

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

In the Matter of

BRIDGEWATER-RARITAN REGIONAL
BOARD OF EDUCATION,

Public Employer,

-and-

DOCKET NO. RO-77-145

BRIDGEWATER-RARITAN SUBSTITUTE
EDUCATORS ASSOCIATION,

Petitioner.

SYNOPSIS

The Director of Representation determines that certain substitute teachers and nurses employed by the Board of Education who display a regularity and continuity of employment, are public employees and directs the conduct of an election among these substitute personnel to ascertain whether they desire to be represented by Petitioner for the purposes of collective negotiations. The Director finds that those substitute personnel who have worked at least 30 days during a given school year, and who express a willingness to accept employment as substitutes for the next succeeding school year, meet the test of regularity and continuity. The Director further finds that a unit comprised of substitute personnel is a prima facie appropriate collective negotiations unit.

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EDUCATORS ASSOCIATION,

Petitioner.

Appearances:

For the Public Employer,
Daniel C. Soriano, Jr., Esq.

For the Petitioner,
John Thornton, NJEA Field Representative

DECISION AND DIRECTION OF ELECTION

Pursuant to a Notice of Hearing to resolve a question concerning the representation of certain employees in a collective negotiations unit proposed by the Bridgewater-Raritan Substitute Educators Association (the "Association"), a hearing was held before Commission Hearing Officer Arnold H. Zudick on November 14, 1977, in Trenton, New Jersey. All parties were provided an opportunity to examine and cross-examine witnesses, to present evidence and to argue orally. Subsequent to the close of the hearing, written briefs were filed by the Association and the Bridgewater-Raritan Regional Board of Education (the "Board") on February 27,

1978 and February 23, 1978, respectively. The Hearing Officer issued his Report and Recommendations on June 9, 1978, a copy of which is annexed hereto and made a part hereof. Exceptions were filed by the Board on June 26, 1978, to which the Association has not responded.

The undersigned has considered the entire record including the Hearing Officer's Report, the transcript, briefs, and exceptions and on the basis thereof finds and determines as follows:

1. The Bridgewater-Raritan Regional Board of Education is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., as amended (the "Act"), and is subject to its provisions.

2. The Bridgewater-Raritan Substitute Educators Association is an employee representative within the meaning of the Act and is subject to its provisions.

3. The Association seeks to represent a unit consisting of substitute teachers and nurses employed by the Board. These substitutes are paid on a per diem basis. The Board has declined to consent to an election in the unit sought, claiming that the petitioned-for individuals are not "public employees." Accordingly, there is a question concerning representation and the matter is properly before the undersigned for determination.

4. The parties have stipulated that the sole issue to be determined is whether or not the substitute teachers and nurses are "public employees" within the meaning of the New Jersey Employer-Employee Relations Act, and have agreed that if they are found to be

public employees, they are appropriate for representation in the petitioned-for unit.

Therefore, this decision is limited by the agreement of the parties and with the approval of the undersigned to the above-stated issue: whether the petitioned-for substitutes are public employees and, therefore, entitled to representation. There is no dispute regarding the appropriateness of the unit sought by the Association.

Therefore, the question of whether an election is to be directed in this matter turns upon the status of the petitioned-for individuals.

5. The Hearing Officer, applying a test of regularity and continuity of employment, found that some per diem substitutes were public employees within the meaning of the Act and that others were not. Therefore, he found that a unit containing both public employees and non-public employees would be inappropriate. The Hearing Officer recommended a two prong test for determining regularity and continuity of employment which would establish public employee status. Under this recommended test those per diem substitutes who had been employed for 90 days or more during one school year, or those who had been employed for 30 days or more during two previous school years, and who had expressed their availability and willingness to be employed as substitutes for the next succeeding school year, would be considered public employees

within the meaning of the Act.

The Hearing Officer recommended that those substitutes who were public employees under the proposed test be entitled to vote in a Commission election to select or reject a collective negotiations representative.

6. The Board takes exception to the Hearing Officer's failure to recommend dismissal of the Association's Petition upon the initial finding that a unit comprised of all of the per diem substitutes employed by the Board would be inappropriate. The Board requests that the Director limit his consideration to this initial finding, and that the Petition be dismissed.

