UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

(Gilroy, CA)

GO KIDS, INC.

Employer[1]

and Case 32-RC-5398

SERVICE EMPLOYEES
INTERNATIONAL UNION
LOCAL 715

Petitioner[2]

DECISION AND CONTINGENT DIRECTION OF ELECTION[3]

Go Kids, Inc., ("the Employer") is in the business of providing school and child care programs to infants, preschool and school age children in the counties of Santa Clara, San Benito, Monterey and Santa Cruz, California. The Service Employees International Union Local 715, ("the Petitioner" or "the Union") filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of all full-time and regular part-time master teachers, teachers, associate teachers, teacher assistants, teachers aides,[4] cooks, program specialists, community outreach specialists, school/community liaisons,

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[1] The name of the Employer appears as amended at the hearing.
[2] The name of the Petitioner appears as amended at the hearing.
[3] Inasmuch as the Petitioner has not taken a clear position in regard to its willingness to proceed to an election in a unit different from the one I find appropriate, or indeed in a unit different from the one for which it petitioned, the Petitioner may now wish to reconsider whether it wishes to proceed to an election in the unit I have found appropriate. If it does wish to so proceed, I direct that the Petitioner advise the Region in writing within seven days of the date of this Decision as to whether or not it wishes to proceed to an election in the Employer-wide unit I found to be appropriate here. As the Petitioned for Unit is an inappropriate unit, if the Petitioner does not provide the Region with such written notice by the above-referenced deadline, I will dismiss the Petition.
[4] The parties appear to have agreed at the hearing that the Employer does not currently utilize, and has not recently utilized, any persons in the "teacher's aid(es)" classification. It does not appear that there is any material difference between the existing, utilized and petitioned-for "teacher assistant" classification and the non-existent teachers aid classification. In these circumstances, I will not include the teacher aides position in any unit found to be appropriate in this decision.

maintenance workers, resource coordinators, and education coordinators at the Employer's Gilroy, California, Morgan Hill, California, and Hollister, California facilities; excluding all other employees, guards, managerial employees and supervisors as defined by the Act.[5] Hearing Officers of the Board held two days of hearings, and the parties made oral arguments, which I have duly considered.

The two primary issues here are whether the unit sought by the Petitioner herein is appropriate for collective bargaining despite its proposed exclusion of the Employer's migrant or "seasonal" employees, and despite its proposed exclusion of the Employer's employees working at a facility already located in Soquel and the facility that is scheduled to open soon in Watsonville, California. The Petitioner contends that the seasonal employees do not share a community of interest with the petitioned-for employees insofar as they receive different benefits, must reapply each year with no enforceable obligation that they be rehired, and serve a different clientele, migrant agricultural workers and their children, than that served by the petitioned-for employees. Petitioner further asserts that the unit should be limited to the employees employed at the Employer's facilities located in Gilroy, Morgan Hill and Hollister, and that the employees of the Soquel and Watsonville locations should not be included in the unit.[6] In this regard, the Union argues that there is both limited interchange and substantial geographic distance between the Employer facilities in Gilroy, Morgan Hill and Hollister on the

[5] At the hearing, the parties stipulated to the fact that none of the petitioned-for job classifications constitute "professional" positions as that term in defined in Section 2(12) of the National Labor Relations Act. The parties stipulated that the petitioned-for positions do not require advanced knowledge or degrees, do not entail predominantly intellectual work, and largely consist of routine mental, manual, mechanical or physical work. In accordance with the parties' stipulation, I find that none of the following petitioned-for classifications or persons filling them constitute professional positions or professionals under the Act: master teacher, teacher, associate teacher, teacher assistant, cook, program specialist, community outreach specialist, school community liaison, maintenance specialist, janitors, custodians, resource coordinator, and education coordinator.

[6] During the first day of hearing, the Petitioner sought to include in the unit only the Gilroy and Morgan Hill locations, while the Employer sought to include the Gilroy, Morgan Hill and Hollister locations. At the second and final day of the hearing, after the record was reopened, Petitioner sought to include in the unit the Gilroy, Morgan Hill and Hollister locations, whereas the Employer sought to include all of its locations, including those located in Soquel and Watsonville.

one hand, and the Soquel and Watsonville locations on the other hand. Petitioner also argues that the individual facilities are separately supervised at the local level with little centralized administration emanating from the Employer's headquarters in Gilroy. Finally, Petitioner argues that an appropriate unit need not, and indeed cannot, include a Watsonville location which is not yet operational and as to which the hiring process remained ongoing as of the time of hearing.

Conversely, the Employer contends that the unit should include the "temporary" or "seasonal" employees because they receive the same wages and perform the same duties as regular employees; work side by side with regular non-seasonal employees; and have a reasonable expectation of recall, as demonstrated by the substantial numbers of returning seasonal employees. The Employer also argues that all locations including Soquel and Watsonville must be included in the unit insofar as there is an extensive degree of centralized control of labor relations and general operations from the Employer's main administration office; there is (or will be) sufficient interchange between the Soquel/Watsonville locations and the Gilroy/Morgan Hill/Hollister locations; and the employees from the petitioned-for locations do not share a community of interest distinct from that shared by all of the Employer's employees at all locations. The parties agree as to the appropriateness of the classifications proposed to be included in the unit and the community of interest shared by the persons in those classifications, and have further stipulated to the non-professional status of such potential unit employees, as well as the supervisory status of several classifications of employees that no party seeks to have included within the unit. Thus, the parties have confined their dispute to the inclusion of the seasonal employees and the Soquel and Watsonville employees.

For the reasons explained in greater detail below, I have concluded that the seasonal employees have a reasonable expectation of employment from year to year, unlike temporary or

casual employees. These seasonal employees perform the same work as regular employees, under the same supervision, and for the same pay. The seasonal employees therefore share a strong community of interest with the regular employees, and possess a sufficient interest in their employment conditions to warrant their inclusion in the unit. I have also concluded that the proposed multi-location unit does not have a distinct community of interest from that of the Soquel and Watsonville locations, and therefore the Soquel and Watsonville locations must be included in the multi-location unit. Therefore, I find that the petitioned-for multi-location unit is not an appropriate unit, because it excludes the seasonal employees and excludes the employees at the Soquel and Watsonville locations. Finally, even though the unit I found to be appropriate includes seasonal employees, I have determined that if an election is held in this case, I will not postpone the election until the seasonal employees resume working for the Employer, which will not occur until about May/June of 2006.

OVERVIEW OF THE EMPLOYER'S OPERATIONS

The Employer operates schools as well as community outreach and resource and referral offices. The Employer receives its funding for operating the facilities from a variety of sources, including payments received directly from families ("full fee funding"), and payments from state (or local) governments pursuant to contracts for "center-based" care or for migrant services.[7]

The Employer's School Locations

In Gilroy, California, the Employer's central administration office is on one floor of its facility at 885 Moro Drive, while the Go Kids Child Development Center at Los Arroyos, an

[7] The Employer receives "targeted" funds from Santa Clara County through the "First-5" or "CARES" program, which are to be utilized within the county. It receives similarly targeted funds from San Benito County. The First-5 funds or grants serve to fund the two Neighborhood Information and Referral ("NIR") resource coordinator positions at the Gilroy headquarters, while a Knight Foundation grant funds the GANAS program and its School Community Liaison position and Community Outreach Specialist position.

infant care through school age program, operates on the other floor of this Moro Drive facility.[8] There are approximately 16 teachers at the Los Arroyos site, as well as a cook, and a janitor/custodian.[9] The site supervisor at Los Arroyos is Patricia Ferrera.

