPER 389 (1977).

Here, although the clarification of unit petition was filed by the Board rather than the Association, the Association bases its argument on clarification of unit principles of identification of a title as being within the scope of the existing recognition clause. Accordingly, the same concepts of waiver enunciated in Bergen Pines,

supra, would apply. The Association has been in existence, and the Board has been employing substitute teachers on a long-term basis, both for a period of at least nine years. The parties have negotiated, executed and fully implemented at least two collective negotiations agreements during this period. Thus, what is finally determinative is that the Association has effectively waived its right to incorporate long-term substitute teachers into its unit by way of the clarification of unit procedure. In re Bergen Pines Hospital, supra.

CONCLUSIONS AND RECOMMENDATIONS

Upon consideration of the entire record and the foregoing discussion, the Hearing Officer concludes that the Association has waived its right to assert representational status over long-term substitute teachers by way of the clarification of unit procedure. ^{8/} Accordingly, the Hearing Officer recommends that the Roxbury Education Association be clarified to exclude the position of long-term substitute teacher.

Respectfully Submitted



Marc F. Stuart
Hearing Officer

DATED: January 12, 1984
Trenton, New Jersey

^{8/} This recommended decision should not be construed to foreclose the Association from seeking to acquire representational status over long-term substitute teachers by way of an appropriately filed certification of public employee representative petition.