7. Based upon the stipulation of the parties, the undersigned determines that the petitioned-for unit, "substitute certified teachers and nurses," ^{1/} is a prima facie appropriate unit. The Association claims that all of the substitute teachers and nurses employed by the Board are public employees. The Board maintains that none of the per diem substitutes have established a sufficient regularity and continuity of employment to qualify as public employees. The Hearing Officer, based upon certain tests of regularity and continuity of employment, has found that some of the substitute teachers and nurses are public employees and that others are not and has recommended that substitute teachers and nurses who are public employees vote in an election to determine their collective negotiations representative, if any, in the unit agreed upon as appropriate.

1/ Exhibit C-1f

There is no support for the Board's position -- either in the record or in Commission policy -- that the Commission's inquiry into a question concerning representation should be discontinued where it is found that certain personnel, proposed by a Petitioner for inclusion in a unit, are not identifiably within the definition of the collective negotiations unit. A determination which identifies non-public employees and which excludes non-public employees from a proposed unit does not alter the definition of the proposed unit nor does it establish a sub-group or sub-unit. Accordingly, the undersigned must reject the Board's contention that "Neither the Board nor the Association addressed itself to the question of whether any subdivision of the whole class of per diem substitute teachers and nurses qualifies as public employees within the meaning of the Act."

8. The definition of "employees" contained in the Act ^{2/} suggests no basis for the exclusion of less than full-time employees. The Commission, relying on precedents in both the public and private sectors, has distinguished between regularly employed part-time employees and casual employees who perform or serve on an occasional or sporadic basis. Employees in the former group have been granted representation rights while the latter group has been denied these rights on the basis that their contact with the employer is too tenuous to constitute a continuing employer-employee relationship. In distinguishing between these two groups the Commission has

2/ N.J.S.A. 34:13A-3(d).

considered whether the employees have a fair degree of regularity and continuity of employment. Considering these factors, the Commission, in In re Rutgers University, P.E.R.C. No. 76-49, 2 NJPER 229 (1976), found that coadjutant faculty exhibited the minimal level of employment which would constitute a fair degree of regularity and continuity by teaching at least two college semesters and indicating a willingness to be rehired for at least one semester during the next academic year.

In the instant matter, there is sufficient record evidence to support a finding that certain substitute teachers and nurses evidence a sufficient regularity and continuity of employment to qualify as public employees while the nature of employment of other substitute teachers and nurses is so casual as to render these personnel non-public employees within the intendment of the Act. The undersigned adopts the recommendation of the Hearing Officer that those employees who fail to meet a test of regularity and continuity are not public employees and, therefore, not includable in the proposed unit.

9. To insure consistency in Commission determinations, the undersigned concludes that the approach utilized in In re Rutgers University, supra, should be applied to measure regularity and continuity of employment in similar situations where a determination must be made concerning the status of personnel as either casual or regular part-time employees. The Rutgers,

supra, approach ^{3/} will be adapted to meet the requirements of the employment relationship at issue.

The undersigned finds that the Hearing Officer's adoption of the Rutgers approach and his attempt to fashion a similar test in this matter was proper. However, in the undersigned's judgment, the test recommended by the Hearing Officer is too restrictive. In Rutgers the Commission determined that an adequate demonstration of regularity and continuity of employment was made where an employee served during two semesters (the equivalent of one full academic year) and was available for service in the succeeding year. In the instant matter, there is a need for the demonstration of significant service for one year and the indication of availability for service the succeeding year. Based on the record evidence, the undersigned concludes that 30 days of service during one school year constitutes significant service demonstrating regularity of employment and the indication of willingness by the employee to serve in the succeeding year will satisfy the test of continuity.

Accordingly, the undersigned finds that those per diem substitute teachers and nurses who meet the above stated standard qualify as public employees under the Act and are entitled to representation thereunder.