The Employer operates a second school in Gilroy, Ochoa Migrant, which is open from approximately May through October each year.[10] During this period of operation, Ochoa Migrant has approximately 18 employees in the classifications of teacher, associate teacher, teacher assistant, and cook. There is currently no site supervisor at Ochoa Migrant.

In Morgan Hill,[11] the Employer operates Jasmine Square Pre-School ("Jasmine Square") and a school age facility, Go Kids Club at Morgan Hill ("Morgan Hill School-Age"), the latter of which is located at 17666 Crest Avenue. Morgan Hill School-Age employs two associate teachers, as well as site supervisor Charlie Miller. Jasmine Square employs approximately five employees in the associate teacher and cook classifications. The site supervisor at Jasmine Square is Suzette Thurman. Jasmine Square opened in June 2005, and is licensed to serve approximately 56 children.

In Hollister, which is in San Benito County, the Employer operates Go Kids Pre-School at Fairview ("Fairview"), Southside Migrant Child Development Center ("Southside Migrant"), and Go Kids Club at Hardin ("Hardin" or "Hardin School-Age"). Fairview has a site supervisor,[12] master teacher, teacher, cook, teacher assistants, and associate teachers, for a total of approximately seven employees. Fairview is also the centralized storage location or "hub" for

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[8] For ease of reference, I will refer to the central administration office as the "Gilroy headquarters" or "main office" while I will refer to the school facility located on the other floor of the same building as "Los Arroyos".

[9] The name of the female janitor/custodian is not in the record, but there is evidence that she splits her time between Los Arroyos and another Employer facility, Ochoa Migrant Child Development Center ("Ochoa Migrant"). The parties stipulated that it is appropriate to include this janitor/custodian position in the unit.

[10] Ochoa Migrant also serves a separate homeless population between about December through February. There are approximately five staff members during this three month season.

[11] Like Gilroy, Morgan Hill is located in Santa Clara County.

[12] The name of the Fairview site supervisor is absent from the record.

various supplies utilized by the Employer at all of its facilities. As such, Facilities Coordinator Jim Zamzow, a stipulated supervisor, works out of the Fairview location, as does maintenance specialist Rodolfo "Rudy" Gomez, who is supervised by Zamzow.

At Hardin, the Employer employs two regular employees and one temporary employee, including site supervisor Xiomara Ventura. At Southside Migrant, the Employer employs about five employees in the classifications of master teacher, teacher assistant, cook, and associate teacher. Southside Migrant operates from approximately June through mid-November each year.

In Soquel, which is in Santa Cruz County, the Employer operates Go Kids Pre-School at Soquel ("Lion Cub's" Child Development Center). The Soquel facility generally does not serve a migrant population and does not utilize seasonal employees. At Soquel, the Employer employs approximately five employees in classifications which include teacher, cook, and associate teacher or teacher assistant.[13] The site supervisor at Soquel will also be acting as the site supervisor for the Employer's Watsonville location (discussed below) when that facility opens in the near future. The Soquel facility is licensed to handle up to 36 children, but typically handles approximately 28 to 32 children.

At the hearing, the Employer put on evidence that it is planning to open the Go Kids Pre-School at Via Del Mar, which will be located at 120 West Beach Street in Watsonville, and that it hopes to open the school on or soon after January 9, 2006.[14] The site director currently at the Soquel location will divide her time between the Soquel and Watsonville locations at such time. The Employer is licensed to care for 32 children at Watsonville, in the same range as at Soquel. Although the hiring/interviewing process for the Watsonville school had not yet been completed

[13] The Employer has determined that the cook assigned to Soquel will be splitting his/her time between the Soquel and Watsonville locations once the Watsonville location opens.

[14] As of the date of the hearing, Gilroy-based Deputy Director Kathy Boettcher was already spending a great deal of time at the Watsonville facility assisting in the preparations for the opening of that facility.

as of the time of the hearing, the Employer provided evidence that it expected to hire two teachers and two teacher assistants for that school. The Employer also intends to hire a master teacher for the Watsonville site, so that all state law licensing and regulatory requirements are satisfied at Watsonville at times when the site supervisor is present at Soquel rather than Watsonville. It is the Employer's expectation that the terms and conditions of employment of the anticipated Watsonville employees will be almost identical to those of employees at the Employer's other locations. However, certain Watsonville teaching employees will be receiving somewhat higher wage rates than the comparable employees receive at the Employer's other facilities, due to a Watsonville living wage ordinance, which was an express condition of the Employer's receipt of the work from the City of Watsonville.

The Employer's Community Outreach and Resource and Referral Locations

In addition to the above-described schools, the Employer also operates community outreach and resource and referral ("R&R") facilities. In Gilroy, for purposes of serving Santa Clara County, the Employer operates a community outreach facility (also known as the Neighborhood Information and Referral ("NIR") facility) out of the Employer's Moro Drive headquarters. At this same Gilroy headquarters location, the Employer also operates the Glen View Alliance Neighbors Achieving Success, or "GANAS" program, another community outreach program. The employees of the Gilroy main office who have community outreach and/or R&R functions, and who also are stipulated statutory supervisors include: FCC Program Coordinator Francis Jimenez, NIR Project Coordinator Keith Morales, and the presently vacant GANAS Project Coordinator position. The proposed bargaining unit employees who are working in the Gilroy outreach programs are the GANAS Community Outreach Specialist,

GANAS School Community Liaison, two NIR Project Resource Coordinators, a Program Specialist and an Education Coordinator.

The San Benito County R&R facility is located at 1111 San Felipe Road in Hollister. The employees at this facility include the following stipulated statutory supervisors: R&R Services Program Director Kendra Bobsin, R&R Program Coordinator Lupe Perez, and Training Coordinator Cindy Torres.[15] Bobsin supervises Perez and Torres at their mutual Hollister office, and also supervises Gilroy headquarters-based stipulated statutory supervisor FCC Program Coordinator Frances Jimenez. It does not appear from the record that there are presently any potential bargaining unit employees working at the Hollister R&R facility.

The Monterey County Resource and Referral facility was formerly located at 294 Green Valley Road, Suite #330 in Watsonville, but closed shortly before the hearing and has moved to a location at 120 West Beach Street in Watsonville, in the facility that will also house the soon to be opened Go Kids Pre-School at Via Del Mar. The Watsonville R&R office employs, and has for several years employed, two Program Specialists. These two program specialists are continuing to perform the same functions since the relocation from Green Valley Road to West Beach Street. It does not appear from the record that any of the stipulated statutory supervisors work primarily in the Watsonville R&R office.

