STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

AIRPORT COMMUNITY SCHOOLS,
Respondents-Public Employer in Case Nos. C98 C-52 & R98 B-25,

-and-

MICHIGAN EDUCATION ASSOCIATION,
Respondent-Labor Organization in Case No. CU98 C-11,
Petitioner in Case No. R98 B-25,

-and-

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 547,
Charging Party-Labor Organization in Case Nos. C98 C-52 & CU 98 C-11,
Incumbent Labor Organization in Case No. R98 B-25.
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APPEARANCES:

Collins, Blaha & Slatkin, by Gary J. Collins, Esq. and Mary Dirkes, Esq., for the Public Employer

White, Przyblowicz, Schneider & Baird, P.C., by Douglas V. Wilcox, Esq. and Bernard Marinelli, Esq., for the Respondent Labor Organization

Homer L. Sterner, Business Representative, for the Charging Party

DECISION AND ORDER

On December 29, 1998, Administrative Law Judge Roy L. Roulhac issued his Decision and Recommended Order in the above case pursuant to pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 *et seq.*; MSA 17.455 *et seq.*, recommending that this Commission dismiss an unfair labor practice charge filed against Respondent Airport Community Schools, and direct an election among certain employees of the school district to determine whether they wish to be represented by the Michigan Education Association (MEA), the International Union of Operating Engineers, Local 547 (IUOE), or no labor organization.

On January 20, 1999, the Employer filed timely exceptions to the Decision and Recommended

Order of the ALJ. Petitioner MEA filed a timely response to the school district's exceptions on January 29, 1999. Incumbent IUOE filed a brief in support of the ALJ's Decision and Recommended Order on March 10, 1999. However, the IUOE's brief was not timely filed and was not considered by the Commission in deciding this case.

Discussion and Conclusions of Law:

For more than twelve years, the IUOE has represented a bargaining unit consisting of all full-time and regularly scheduled part-time bus drivers and on-call substitute bus drivers employed by Airport Community Schools. The collective bargaining agreement between the Employer and the IUOE covers the period July 1, 1995, to June 30, 1998. On February 23, 1998, the MEA filed a petition for election seeking to represent all bus drivers currently represented by the IUOE. At the hearing, the school district took the position that the on-call substitute bus drivers should be severed from the bargaining unit. The ALJ concluded that the substitute bus drivers share a community of interest with the full-time employees sufficient to justify their continued inclusion in the bargaining unit. The ALJ also recommended dismissal of two unfair labor practice charges which were consolidated with the representation petition. The ALJ found no evidence to support the IUOE's contention that the Employer unlawfully permitted the MEA to interfere in the grievance process. The IUOE has not excepted from the ALJ's decision regarding the unfair labor practice charges. Accordingly, we adopt the findings and conclusions of the Administrative Law Judge as to that issue.

Although individuals who work as substitutes are employees for purposes of PERA, whether they are entitled to bargaining rights depends on whether they are deemed casual or irregular employees. *Coldwater Community Schools*, 1998 MERC Lab Op 471, 476; *Southfield Public Schools*, 1984 MERC Lab Op 162, affirmed 148 Mich App 714 (1985). This determination is made on a case by case basis, *Coldwater, supra*, and requires an examination into whether the substitutes have a substantial and continuing interest in their employment to justify their inclusion in a unit of regular, full-time employees. *Chelsea School District*, 1994 MERC Lab Op 268, 274. Factors to be considered include, but are not limited to, the duties and responsibilities of the substitutes, regularity of employment, the right to refuse assignments, expectations of continued employment, the degree of contact with other employees, and overlap of supervision. See e.g. *Coldwater*; *Chelsea*; *Lansing Public Schools*, 1993 MERC Lab Op 18; *Mt Morris Consolidated Schools*, 1993 MERC Lab Op 24; *Waterford School District*, 1977 MERC Lab Op 697, 702. While the number of days worked over a period of time may substantiate regularity of employment or lack thereof, this factor alone is not determinative. *Chelsea, supra* at 275. Similarly, past agreement among the parties to include substitutes in a unit of full-time and regular part-time employees is not enough to overcome our policy of exclusion. *Chelsea, supra*; *Sault Ste Marie Area Public Schools*, 1993 MERC Lab Op 895, 897, affirmed 213 Mich App 176 (1995).