Based upon the above findings, the undersigned hereby directs that a secret ballot election be conducted among the

^{3/} The approach established by the Commission has been confirmed by the Appellate Division of the Supreme Court. Rutgers University v. Rutgers University Coll. Teachers Assn., E.D. No. 76-35, 2 NJPER 176 (1976) aff'd and modified P.E.R.C. No. 76-49, 2 NJPER 229 (1976), D.R. No. 77-5, 3 NJPER 12 (1976) (dismissed election objections), aff'd App. Div. Docket No. A-1652-76 (1977), cert. den. ___ N.J. ___ (1978).

employees in a unit composed of "all substitute teachers and nurses who have worked in that capacity for at least thirty (30) days during a given school year, and express a willingness to accept employment as a substitute teacher or nurse for the next succeeding school year, but excluding all other employees, managerial executives, confidential employees, craft employees, non-professional employees, policemen and supervisors within the meaning of the Act."

The undersigned directs that a secret ballot election be conducted in the unit found appropriate no later than thirty (30) days from the date set forth below.

Those eligible to vote are employees set forth above who were employed as a substitute teacher or nurse for at least thirty (30) days during school year 1977-1978 and who indicate a willingness to accept employment as a substitute teacher or nurse during school year 1978-1979. Employees must appear in person at the polls in order to be eligible to vote.

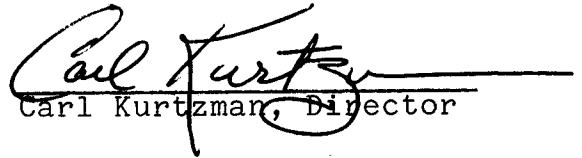
Pursuant to N.J.A.C. 19:11-9.6 the Board is directed to file simultaneously with the undersigned and with the Association, an election eligibility list, consisting of an alphabetical listing of the names of all eligible voters together with their last known mailing addresses and job titles. Such list must be received no later than ten (10) days prior to the date of the election with a statement of service to the undersigned. Failure to comply with the foregoing shall be grounds for setting aside the election

upon the filing of proper post-election objections pursuant to the Commission's Rules.

Those eligible to vote shall vote on whether they desire to be represented for the purposes of collective negotiations by Bridgewater-Raritan Substitute Educators Association.

The majority representative shall be determined by a majority of the valid ballots cast. The election directed herein shall be conducted in accordance with the provisions of the Commission's Rules and Regulations and Statement of Procedure.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Carl Kurtzman, Director

DATED: October 19, 1978
Trenton, New Jersey

STATE OF NEW JERSEY
BEFORE A HEARING OFFICER OF THE PUBLIC EMPLOYMENT
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Petitioner.

SYNOPSIS

A Commission Hearing Officer recommends that per diem substitutes as a group are not public employees within the meaning of the New Jersey Employer-Employee Relations Act, and a unit of all such substitutes would be inappropriate. He further recommends, however, that those per diem substitutes who have established a regularity and continuity of employment are public employees within the meaning of the Act and are entitled to vote in a secret ballot election.

The Hearing Officer recommends a two prong test for determining whether per diem substitutes have established a continuity of employment. Those per diem substitutes who have been employed for ninety (90) days or more during one given school year, or those per diem substitutes who have been employed for thirty (30) days or more during two previous given school years, and who have expressed their availability and willingness to be employed as a substitute the next succeeding school year are public employees within the meaning of the Act.

The Hearing Officer further recommends that a secret ballot election be directed among those per diem substitutes who have established a continuity of employment pursuant to the aforementioned two prong test.

H.O. NO. 78-19

A Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. The Report is submitted to the Director of Representation who reviews the Report, 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. The Director's decision is binding upon the parties unless a request for review is filed before the Commission.

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Appearances:

For the Public Employer
Daniel C. Soriano, Jr., Esq.

For the Petitioner
John Thornton, N.J.E.A. Field Representative

HEARING OFFICER'S REPORT
AND RECOMMENDATIONS

A Petition for Certification of Public Employee Representative was filed with the Public Employment Relations Commission (the "Commission") on February 24, 1977, by the Bridgewater-Raritan Substitute Educators Association (the "Association") for a unit of all substitute teachers and nurses employed by the Bridgewater-Raritan Regional Board of Education (the "Board"). The Board argues that the proposed unit is inappropriate because it alleges that per diem substitute teachers and nurses are not public employees within the meaning of the New Jersey Employer-Employee Relations Act

(the "Act"). ^{1/} The Association argues, however, that the instant per diem substitute teachers and nurses have a regularity and continuity of employment and are, therefore, public employees within the meaning of the Act.