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[15] Also employed at the San Benito County R&R location are the R&R Specialist, Elvira Torres, and her daughter (whose name is not in the record), who serves as the R&R Program Assistant. With respect to the R&R Program Assistant position, the parties stipulated that this is a non-employee, independent contractor position that should be excluded from the unit, and I find that that position is excluded from the unit. With regard to the R&R Specialist position, I note that this job title was not included in the proposed unit, and that one of the unit exclusions is "all other employees". However, neither of the parties specifically took a position or provided evidence regarding whether, much less why, this position should be excluded from the unit. The record also shows that the term "specialist" is used in the job title of several bargaining unit positions (e.g., program specialist, community outreach specialist) but is not used in the job title of any stipulated statutory supervisor positions. I also note that there is testimony regarding the R&R Specialist and that no one ever raised the point during the hearing that the R&R Specialist was to be excluded from the unit. In these circumstances, I conclude that the intent of the parties is not clear, and there is insufficient evidence for me independently to exclude the R&R Specialist from the unit. Therefore, the R&R Specialist will be permitted to vote in any election resulting from this petition, subject to challenge. I also note that the record shows that the R&R Specialist does not have any kind of teacher requirement or any kind of certification.

The Employer's Use of Seasonal Employees

As noted above, Ochoa Migrant has a season that lasts from May through October each year, while Southside Migrant typically operates from approximately June through mid-November. The Employer utilized approximately 16 seasonal employees in teaching-related positions (e.g., teacher, associate teacher, teacher assistant) during the most recent season, which began in the spring of 2005. The Employer's starting point in hiring seasonals for a given year is to look at the list of seasonals from the prior year to whom "reemployment letters" will be sent.[16] Such letters typically announce the dates for the upcoming season, who the site supervisors will be at each pertinent location, and other background information. The reemployment letters also include application forms and related paperwork such as W-4 forms and I-9 forms.

At the end of each season, the seasonal employees participate in exit interviews in which they receive information about unemployment benefits. At these interviews, those seasonal employees who have not worked out well and are unlikely to be hired the next season are informed of their doubtful prospects. Those employees who did perform satisfactorily and would like to return in future seasons sometimes will inquire about their prospects, and will be informed that they will receive their reemployment letter in March or early April. The departing seasonal employees typically receive standardized form letters from the Employer which describe them as "terminated," but the more accurate term, "laid off", was used by the parties throughout the hearing. The seasonal employees also receive performance evaluations, which set forth goals that the Employer would like them to achieve during the offseason in anticipation of

[16] While the Employer also utilizes its website to advertise for job openings, and posts job opening advertisements at a local community college and in the newspaper, it appears that the Employer utilizes these resources only after, or in order to supplement, its initial hiring efforts through the use of the reemployment letters. I note also that the Employer generally posts available positions internally (so that existent employees become aware of them first) prior to posting them in any public manner.

future rehire. While seasonal employees are not "guaranteed" reemployment, the majority of seasonal employees in fact return from season to season.

The Employer's Supervisory Structure[17]

At the top of the Employer's managerial hierarchy are stipulated statutory supervisors Executive Director Lawrence "Larry" Drury, Finance Director Pat Delbene, and Human Resources Manager Helen Barcellos, all of whom work out of the Employer's Gilroy headquarters and report to a Board of Directors. Beneath Executive Director Drury are stipulated statutory supervisors Deputy Director Kathy Boettcher and Health and Nutrition Coordinator Kim Roth, each of whom work at the Gilroy headquarters. Beneath Finance Director Delbene are stipulated statutory supervisors Accounting Coordinator Veronica (last name unknown) and Fiscal Administrative Assistant Richard Zander, each of whom work at the Gilroy headquarters. Beneath HR Manager Barcellos are stipulated statutory supervisors CARES/HR Program Assistant Sandra Castaneda, Administration Coordinator Todd Tevis, and Facilities Coordinator Jim Zamzow.[18]

Beneath Deputy Director Boettcher is the currently vacant, but stipulated supervisor position of, child development centers program director, which also operates out of the Gilroy headquarters. This vacant child development centers program director normally supervises the stipulated statutory supervisor position of program coordinator (currently occupied by Lupe Vella at the Gilroy main office) as well as the eight site supervisors at the eight school sites. Also beneath the deputy director position, but currently being performed by Executive Director

[17] At the hearing, the parties stipulated to the exclusion of several job classifications as statutory supervisors, based on the fact that the persons in these positions have and exercise the authority to impose discipline. That stipulation applies to all positions described in this section as supervisory, with the exception of local site supervisors at the Employer's individual school locations. As to such local site supervisors, the parties further stipulated that they should be excluded as statutory supervisors, but on the basis that site supervisors have the authority to effectively recommend discipline and to assign work based on independent discretion and judgment.

[18] While Zamzow works at the Employer's Fairview location in Hollister, Castaneda and Tevis work alongside Barcellos at the Gilroy headquarters.

Drury on a temporary basis, is the currently vacant and unfunded but stipulated supervisor position of outreach services program director, also based at the Gilroy headquarters. The outreach services program director normally supervises the stipulated statutory supervisor position of NIR project coordinator, currently occupied by Keith Morales in the Gilroy main office, as well as the stipulated statutory supervisor position of GANAS project coordinator (currently vacant).

The Employer's Centralized Operations

Executive Director Drury and Human Resources Manager Barcellos exercise a substantial degree of control over the Employer's operations from the Gilroy headquarters on Moro Drive. Barcellos and Drury testified that labor relations and human resources for all locations are centralized at the Gilroy headquarters, a conclusion that is supported by substantial evidence in the record. From the Gilroy headquarters, Barcellos is involved in all termination and other disciplinary decisions for all locations in all cities. Barcellos routinely visits all sites for safety audits on a quarterly basis, and testified that she is in constant communication with the various locations. Barcellos visits each site from one to three times per month in connection with various personnel matters. Barcellos presides over monthly site supervisor meetings which take place at the Gilroy headquarters. These supervisor meetings include the supervisors from each of the Employer's facilities, including the site supervisors from the Soquel and/or Watsonville locations.[19] In addition, any employee at any location is free to contact Barcellos directly about human resource or personnel issues without any need to first go through a formal chain of command.

[19] Similarly, Deputy Director Boettcher frequently confers with site supervisors when the site supervisors deliver their end of the month reports to the Gilroy headquarters, and Boettcher also visits each site at least once every two months.

The Employer also utilizes an employer-wide email system for purposes of announcements, with all employees having access to the Employer's computer system. There are also mailboxes at the Gilroy main office corresponding to each of the other sites so that employees at those sites can visit and pick up mail and other employer-distributed documents. Such materials placed in these mailboxes are picked up by employees or delivered to employees at the outlying sites at least once a week and sometimes twice a week.

While employee performance evaluations are initially prepared by local site supervisors, they are reviewed by Gilroy headquarters Deputy Director Boettcher before they are provided to employees, and the final copies of the evaluations are retained at the Employer's Gilroy headquarters. Boettcher and/or Barcellos then work collaboratively with the site supervisors to determine whether raises are appropriate in light of the evaluations and the Employer's budget situation.

Gilroy-based Program Coordinator Lupe Vella is the person who secures substitutes when teachers or other employees are ill or unavailable, and it is Vella who moves personnel among the facilities as necessary in order to assure proper student to teacher or child to caregiver ratios at each facility. While Vella utilizes a list of available possible substitutes, and takes into consideration the needs of various employees to receive a certain number of hours of work in order to retain their full-time regular status, it does not appear from the record that there are any geographical restrictions upon Vella's efforts to obtain suitable substitutes.[20] Vella considers and recommends approval or disapproval of employees' extended vacation requests at all locations, with an eye toward ensuring compliance with minimum staffing requirements. From

[20] Drury testified that substitutes are obtained for Soquel in the same way that they are obtained for the Employer's other sites.

the main office, Vella also processes supply requisitions from all sites,[21] and makes eligibility determinations with respect to families seeking partial subsidization of their children at any or all sites.

