

D.R. NO. 92-37

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF REPRESENTATION

In the Matter of

ORANGE BOARD OF EDUCATION,

Public Employer,

-and-

Docket No. CU-92-24

ORANGE CUSTODIAL AND
MAINTENANCE ASSOCIATION,

Petitioner.

SYNOPSIS

The Director of Representation clarifies a unit of custodial and maintenance employees to include the newly-created title of substitute custodian. The Director finds that during the current school year, the Board used substitute custodians regularly to supplement its regular workforce. The Board currently employs at least ten substitutes, who each worked between 29 and 198 days during the current school year, and perform the same duties as permanent employees.

The Director finds that regularly employed substitute custodians -- those who have worked at least 40 days during a school year (1/6 of the total 240 working days in a twelve-month workyear) and who are willing to continue to work as a substitute custodian -- are appropriately included in the unit. The Director clarifies the substitutes into the unit, effective immediately.

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Appearances:

For the Public Employer
Ashley & Charles, attorneys
(Ronald C. Hunt, of counsel)

For the Petitioner
Balk, Oxfeld, Mandell & Cohen, attorneys
(Sanford R. Oxfeld, of counsel)

DECISION

On November 25, 1991, the Orange Custodial and Maintenance Association ("OCMA") filed a Petition for Unit Clarification with the Public Employment Relations Commission. OCMA sought to clarify its collective negotiations unit of custodial employees to include newly hired substitute custodians.^{1/}

^{1/} OCMA also filed an unfair practice charge on June 13, 1991, alleging the Board's refusal to negotiate concerning substitute custodians. The Board responded to the charge by denying that substitute custodians are included in the unit. The charge has been held in abeyance, first while the parties attempted to voluntarily resolve the issue; and then pending the disposition of this Unit Clarification Petition.

As a result of a Commission-conducted secret ballot election on January 3, 1992, we consolidated the Board's support staff, including custodial and maintenance employees, with the professional staff and certified the Orange Education Association ("OEA") as majority representative of the combined unit.^{2/} See Orange Bd. of Ed., D.R. No. 92-6, 18 NJPER 2 (¶23001 1991). On March 16, 1992, OEA advised us that, as the successor majority representative to OCMA, it was taking over the processing of this CU petition and the related charge.

The Board and OCMA were parties to a collective negotiations agreement covering "all employees in the classifications [of] custodial, maintenance, and utility" for the period July 1, 1988 through June 30, 1992. There are approximately 44 custodial and maintenance employees. In the Summer of 1990, the Board hired certain substitute custodians, ostensibly to fill in for employees taking vacations. The Board told the Association these substitutes were one-time temporary employees hired for a limited time period. When the Board continued to use substitute custodians, the Association approached the Board and asked to negotiate a per diem rate for them and include them in the OCMA unit.^{3/} The Board

^{2/} We held the processing of the petition in abeyance until the election petition was resolved.

^{3/} Initially, the Board agreed to negotiate the per diem rate with OCMA and the parties met in one negotiations session.

took the position that the Association did not represent substitutes and the Board had no duty to negotiate. An unfair practice charge and this unit clarification petition were then filed.

The Association seeks to clarify its unit to include all substitute custodians. The Board objects to the inclusion of substitute employees in the unit. It maintains that substitutes have never been included in any of its units.

We have conducted an administrative investigation pursuant to N.J.A.C. 19:11-2.6. The parties were requested to support their respective positions concerning the substitutes by supplying us with specific information concerning the scheduling and use of substitutes. The Association made specific factual assertions. On April 23, 1992, I advised the parties in writing of my tentative factual conclusions and my intention to clarify the Association's unit to include certain regularly employed substitutes. The parties both submitted legal argument, and the Board submitted an additional factual proffer. The administrative investigation reveals the following facts.

As of April, the Board employed at least ten custodians in the title substitute custodian. The Association asserts that a few

3/ Footnote Continued From Previous Page

OCMA made a salary demand and the Board made a counterproposal. Thereafter, OCMA filed a Notice of Impasse (I-91-208) and the Commission assigned a mediator. The mediator met with the parties once and the Board then refused to negotiate over substitutes.

of the substitutes work on an assigned schedule, five days a week, eight hours a day. Others work on an as-needed basis. These individuals contact the Board to find out if work is available.

The Board employed 23 "temporary" custodians during various times of the 1991-92 school year. Those custodians collectively worked 1078 days in the first ten months of that year, averaging 108 days a month. Eight of these employees worked only in the first half of the school year, and have not been used since.^{4/} Another five persons were only hired since March 1, 1992. The other 10 "temporary" custodians, who worked throughout this school year, worked a range of 29 to 198 days this school year. Most worked regularly every month.

The issue is whether the substitute custodians are too temporary or irregular in their employment relationship with the Board to be included in the unit of regular custodians represented by the OEA. The Board argues that substitutes are temporary and should not be included in the unit; that no other substitute employees are in bargaining units; that placing substitute drivers in a unit would mean the end of the substitute program if the Board were required to pay the substitutes contractual salaries and benefits.