Pursuant to a Notice of Hearing dated November 14, 1977, a hearing was held before the undersigned Hearing Officer on December 16, 1977, in Trenton, New Jersey at which all parties were given an opportunity to examine and cross-examine witnesses, to present evidence, and to argue orally. Subsequent to the close of the hearing both parties filed written briefs in this matter. Upon the entire record in this proceeding, the Hearing Officer finds:

1. That the Board is a public employer within the meaning of the Act and is subject to its provisions.
2. That the Association is an employee representative within the meaning of the Act and is subject to its provisions.
3. That the Association is seeking to represent in one unit all per diem substitute teachers and nurses employed by the Board, and that the Association believes that said employees have a regularity and continuity of employment.

^{1/} The term "public employee" is defined in the Act at N.J.S.A. 34:13A-3(d). The definition in pertinent part is as follows:

This term shall include any public employee, i.e. any person holding a position, by appointment or contract, or employment in the service of a public employer, except elected officials, members of boards and commissions, managerial executives and confidential employees.

4. That the Board maintains that the proposed unit is inappropriate, and that the employees in question do not have a regularity or continuity of employment and are, therefore, not public employees within the meaning of the Act.

5. That the parties stipulated the following information:

a. That the sole issue to be determined herein is whether the substitute teachers and nurses in question are public employees within the meaning of the Act.

b. That the substitutes in question are paid by check and on a per diem basis when employed and they receive no benefits.

c. That the substitutes in question have the same supervision as the employees they are replacing.

d. That the parties agree to stipulate into the record as joint exhibits the Handbooks for Substitutes dated August 1977 and August 1976. ^{2/}

BACKGROUND

In support of its position that per diem substitutes have a regularity and continuity of employment, the Association argued generally that said substitutes:

1. are required to be available and on call five days a week.

2. are required to attend an orientation meeting and other meetings.

^{2/} Exhibits J-1 and J-2 respectively.

3. are required to have substitute certificates.

4. are required to prepare programs and,

5. have a salary guide that awards continuous service.

Moreover, the Association contends that a community of interest exists among per diem substitutes, and that they are public employees within the meaning of the Act.

The Board argues that per diem substitutes are not public employees for several reasons. First, although people may have their names on the substitute list, they need never be called or employed by the Board. Second, per diem substitutes may be on the list of more than one board of education at the same time and may work for other boards, and third, because they may take their names off the list at any time.

A review of the record reveals additional information. The Assistant Superintendent for Administration and Personnel for the Board, Mr. Kearney, testified that there are different wage structures for degree and non-degree substitutes and for those with prior experience. ^{3/} More importantly, he confirmed the fact that per diem substitutes on the list can refuse assignments and that they can be on the list of more than one board of education at the same time. ^{4/} Mr. Kearney also testified that it is the Board's desire to have a continuity of operations with substitutes and that the required substitute orientation process is one way to achieve same. ^{5/}

^{3/} Transcript (T) p. 16.

^{4/} T. pp. 21-23.

^{5/} T. pp. 65-68.

Mr. Kearney also provided statistical information regarding the Board's use of per diem substitutes. He testified that there are 180 days in the school year and that there were a total of 189 people approved by the Board as per diem substitutes between August 1976 and May 1977. Of those 189 potential substitutes only 53 or 28% of them worked 30 days or more. Mr. Kearney testified that 12 substitutes or 6.7% of the 189 worked 90 days or more, but that only 8 of those 12 returned for the 1977-78 school year. He also testified that 41 substitutes or 21.5% of the 189 worked 30 days or more, but that only 23 of the 41 substitutes returned for the 1977-78 school year. ^{6/}

Regarding the 1977-78 school year, Mr. Kearney testified that in the beginning of the year the list consisted of 115 names, but that 17 people had withdrawn their names by December 1977 leaving 98 potential substitutes. Moreover, he testified that by December 1977, there were only 31 people who worked 30 days or more in both the 1976-77 and 1977-78 school years. ^{7/}

During the course of the hearing the Association presented a certain document listing numerous substitutes and purportedly showing the number of days each person worked as a substitute in the last several school years. ^{8/} Although the document was admitted into evidence, the Board objected to the use of the document arguing that the same was inaccurate and unverified. The record reflects that the document was admitted

^{6/} Mr. Kearney's testimony concerning statistical information is found at T. pp. 28-33.