Other supervisory personnel from the Employer's Gilroy headquarters regularly visit all school sites in the course of their routine duties. For example, Administration Coordinator Todd Tevis visits all sites in order to address computer, phone or similar technical problems, and the Employer utilizes a common computer server for all sites. Health and Nutrition Coordinator Kim Roth visits each school site at least once a month in the course of meeting with the cooks for the purpose of developing and refining a standardized menu used at all school locations. Finance Director Pat Delbene and Accounting Coordinator Veronica (Last Name Unknown) visit the various sites to conduct financial audits, and there are technological shifts in progress which are expected to render the process of billing and collection from parents more rather than less centralized in the future.[22] Similarly, there are non-Gilroy based personnel (Hollister Fairview-based Facilities Coordinator Jim Zamzow and Hollister Fairview-based Maintenance Specialist Rodolfo Gomez) who frequently visit all sites (including Soquel) in order to perform their repair and maintenance-related duties.

The formalized professional creative curriculum for preschool children through grade school that is in effect at all of the Employer's school locations is developed at and promulgated by the Gilroy main office. While individual schools may vary the order in which they cover certain subjects, they are not permitted to stray from the curriculum content in any manner.

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[21] Although the actual supply storage facility is located in Hollister at the Fairview location, the supply "wish lists" from site supervisors are received and approved or disapproved by the Gilroy headquarters.

[22] There is also evidence that certain Gilroy headquarters-based non-supervisory personnel have occasion to visit all other sites, such as non-supervisory Education Coordinator Joy Blanding's visits to other sites to meet with site supervisors in an effort to ensure that the individual sites are adhering to centralized curriculum standards.

The Employer also utilizes a centralized and integrated budgetary system. Though each individual facility has its own operations budget, all of the budgets are "rolled together" into one budget prepared at the Gilroy headquarters by finance personnel with the input of the site supervisors. Accounting personnel such as the Gilroy-based Accounting Coordinator and Finance Director work with site supervisors to ensure that the sites' monthly budgets conform to the Employer's overall annual budget.[23] In addition, all payroll functions for all sites are handled in the Gilroy main office. Finally, the Gilroy main office (through Drury) handles all contracting with outside companies for maintenance that cannot be performed by the Employer's own maintenance specialist, and is responsible for all of the Employer's leases, rents and other facility-related and building management issues.

THE POSITIONS OF THE PARTIES

As amended at the hearing, the Petitioner seeks a unit comprised of all master teachers, teachers, teacher assistants, cooks, and janitors/custodians employed at any of the Employer's Gilroy, Morgan Hill, or Hollister locations. The Petitioner also seeks to have included in the unit the following employees who are employed at the Employer's community outreach and resource and referral facilities located in Gilroy and Hollister: the program specialists, community outreach specialists, school community liaisons, maintenance specialists, janitors, custodians, resource coordinators, and education coordinators. The Union seeks to exclude all other employees, including the seasonal employees. The Employer agrees to the inclusion of the above-referenced job classifications in the unit; however, it adheres to its position that the seasonal employees must be included in the unit, and that all of the Employer's locations,

[23] As an illustration of the way in which the individual facilities financially affect each other in this manner, the Employer presented evidence that the Soquel facility has recently been losing money, but that the Employer intends to attempt to keep it open by taking steps such as utilizing a site supervisor and cook who will both split their time between Soquel and Watsonville in order to save money at Watsonville that can be used to help cover expenses incurred at Soquel.

including Soquel and Watsonville, must be included in the unit in order for it to be found appropriate.

ANALYSIS

I. Status of Seasonal Employees

The first issue in this case is whether the Employer has regular seasonal employees, who should be included in the unit with the full time and regular part time employees, or whether the Employer's seasonal employees are casual or temporary seasonal employees, who should be excluded from the unit. In determining whether seasonal employees are regular seasonal employees who have a sufficient community of interest with the full time and regular part time employees to warrant their inclusion in the same unit, a key factor is whether the seasonal employees have a reasonable expectation of future employment with the employer. In determining whether seasonal employees have such an expectation, the Board will consider actual commitments made to employees about future employment and will examine whether the evidence as a whole demonstrates that the employees have a reasonable expectation of re-employment. I also note that the burden of proof is upon the party who seeks to disenfranchise the employees, which in this case is the Petitioner. See *A L Investors Orlando, LLC, d/b/a Pavilion at Crossing Pointe*, 344 NLRB No. 73, slip op. at 3 (2005); *Laneco Construction Systems*, 339 NLRB 1048 (2003).

In assessing the expectation of future employment among seasonal employees under the circumstances as a whole, the Board considers such factors as the stability of the Employer's labor requirements and the extent to which it is dependent upon seasonal labor; the actual reemployment season-to-season of the worker complement; the Employer's recall or preference

policy regarding seasonal employees; the comparative terms and conditions of employment of the regular and seasonal employees; the evidence of transition from seasonal to regular employment; and the size of the area labor force. *Maine Apple Growers, Inc.*, 254 NLRB 501, 502 (1981); *Baumer Foods, Inc.*, 190 NLRB 690 (1971); *Macy's East*, 327 NLRB 73 (1998).[24] I turn now to an application of these factors.

Stability of the Employer's Labor Requirements and Dependence Upon Seasonal Labor

In this case, the evidence shows that there is a strong degree of stability to the Employer's labor requirements, because it consistently has used a significant number of seasonal employees for the same periods each year.[25] Ochoa Migrant is open from approximately May through October each year, while Southside Migrant operates from approximately June through mid-November each year. Moreover, the record demonstrates that at least for the last several years, the Employer has consistently hired over 10 seasonal employees to work at the migrant oriented schools, rather than assigning that work to its regular full time or part time employees. Thus, the evidence establishes that the Employer has stable season labor requirements and that it is dependent on seasonal labor to perform the seasonally based work at its migrant oriented schools. *California Vegetable Concentrates*, 137 NLRB 1779 (1962).

Actual Reemployment Season-to-Season of the Worker Complement

The Board has traditionally found that seasonal employees can be deemed to have a reasonable expectation of future employment where at least 30% of an employer's seasonal employees have previously worked for the Employer. See *Kelly Brothers Nurseries, Inc.*, 140

[24] I note that the Employer's handbook uses the term "temporary" rather than "seasonal" or "migrant" to describe the employees. However, the Employer's choice of how to label the employees is not determinative. For example, where an employer calls back a substantial number of the same employees each year, even though they are described as "temporary," they are included in the unit. *Tol-Pac Inc.*, 128 NLRB 1439 (1960).

[25] Further, the Employer is subject to various state-mandated requirements as to the numbers of licensed or otherwise certified personnel who must be present in order to have an appropriate ratio of children to instructors or caregivers.