There is no express statutory prohibition against the inclusion of "temporary" employees in collective negotiations

^{4/} We infer that these employees are no longer on the Board's payroll.

units. See City of Rahway, D.R. No. 83-9, 8 NJPER 538 (¶13247 1982), in which we rejected the employer's argument that crossing guards, holding temporary Civil Service positions, were ineligible for representation because they were terminated and rehired each year. We have previously found that "temporary" employees performing work of regular unit members are appropriate for inclusion in their unit. Cranford Tp., D.R. No. 86-26, 12 NJPER 566 (¶17214 1986).

The Commission has distinguished between "casual" employees hired on a limited, nonrecurring basis and those employees possessing a sufficient degree of regularity and continuity of employment to warrant collective negotiations rights. Casual employees are not afforded collective negotiations rights; employees who have a continuity and regularity of employment are public employees eligible for representation in collective negotiations units. See Lakewood Bd. of Ed., P.E.R.C. No. 87-166, 13 NJPER 603 (18227) 1987); Mt. Olive Bd. of Ed., P.E.R.C. No. 82-66, 8 NJPER 102 (¶13041 1982); State of New Jersey, D.R. No. 87-25, 13 NJPER 326 (¶18136 1987); Cranford Tp., D.R. No. 86-26, 12 NJPER 566 (¶17214 1986); Rutgers Univ. v. Rutgers Univ. Coll. Teachers Ass'n, E.D. No. 76-35, 2 NJPER 176 (1976), aff'd P.E.R.C. No. 76-49, 2 NJPER 229 (1976), D.R. No. 77-5, 3 NJPER 12 (1976) [dism. elec. objections], aff'd. App. Div. Dkt. No. A-1652-76 (1/26/78), certif. den. 76 N.J. 243 (1978); Bridgewater-Raritan Bd. of Ed., D.R. No. 79-12, 4 NJPER 444 (¶4201 1978).

Regularity of employment is determined by how frequently an employee works. In Mt. Olive, the Commission upheld and approved the Director of Representation's determination that substitute bus drivers who worked more than 1/6 of the average number of hours worked by regular full-time and part-time bus drivers were sufficiently regular employees to qualify for representational rights under the Act. This test originated in the Bridgewater-Raritan case where substitute teachers who worked at least 30 days out of a possible 180 and expressed a willingness to do so for the following school year,^{5/} were considered to be public employees within the meaning of the Act and eligible voters. See also, Lakewood Bd. of Ed., Cranford Tp., Mt. Holly Tp., D.R. No. 91-19, 17 NJPER 88 (¶22042 1991); Lawrence Tp., D.R. No. 82-49, 8 NJPER 278 (¶13125 1982).

Continuity of employment runs to the relative "permanency" of the employment and the degree of stability within the unit. State of New Jersey (State Colleges adjunct faculty teaching for at least their second semester in a regular recurrent position are unit eligible); County of Ocean, D.R. No. 79-25, 5 NJPER 128 (¶10076 1979) (Employees in a "temporary 80-day program" are eligible for inclusion in a unit with full-time regular employees, if they worked at least 45 days and willing to accept additional employment); City of Rahway (crossing guards laid off and rehired each school year are

^{5/} The Bridgewater election was ordered within the first six weeks of a new school year.

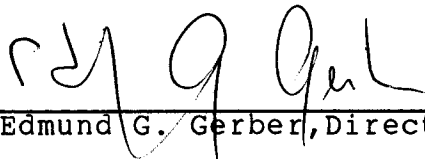
eligible for representation because they occupied permanent, on-going positions); Red Bank Bd. of Ed., D.R. No. 86-5, 12 NJPER 35 (¶17013 1985) (school aides working regularly in "permanent" position are unit eligible, even if employees "come and go" frequently).

Here, there is no basis to distinguish between the employees the Board has hired as "substitute custodians" who work daily on a continuing basis from "permanent" unit employees; it appears the only distinguishing characteristic is that the former group is not covered by the contract, while the latter is.

Those employees who work on an "as needed" basis must be evaluated under the Commission's Mt. Olive standard to determine whether their work time is sufficiently "regular" and they possess sufficient job continuity. I find that those "substitute" employees who have worked at least forty working days (1/6 of the approximate 240 working days in a workyear for full-time, twelve-month custodians), and who are willing to continue to accept assignments as substitutes, (that is, those that continue to be on the Board's list of substitute custodial employees), are eligible for inclusion in the unit.

Based upon the foregoing, the Association's collective negotiations unit is hereby clarified to include regularly employed substitute custodians as defined above, effective immediately.^{6/}

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Edmund G. Gerber, Director

DATED: June 29, 1992
Trenton, New Jersey

^{6/} See Clearview Reg. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977).