^{7/} T. pp. 31, 33.

^{8/} See Association Exhibit 6.

through the testimony of Mary Rose Douglas, a substitute teacher. It was the Association's intent to demonstrate through that document that numerous substitutes had a continuity of employment with the Board. However, the testimony of both Ms. Douglas and Janet Regan, another substitute, cast considerable doubt as to the accuracy of the document. Ms. Douglas testified that the figures were only an approximation, that they were obtained telephonically, and, that the list was not current. ^{9/} Ms. Regan testified that her records reflected that she worked a different number of days than those reported on the list. ^{10/}

After reviewing the document in question and all the relevant testimony, the undersigned must sustain the Board's objection to the use of the document. The testimony revealed that the entire list may be inaccurate, and therefore, the same cannot be used to demonstrate a continuity of employment among substitutes.

ANALYSIS

The Association in this matter petitioned-for a unit of all substitute teachers and nurses. The Board, for the reasons enumerated herein, and particularly for the reasons set forth in its brief, argued that a unit of all per diem substitutes -- as a group -- was inappropriate. The Board cited several cases to support its position.

^{9/} T. pp. 86, 94-95.

^{10/} T. p. 117.

In the leading related case before this Commission, In re Rutgers the State University, P.E.R.C. No. 76-49, 2 NJPER 229 (1976), a petition was filed seeking a unit of all coadjutant professors employed at University College. The threshold issue in that matter was whether the coadjutants were public employees within the meaning of the Act. The Commission found that not "all," but "some" coadjutants were public employees, and it established a criteria to be used in determining those coadjutants who would be eligible to vote in a secret ballot election. The Commission established a test:

"All coadjutant faculty members who commence employment for at least their second semester during a given academic year, and who express a willingness to be rehired to teach at least one semester during the next succeeding year." Rutgers, supra, P.E.R.C. No. 76-49 at p. 4, 2 NJPER 229.

Other jurisdictions have also addressed similar issues. In New York, for example, the Public Employment Relations Board dismissed a petition for a unit of all per diem substitute teachers. The Board found that as a group, per diem substitutes did not have a continuing employment relationship. ^{11/} In Pennsylvania and Wisconsin, the respective state labor relations agencies also found that not all per diem substitutes were public employees, but those agencies nevertheless found that substitutes who worked a specified

^{12/} In re Petition of Bernard T. King, Esq., 6 PERB 3132 (Para. 3083, 1973).

period of time were public employees and entitled to representation. 12/

The undersigned has considered the record and the law cited in this matter and must agree with the Board, and recommend to the Director of Representation, that a unit of all per diem substitute teachers and nurses is inappropriate. However, such a finding does not necessarily require that the Petition be dismissed. In Rutgers, supra, the Commission determined that the actual petitioned-for unit was inappropriate, but it nevertheless did not dismiss the petition. Rather, the Commission found that some, but not all, of the petitioned-for employees would be appropriate for representation and it established a test for determining which employees were eligible.

In the instant matter, the undersigned must recommend that a unit of all per diem substitute teachers and nurses is inappropriate, but that a unit of some per diem substitutes who have demonstrated a regularity and continuity of employment, and are thereby public employees within the meaning of the Act, is appropriate for representation.

In deciding upon the criteria to be used in defining which substitutes have a continuity of employment, the undersigned

12/ In the matter before the Pennsylvania Labor Relations Board, In re Philadelphia School District, PERA-R-5090-E, 5 PPER 113 (1975), the Board found that per diem substitutes who taught 22 days or more in one school year were eligible for representation.