NLRB 82, 85 (1962); *Saltwater, Inc.*, 324 NLRB 343 (1997). In the instant case, although the parties did not produce years of employment records for the purposes of analysis or computation, I find it significant that of approximately 16 seasonal employees who worked during the 2005 season, 13 of these employees had worked as seasonals during the 2004 season, an 81% returnee rate, far in excess of the 30% minimums set forth in the above-referenced cases.[26] Under the circumstances, I find that these substantial numbers of actual reemployment strongly support the inclusion of seasonal employees in the unit in this case.

Employer's Recall or Preference Policy

Turning to the Employer's recall or preference policy regarding seasonal employees, I find that the evidence supports a finding that the Employer makes a concerted effort to rehire employees who have previously worked for it. The Employer testified without contradiction that its main source of seasonal employees is its previous seasonal employees. In this regard, the Employer utilizes a list of employees to whom it sends "reemployment" letters each spring. The letters are sent to those persons the Employer believes are interested in returning to work for it and whom the Employer would like to have return. The performance appraisals given employees at the end of each season expressly set forth goals the Employer would like to see the employees reach before their return the next season. While the Employer testified that no "guarantees" of future employment were made to departing employees, and that such employees would have to reapply each year, I find that the Employer's above-described practices regarding the rehiring of former seasonal employees amply demonstrates that it has a de facto preference policy, and therefore, this evidence supports a finding that the Employer's migrant school employees have a reasonable expectation of reemployment. See *Musgrave Manufacturing*

[26] There is also evidence that several of the seasonal employees have worked as seasonal employees for the Employer for over ten years.

Company, 124 NLRB 258, 261 (1959); *Bogus Basin Recreation Association*, 212 NLRB 833 (1974); *Aspen Skiing Corp.*, 143 NLRB 707, 711 (1963); *Micro Metalizing Co.*, 134 NLRB 293 (1962) (preference given to former employees in rehiring supports inclusion of regular seasonal employees even where no preferential hiring list is utilized); Accord: *California Vegetable Concentrates, Inc.*, 137 NLRB 1779, 1780 (1962).

Terms and Conditions of Employment of Permanent and Seasonal Employees

The Board also considers whether the duties, working conditions, supervision and/or benefits are substantially similar for both permanent and arguably seasonal employees. *Kelly Bros. Nurseries*, 140 NLRB 82, 85 (1962); *California Vegetable Concentrates, Inc.*, 137 NLRB 1779, 1780 (1962). In this case, I find that this factor strongly supports inclusion of the seasonal employees in the unit. The record evidence establishes that the wages and terms and conditions of employment of the permanent and seasonal employees are almost identical. The permanent and seasonal employees work side-by-side at those locations where seasonal employees work, perform the same duties, work the same hours, receive the same orientation and training, utilize the same break rooms, are subject to the same evaluation/appraisal process based upon the same employer expectations, and are supervised in the same manner. While seasonal employees concededly receive different Employer-provided benefits than do regular full time employees,[27] and while seasonal employees are not present at all of the Employer's locations, I find that these dissimilarities are markedly outweighed by the numerous similarities in the terms and conditions of employment of seasonal and regular employees discussed above.

[27] I note, however, that even among regular employees, benefits are afforded to full time (at least 30 hours per week) but not part time (less than 30 hours per week) employees, thus suggesting that benefits serve to differentiate full time from part time employees at least as strongly as they differentiate regular from seasonal employees.

Transition from Seasonal to Permanent Employment

The Board also considers the opportunity employees have to go from seasonal to permanent employment. *California Vegetable Concentrates*, 137 NLRB at 1780; *Winkie Mfg. Co., Inc.*, 338 NLRB No. 106 (2003), affirmed 348 F.3d 254 (7th Cir. 2003). In the present case, there was evidence that at least some of the regular full time employees were seasonal employees prior to obtaining their full time positions.[28] Furthermore, the record reflects no prohibition upon seasonal employees seeking permanent employment. The evidence on this factor gives some additional support to my conclusion that the employees in issue in this case are seasonal employees who should be included in the unit.

Size of the Area Labor Force

I find that the record contains limited evidence with respect to the size of the area labor force and the particular geographical area in which the labor force resides.[29] I conclude that this limited evidence is insufficient to support or undermine my seasonal employee finding. See *Maine Apple Growers, Inc.*, 254 NLRB 501, 503 (1981) (party need not demonstrate a positive finding for each factor in order to sustain a finding of reasonable expectation of future employment).

In light of the above, and particularly taking into account the 81% return rate, the identical working conditions of seasonal and permanent employees, the de facto recall preference policy, and the possibility of promotion from seasonal to permanent, I find that the employees at

[28] Teacher assistants Gladiz Haro and Esperanza Gonzalez, and Teacher Anita Grijalva, all started as seasonal employees before accepting regular full time positions with the Employer. With regard to the rest of the Employer's current regular full and part time employees, the record is silent regarding whether they had or had not previously been employed by the Employer as seasonal employees.

[29] There is evidence in the record that many of the persons who serve as seasonal employees during the May/June through October/November season reside in Arizona or Texas during the offseason. There is also some anecdotal evidence as to certain employees who reside and work in the same city (e.g., employee Gloria Santos in Hollister).

issue in this case must be considered seasonal rather than temporary or casual employees, and that they should therefore be included in the unit.[30]

II. Appropriateness of the Petitioned-for Unit

I turn now to the second and final issue I must decide, the appropriate unit scope. Resolution of this issue begins with an examination of the petitioned-for unit. Only if it is inappropriate will alternative units be found. *Bartlett-Collins Company*, 334 NLRB 484 (2001). In making a determination as to whether a petitioned for unit is appropriate, the Board has held that Section 9(a) of the Act only requires that the unit sought by the petitioning union be an appropriate unit for purposes of collective bargaining. Nothing in the statute requires that the unit be the only appropriate unit or the most appropriate unit. See *Morand Brothers Beverage Co.*, 91 NLRB 409, 418 (1950); *National Cash Register Co.*, 166 NLRB 173, 174 (1967); *Dezcon, Inc.*, 295 NLRB 109, 111 (1989). Moreover, a union is not required to request representation in the most comprehensive or largest unit of employees of an employer, unless an appropriate unit compatible with the requested unit does not exist. *Visiting Nurses Association of Central Illinois*, 324 NLRB 55 (1997); *P. Ballentine & Sons*, 141 NLRB 1103, 1107 (1963). A union's desire is always a relevant, but not dispositive, consideration. *E.H. Koester Bakery & Co.*, 136 NLRB 1006 (1962). Where a petitioned-for unit is not appropriate, the Board may examine the alternative units suggested by the parties. *Boeing Co.*, 337 NLRB 152, 153 (2001); *Overnite Transportation*, 331 NLRB 662, 663 (2000).

As referred to above, here the Petitioner is seeking a multi-location unit.[31] In determining whether such units are appropriate, the Board considers whether the petitioned-for multi-location

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[30] See *Maine Apple Growers*, 254 NLRB 501, 503 (1981) (assuming existence of other pertinent factors, reasonable expectation of future employment requires only that seasonal employees be permitted to reapply the next season and that some of them be in fact rehired).