This Commission has addressed the issue of whether on-call substitute bus drivers are casual or regular part-time employees in two recent decisions. In *Chelsea*, 1994 MERC Lab Op 268, we determined that substitute bus drivers and substitute monitors employed by the school district were not regular employees because they "are on-call, are not guaranteed an assignment, may reject an assignment, and may accept work in another district. They are used only when a regular driver or

monitor is absent." *Id.* at 274. Similarly, in *Coldwater,* 1994 MERC Lab Op 471, we found that on-call substitute bus drivers were casual employees who should be excluded from a unit of regularly scheduled employees. We held:

> The substitute drivers in this case work on call. Their assignments are short and of irregular duration; if the Employer has the need for a long-term substitute, it creates a temporary assignment and the substitute filling it is treated as a regular driver for the duration of that assignment. The substitute drivers do not commit to work from one day to the next. They may be dropped from the substitute list if they fail, over time, to make themselves sufficiently available to fill the Employer's needs. However, they may decline to work on a particular day or for a particular opening. Substitutes are not prohibited by the Employer from working elsewhere. We conclude that these factors alone support a finding that the substitute drivers here are casual employees.

Id. at 477.

The Employer argues that the instant case closely parallels *Coldwater* and *Chelsea*. After carefully reviewing the record, including the transcript and exhibits submitted by the parties, we disagree. The nature of the employment relationship here is different than in *Coldwater* and *Chelsea* in several important respects. First, the bus drivers in the prior cases had no reasonable expectation of becoming regular full-time employees. In *Coldwater*, the collective bargaining agreement had, at one time, required the school district to offer regular driver vacancies to the most senior substitutes. However, at the time of the hearing, this provision was no longer part of the contract, and it applied retroactively to only one employee. Similarly, there is nothing to indicate that the substitute drivers at issue in *Chelsea* were entitled to any hiring preference. In contrast, the collective bargaining agreement between the IUOE and Airport Community Schools explicitly provides that vacancies and newly created positions within the unit are to be filled by the most senior qualified driver who applies. Moreover, the superintendent testified that an employee must first serve as a substitute driver before being eligible for regular full-time employment, and that substitutes typically are promoted after three to five years. Under such circumstances, we conclude that the on-call substitute bus drivers here have a reasonable expectation of permanent full-time employment with the school district.

Another factor which distinguishes this case from both *Coldwater* and *Chelsea* concerns the right of on-call substitute bus drivers to reject assignments. In the instant case, the contract specifically provides that any substitute bus driver who refuses work more than 25% of the time it is offered "shall be removed from the seniority list and face possible dismissal." Moreover, the IUOE presented evidence that at least one substitute driver has been terminated for failing to accept a sufficient number of assignments. In contrast, the on-call substitute drivers in *Chelsea* were not subject to loss of seniority or termination for failing to accept assignment. If a substitute rejected two consecutive assignments, he or she simply would not be called for the next available assignment. While the substitute drivers in *Coldwater* were required to make themselves available to the school district, there was no fixed number of assignments which the substitutes were required to accept, nor was the penalty for unavailability predetermined. The availability requirement at issue here is particularly onerous in light of the fact that the on-call substitutes employed by Airport Community

Schools are not permitted to set their own hours, as was the case in *Coldwater*. At least one substitute driver was told by the Employer to make herself available from 5:00 a.m. to 5:00 p.m. Moreover, the superintendent admitted at the hearing that it would be "kind of hard" for substitute drivers to hold another job, and that substitute drivers are expected to "put Airport Community Schools first as it pertains to some other employment that they may have." Given these facts, it is hardly surprising that only one of the six substitute drivers covered by the general provisions of the collective bargaining agreement had a second job at the time of hearing.[1] We find that the substitute drivers at issue here, unlike the employees in *Coldwater* and *Chelsea*, have essentially committed themselves to working only for Respondent.

For the foregoing reasons, we conclude that the on-call substitute drivers have a substantial and continuing interest in the concerns of their workplace so as to be considered regular employees under PERA, despite the fact that they work only when called. See *Coldwater*, *supra*, 1998 MERC Lab Op at 478, discussing *Southfield Public Schools*, *supra*. In light of our determination that these factors alone support a finding that the substitute drivers should be included within the bargaining unit, it is not necessary to address the Employer's arguments concerning the other factors relied upon by the ALJ.

ORDER

Pursuant to Section 16 of PERA, we hereby adopt the recommended order of the ALJ as our final order in this case.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Maris Stella Swift, Commission Chair

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Harry W. Bishop, Commission Member

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C. Barry Ott, Commission Member

[1] Another substitute bus driver, Earl Heiss, works for both Airport Community Schools and the U.S. Postal Service. However, Heiss is covered by a special provision in the contract which permits him to drive for the school district only on Mondays and after all other drivers have rotated through the assignment lists.

Date: _____