In the matter before the Wisconsin Employment Relations Commission, In re Petition of Milwaukee Teachers Education Assoc., Case XI, No. 12307, ME 395, Decision No. 8901 (Wis. ERC 1969), The Commission found that per diem substitutes who taught 30 days or more were eligible for representation.

has carefully considered the parties position and the cases mentioned above. The Association believes that substitutes who have worked for a period of time are entitled to the rights provided in the Act and should have the opportunity to be represented in a labor relations unit. The Board believes that in order to operate an efficient educational system it must be assured of who its employees are through a demonstration of continuity of employment. In either case, a reasonable definition of the length of time necessary to establish a continuity of employment should adequately satisfy the needs and concerns of both parties.

The undersigned has looked to the Rutgers case, supra, both the Pennsylvania and Wisconsin cases cited earlier, and the statistical information provided by Mr. Kearney in reaching a decision on the period of time a substitute is required to work in order to establish a continuity of employment as a public employee within the meaning of the Act. As stated earlier, Mr. Kearney testified that 12 substitutes worked 90 days or more and that 41 substitutes worked 30 days or more in the 1976-77 school year. ^{13/} But Mr. Kearney also testified that only 8 of the 12, and 23 of the 41 substitutes returned for employment at the beginning of the 1977-78 school year. ^{14/}

In order to ensure a continuity of employment it is, therefore, essential that per diem substitutes working a specified number of days in previous years be available for employment

^{13/} Supra, n. 6.

^{14/} Id.

the following year. The undersigned must, therefore, recommend that a Rutgers type criteria be utilized. The undersigned believes that a two prong test can best define the period of time a substitute must work to establish a continuity of employment. Although the undersigned recognizes several differences between Rutgers and the instant matter, Rutgers still provides the framework for the resolution of this matter.

The undersigned, therefore, recommends the following two prong test: All per diem substitute teachers and nurses employed by the Board as a substitute for either,

a. Ninety (90) days or more during one given school year and who express their availability and willingness to be employed as a substitute the next succeeding school year, or

b. Thirty (30) days or more during two previous given school years and who express their availability and willingness to be employed as a substitute the next succeeding school year, have a continuity of employment, and are public employees within the meaning of the Act and eligible to vote in a secret ballot election concerning representation. 15/

RECOMMENDATIONS

Based upon the entire record herein, and for the above stated reasons, the undersigned Hearing Officer recommends the

15/ The undersigned notes that in the instant matter a substitute's availability and willingness may be expressed by obtaining the required substitute certification, placing ones name on the list, and attending the substitute orientation meeting. Although not all of these items may be required, the substitute must make it clear to the Board that he/she is available for employment.

following:

1. That a unit of "all" per diem substitute teachers and nurses is inappropriate, and that per diem substitutes as a group are not public employees within the meaning of the Act.

2. That all per diem substitute teachers and nurses who are employed by the Board

a. for ninety (90) days or more during one given school year and who express their availability and willingness to be employed as a substitute the next succeeding school year, or

b. for thirty (30) days or more during two previous given school years and who express their availability and willingness to be employed as a substitute the next succeeding school year are public employees within the meaning of the Act and eligible to vote in a secret ballot election concerning representation.


3. That pursuant to N.J.A.C. 19:11-5.1, an election be directed in the following recommended appropriate unit: "All per diem substitute teachers and nurses employed by the Board for either the ninety or thirty day requirement as set forth herein, and who express(ed) their availability and willingness to be employed as a substitute the next succeeding school year, but excluding all other per diem substitutes and all other employees employed by the Board."

4. That those employees eligible to vote are those per diem substitute teachers and nurses as set forth above who were employed by the Board for ninety (90) days or more in the 1976-77 school year, or for thirty (30) days or more in both the

1975-76 and 1976-77 school years and who expressed their availability and willingness to be employed as substitutes for the 1977-78 school year and are still available for employment as substitutes. 16/

5. That those employees eligible to vote shall vote as to whether they wish to be represented for the purpose of collective negotiations in the above described unit by the Bridgewater-Raritan Substitute Educators Association or whether they wish no representation.

Respectfully submitted,


Arnold H. Zudick
Hearing Officer

DATED: June 9, 1978
Trenton, New Jersey

16/ For the purposes of voting in the recommended election it is necessary for those eligible voters, i.e., those per diem substitute teachers and nurses who satisfied the ninety or thirty day requirement and who were available at the start of the 1977-78 school year, to still be on the substitute list and available for employment as a substitute at the time of the election.