[31] Because the Union has petitioned for a multi-facility unit, it cannot avail itself of any single facility presumption in this case. *NLRB v. Carson Cable TV*, 795 F.2d 879 (9th Cir. 1986); *Hazard Express*, 324 NLRB 989 (1997).

unit has a sufficiently distinct community of interest from the employer's other facilities. *Laboratory Corporation of America Holdings*, 341 NLRB No. 140 (2004). In making this analysis, the Board evaluates the following factors: the employees' skills and duties; their terms and conditions of employment; employee interaction and interchange; centralized control of management and supervision; the functional integration of the Employer's operation; geographic proximity; and bargaining history. *Basha's, Inc.*, 337 NLRB 710, 711 (2002); *Alamo Rent-A-Car*, 330 NLRB 897 (2000); *Clarian Health Partners*, 344 NLRB No. 28, slip op. at 3 (2005).

Applying these factors more fully below, I conclude that the petitioned-for unit comprised solely of Gilroy, Morgan Hill and Hollister locations but excluding Soquel and Watsonville locations is not appropriate, because the Gilroy, Morgan Hill and Hollister employees do not share a community of interest distinct from the community of interest they share with the employees in Soquel and Watsonville. Indeed, the petitioned-for unit is exactly the sort of arbitrary grouping that the Board has recently viewed with disfavor. See *Laboratory Corporation of America Holdings*, 341 NLRB No. 140 (2004); *Stormont-Vail Healthcare, Inc.*, 340 NLRB No. 143 (2003); *Clarian Health Partners, Inc.*, 344 NLRB No. 28 (2005).

Employee Skills, Duties and Job Functions

At the first day of hearing, HR Director Barcellos testified that there are no differences in the jobs and responsibilities of the employees at the Soquel location and those of the Gilroy, Morgan Hill or Hollister locations. Given the Employer's stated intent to hire two teachers, two teacher assistants and a master teacher for the Watsonville school, and the fact that the unopened Watsonville facility is licensed to handle approximately the same number of children as the now 10-year old Soquel facility, there is no basis to suggest that the duties and responsibilities of the Watsonville school employees will be any different from those of the Gilroy, Morgan Hill,

Hollister and Soquel employees. Thus, but for the fact that Soquel does not employ seasonal workers and it is not yet known with certainty whether Watsonville will require the employment of seasonal workers, the Soquel and Watsonville locations either employ or will be employing persons in the same teacher, teacher assistant, associate teacher and cook classifications as are employed at the Gilroy, Morgan Hill and Hollister locations. They will be serving the same types of students at largely the same places and performing the same educational and related functions.

Terms and Conditions of Employment

Method of Pay/Similarity in Wages

The teaching salary ranges for the various unit positions apply at all locations, including the Soquel and Watsonville locations Petitioner seeks to exclude. See Employer's Exhibit 2. While it is anticipated that certain Watsonville personnel will receive somewhat higher hourly wages pursuant to a local living wage ordinance in that city, I do not find that compliance with this municipally imposed condition detracts from the overall uniformity of the Employer's wage structure throughout its locations. See *Acme Markets, Inc.*, 328 NLRB 1208, 1209 (1999) (finding employerwide unit spanning states of Pennsylvania, Delaware, Maryland and New Jersey appropriate notwithstanding higher salaries in New Jersey and Delaware locations).

Benefits

Employees are eligible to receive the same health insurance and other Employer-provided benefits so long as they continue to maintain their full time status by working in excess of 30 hours per week. However, it does not appear that an employee's entitlement to benefits in any way depends upon the location at which the employee works. There is no evidence in the record supporting the conclusion that the Soquel and Watsonville employees have received or will

receive benefits that differ in any way from those received by employees in Gilroy, Morgan Hill and Hollister. See *J.C. Penney Company*, 328 NLRB 766 (1999) (requiring inclusion of telemarketers in unit of catalog employees where telemarketers share benefits with other unit employees so long as averaging 25 or more hours of work per week). Therefore, this factor supports the Employer's position that the multi-location unit sought by the Petitioner is not an appropriate unit.

Other Terms and Conditions of Employment

The Employer's employee handbook applies to all employees regardless of their location. Teachers receive the same orientation from Gilroy headquarters personnel regardless of the site and city to which they will be assigned. The record reflects that the Employer is or will be utilizing the same types of unit positions at Soquel and Watsonville that it utilizes at the petitioned-for Gilroy, Morgan Hill and Hollister locations. All school facilities regardless of location are open from 6:00 or 6:30 a.m. to 6:00 p.m., and all or virtually all employees work eight hour shifts, and are subject to the same overtime policies and opportunities. The R&R and community outreach offices are generally open from 8:00 a.m. to 5:00 p.m., but their employees work eight hour shifts like the teaching personnel. The parties pointed to no substantial differences in day-to-day working conditions as between the preschool employees who work in one city and those who work in another city, other than those minor differences resulting from differences in the respective buildings.

I note the existence of some factors that are shared only by some of the employees at the Gilroy, Morgan Hill and Hollister locations. For example, it appears from the record that in the summertime there are jointly conducted field trips in which school age students from Los Arroyos in Gilroy, Morgan Hill School-Age, and Hardin School Age in Hollister participate, and

there is no evidence in the record to suggest that students from Soquel or Watsonville participate in these jointly conducted field trips.[32] Further, there is apparently no seasonal employment in Soquel, while there is seasonal employment at Ochoa Migrant in Gilroy and Southside Migrant in Hollister. I find that these isolated factors are strongly outweighed by the similarities in terms and conditions of employment shared by the employees at all locations in this case.[33]

Thus, taking all of these factors into account, I conclude that the similarities in wages and other terms and conditions of employment as between the Gilroy/Morgan Hill/Hollister employees and the Soquel/Watsonville employees supports the Employer's position that the multi-location unit sought by the Petitioner is not an appropriate unit.

Employee Interaction and Interchange

While the parties did not introduce documentary evidence confirming the frequency with which interchange has occurred, the record anecdotally reflects interchange both in the form of long term movement between locations (permanent transfers) and in the form of short term movement between locations (e.g., employees substituting for temporarily ill or absent personnel).

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[32] I further note that it appears that these field trips are limited to school age children, such that there is no participation by those Gilroy, Morgan Hill and Hollister teachers who teach infant or preschool students.

[33] At the hearing, the Petitioner argued that it would not be appropriate to include the as yet unopened Watsonville location because it would be unduly speculative to evaluate the terms and conditions of employment of employees who have not yet been hired or begun working. Petitioner cited no Board cases in support of its position in this regard. To the contrary, I find that, in view of the Employer's plans and its preliminary steps to carry out that plan, it is permissible and appropriate for me to rely upon the evidence in the record with respect to the Employer's plans or intentions with respect to this facility. See *Laboratory Corporation of America Holdings*, 341 NLRB No. 140, slip op. at 4 (2004) (evaluating individual's supervisory authority in light of Employer's planned future changes); *Clarian Health Partners, Inc.*, 344 NLRB No. 28, slip op. at 3 (2005) (evaluating functional integration of employer's multiple facilities including consideration of employer's under construction but not yet completed or occupied central medical laboratory). As previously noted, the evidence at the hearing for the most part established that the Employer intends to operate the Watsonville school in the same way it has operated the now 10-year old Soquel location (which is licensed for approximately the same amount of children as Watsonville), a likelihood bolstered by the Employer's intent to have a shared site supervisor between the Soquel and Watsonville locations. In the event that the Watsonville facility opens in the near future as anticipated, and Petitioner subsequently learns that that facility is being operated in a manner that is significantly different than that claimed by the Employer at the hearing, the Petitioner may then submit its evidence and arguments to the Region at that time

The Employer introduced evidence that it averages approximately three permanent transfers per year among its eight locations. While the Board routinely gives less weight to voluntary interchange driven by the convenience or personal needs of employees rather than the operational demands of the employer,[34] it appears that a permanent transfer of an employee from Gilroy to Soquel addressed in the record was not employee-initiated but rather was instigated by the Employer. The Employer also introduced evidence that approximately half of all transfers are employer-initiated. As further examples of permanent transfers, associate teachers Mercedes DeHaro and Esmeralda Garcia have worked in Gilroy, Morgan Hill, and Hollister, both in regular year-round schools and in seasonal migrant facilities. Master Teacher Christine Perry has worked at both Hollister and Gilroy facilities. Teacher Assistant Esperanza Gonzalez who initially worked at Gilroy (as a seasonal employee) has substituted at Morgan Hill, Hollister, and Gilroy locations. Teacher Anita Grijalva worked in Hollister at Southside Migrant and Hardin School-Age, but now works at the Los Arroyos school in Gilroy. Seasonal associate teacher Wendy Franco works at Ochoa Migrant in Gilroy during its season but then works at Southside Migrant in Hollister during the short period in which Ochoa is closed but Southside remains open. The Employer also asserted that it frequently ends up hiring especially talented or accomplished substitute teachers as regular teachers, which entails re-assignment from the migrant school to one of the year round schools.

Turning to temporary transfers, the Employer testified that, on average, it sends a substitute to each facility about once every three or four months, except for Los Arroyos, where the rate is about once every two months. The evidence also shows that, because the seasonal

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[34] See *New Britain Transportation Co.*, 330 NLRB 397, 398 (1999); *D&L Transportation*, 324 NLRB 160, 162 n. 7 (1997); *Red Lobster*, 300 NLRB 908, 911 (1990). I also note that the Board attaches less weight to permanent transfers than temporary transfers. See *Red Lobster*, 300 NLRB 908, 911 (1990); *Lipman's, a Division of Dayton-Hudson Corporation*, 227 NLRB 1436, 1438 (1977).

employees at Ochoa Migrant have a relatively short work season, they are used as substitutes more frequently than others, especially during the periods when their school is closed. I note that the Employer only rarely re-assigns regular full time employees to other facilities; rather, it usually utilizes "permanent subs" who go from school to school and city to city as needed, including at least one substitute who was assigned to the Los Arroyos facility in Gilroy but who has also substituted at the Soquel and Hollister locations.

The Employer's Executive Director also testified that there are approximately two to three more extended (in excess of one month) temporary transfers per year, and that the number of temporary transfers has been essentially equal between all locations, but for the Morgan Hill location, which opened more recently and correspondingly has a less established history. See *Stormont-Vail Healthcare, Inc.*, 340 NLRB No. 143, slip op. at 3 (2003) (relying upon evidence of some interchange in course of finding unit wider than petitioned-for unit to be appropriate).

In addition to permanent and temporary transfers, the record shows that the employees from the different locations come together four times a year for employer-provided trainings or "in-services".[35] Additionally, the Employer utilizes a common computer server for all locations, and employees from any location may visit the Gilroy headquarters to pick up their mail (unless the mail is delivered to them by Gilroy-based personnel). Finally, in addition to the Gilroy-based management personnel who routinely visit all sites (e.g., Drury, Boettcher, Barcellos, Tevis, etc.), the Employer utilizes both managerial and non-managerial maintenance and other personnel who visit all sites in order to perform their duties (Facilities Coordinator Jim Zamzow, Maintenance Specialist Rudolfo Gomez, Education Coordinator Joy Blanding).

[35] Each individual facility apparently has its own holiday party, rather than there being any common Employer party attended by employees of all or most facilities.

Based on all of the above, particularly the evidence of permanent and temporary transfers; the contact among employees by mail and at training sessions at the Employer's headquarters; and the supervisorial and non-supervisorial personnel who routinely visit each of the Employer's sites in order to perform their duties, I conclude that the interchange/interaction factor supports my conclusion that the employees at all locations share such a substantial community of interest as to require the inclusion of the Soquel and Watsonville employees in the unit.

Centralized Control of Management and Supervision

As discussed above, the Employer exercises a substantial degree of control over labor relations from its Gilroy headquarters through Executive Director Drury, Human Resources Manager Barcellos, and Deputy Director Boettcher.[36] Indeed, decisions regarding wages, benefits, employee rules, discipline, curriculum, menus, budgeting and maintenance are all made at the Employer's Gilroy headquarters. Also, each of the site supervisors is typically under the supervision of the Child Development Centers Program Director.

Although the site supervisors have statutory supervisory authority, this is beside the point in a case such as this one where the Petitioner is not seeking a single-facility unit. *Hazard Express*, 324 NLRB 989 (1997); *Capital Coors Co.*, 309 NLRB 322 n. 1 (1992). Rather, the present case is akin to *Basha's, Inc.*, 337 NLRB 710 (2002), in which the Board found that a unit comprised of seventeen grocery stores located in Maricopa County, Arizona was not appropriate given the exclusion of nearby stores in a different county, notwithstanding that the store managers at the 17 petitioned-for stores retained significant local autonomy and lacked supervisory power over other stores. In *Basha's*, as here, the skills and duties of the employees

[36] It is true that the parties stipulated that the individual local site supervisors at each of the sites constitute statutory supervisors, due not only to their authority to effectively recommend discipline but also their power to assign work using independent judgment.

as well as their other terms and conditions of employment were largely uniform among all stores, not simply among the 17 petitioned-for locations. See also *Alamo Rent-A-Car*, 330 NLRB 897, 898 (2000) (rejecting petitioned-for unit of only two of employer's four San Francisco facilities when there was no supervisory link between the two facilities not shared among all four facilities).

Functional Integration

The evidence strongly suggests a functionally integrated operation. As set forth in the previous section, the Employer has a strong centralized management structure and everything from the overall content of the curriculum down to the foods served by the cooks at the individual facilities is essentially the same. Maintenance and repair work and the supplies needed to perform the employees' work are all maintained on a centralized basis. Human resources functions, including all elements of the hiring process culminating in the extension of an offer of employment, are centrally administered from the Gilroy headquarters.[37] See *Stormont-Vail Healthcare, Inc.*, 340 NLRB No. 143, slip op. at 4 (2003). Just as in *Stormont-Vail*, the human resource department here plays the same role with respect to hiring, terminations and discipline at the locations Petitioner would include and those Petitioner would exclude. Just as in *Stormont-Vail*, the final hiring decisions are made and employment offers extended from the central human resources department, and the Employer utilizes a roster of permanent available substitute teachers not assigned to specific facilities, akin to the "float pool" in *Stormont-Vail*. As in *Stormont-Vail*, the employer's personnel policies apply at all locations, the pay scales are the same at the various locations, and the employees from all locations participate in the same orientations and quarterly training sessions. 340 NLRB No. 143, slip op. at 4 (2003).

[37] That individual site supervisors participate in certain aspects of the hiring process does not detract from the crucial role played by the Employer's Gilroy headquarters in the hiring process.

Like the Board's recent decision in *Clarian Health Partners, Inc.*, 344 NLRB No. 28 (2005) in which the Board found that the petitioned-for unit was artificially and unduly limited to two of an employer's three locations, here all of the Employer's facilities are overseen by a single board of directors who oversee all operations at all facilities, and to whom Finance Director Pat Delbene, Executive Director Larry Drury and Human Resources Manager Helen Barcellos are responsible. As in *Clarian*, job openings regardless of location are posted electronically on the Employer's website, and hiring preference is given to the Employer's current employees. 344 NLRB No. 28, slip op. at 3-4. In short, the extent of functional integration and centralization in this case is certainly not less than the Board found compelling in *Stormont-Vail* and *Clarian*.

Geographic Proximity

Turning first to the three cities which all parties agree are appropriately included in the unit, the record shows that the Ochoa Migrant facility in Gilroy is only 5.10 miles from the Employer's Gilroy headquarters on Moro Drive. Ranging outward, the Morgan Hill facilities at issue range from 8-10 miles from the Employer's Gilroy headquarters. The Hollister facilities range from 17-21 miles from the Employer's Gilroy headquarters. The distance between the various Morgan Hill and Hollister facilities is about 26 miles. Turning to the disputed locations, the Watsonville facility is approximately seventeen miles from the Gilroy headquarters,[38] 35 miles from Hollister, and 13 miles from Soquel. The Soquel facility is approximately 28.55 miles from the Gilroy headquarters, about 37 miles from Hollister, and about 47 miles from Morgan Hill.

[38] Specifically, the newly opened Watsonville R&R facility, along with the soon to be opened Via Del Mar Pre-School, are approximately 17.45 miles (and a 32 minute drive) from the Gilroy headquarters. The recently closed Watsonville R&R facility on Green Valley Road is approximately 16.65 miles (and a 29 minute drive) from the Gilroy headquarters.

At hearing Petitioner described the Soquel and Watsonville facilities as "geographically distant" and argued against their inclusion. However, I find that there is no basis to conclude that the purportedly excluded Soquel and Watsonville locations are significantly more remote than the purportedly included Hollister locations. The 28.55 mile distance between the Employer's Moro Drive headquarters in Gilroy and its Soquel facility is not substantially longer than the 21.44 mile distance between the Gilroy headquarters and the Southside Migrant location in Hollister which Petitioner seeks to include. The 17.45 miles between the Gilroy headquarters and the newly opened Watsonville facility on West Beach Street is actually less than the distance between the Gilroy headquarters and the Southside Migrant, Fairview, and Hardin facilities in Hollister that Petitioner seeks to include. Moreover, 29.76 mile distance between the Morgan Hill School-Age and Hollister Southside Migrant facilities the Petitioner seeks to include exceeds the 28.55 mile distance between the Employer's Gilroy headquarters and the Soquel location. I recognize that the distance between Soquel and Morgan Hill is about 47 miles, which is greater than the distance between any of the other locations. However, in view of the generally similar and substantial distances between the various facilities that are concededly in the unit, I have concluded that the geographic distance between the facilities does not detract from my conclusion that the petitioned for unit is not an appropriate unit. See also *Stormont-Vail Healthcare, Inc.*, 340 NLRB No. 143 slip op. at 4 (2003) (including 15 outlying clinics ranging from 10 to in excess of 50 miles away from employer's main campus in unit, where petitioner had already stipulated to inclusion of another facility 60 miles from main campus).[39]

[39] There is no evidence in the record with respect to the specific geographical area, if any, covered by the petitioning union local. In any event, the Board has long held that a union's territorial jurisdiction and limitations do not generally affect the determination of the appropriate unit. *Laboratory Corp. of America Holdings*, 341 NLRB No. 140, slip op. at 5 n. 12 (2004); *Groendyke Transport*, 171 NLRB 997, 998 (1968).

Bargaining History

The parties stipulated at the hearing that there was no prior bargaining history as to any of the Employer's facilities. Thus, I find that the bargaining history in this case neither necessitates nor precludes the placement of the employees at all locations in the same unit. See *Trane*, 339 NLRB No. 106, slip op. at 3, n. 4 (2003) (absence of bargaining history as neutral factor).

While there can be no doubt that the employees in the petitioned-for unit share a community of interest, the evidence fails to establish that it is separate and distinct from the community of interest they share with the Employer's other employees such as those in Soquel and Watsonville. Nor do the Soquel and Watsonville employees share a community of interest among themselves that is distinct from that which they share with the Gilroy, Morgan Hill and Hollister employees. Therefore, in adherence with the teachings of *Basha's*, *Alamo*, *Stormont-Vail*, *Laboratory Corp.*, and *Clarian Health Partners*, I find that the unit sought by the Petitioner is not an appropriate unit. Moreover, where, as here, the petitioned-for unit is inappropriate, and where no party has proposed or made an argument for any other alternative unit that would be smaller than an employer wide unit, an employer wide unit is the only one of the alternatives under consideration in this proceeding that is an appropriate unit.[40] See *Acme Markets, Inc.*, 328 NLRB 1208, 1210 (1999)

Date of Election

In deciding when to hold the election in seasonal employee cases, the Board tries to balance the twin goals of holding a prompt election while also enfranchising the greatest number of eligible employees. *Kelly Bros. Nurseries*, 140 NLRB 82 (1962). Although the Board may delay an election in a situation when an Employer's work force

[40] I note that the Employer's proposed employerwide unit is presumptively appropriate. See *Greenhorne & O'Mara, Inc.*, 326 NLRB 514 (1998); *Acme Markets, Inc.*, 328 NLRB 1208, 1209 n. 9 (1999)

is substantially greater at a seasonal peak than it is in the off season, here the Employer's regular complement of employees in the off season greatly outnumbers its seasonal employees. *Dick Kelchner Excavating Co.*, 236 NLRB 1414 (1978); *Oregon Frozen Foods Company*, 108 NLRB 1668 (1954); *Knouse Foods Cooperative, Inc.*, 131 NLRB 801 (1961). In cases where the numbers of regular employees is significantly greater than, or even roughly equal, to the number of seasonal employees, the Board has seen fit not to delay an election so as to best effectuate the Section 7 rights of year-round employees. See *Baugh Chemical Company*, 150 NLRB 1034 (1965). Therefore, if the Petitioner provides timely written notice of its willingness to proceed to an election in the Employer wide unit found to be appropriate in this case, I find that it will be appropriate to hold the election in this case as soon as possible, even if that precedes the commencement of the next migrant school season, which begins in or about May 2006.[41]

In the present case, the unit is comprised of approximately 63 teaching-related, cook or janitor/custodian positions, and 9 outreach positions (three program specialists, one education coordinator, one maintenance specialist, two NIR Project resource coordinators, one school community liaison, and one community outreach specialist) for an approximate total of 72 persons, of whom approximately 16 are seasonal employees.

CONCLUSIONS

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, including the parties' arguments made at the hearing, and in accordance with the discussion above, I conclude and find as follows:

[41] Given the Employer's evidence that at the end of each season it informs those seasonal employees whom it has no intent to rehire of the unlikelihood of their being rehired, the Employer correspondingly may be presumed to know those employees to whom it intends to send "reemployment" letters in Spring 2006.

1. The hearing officers' rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated, and I find, that the Employer is a California non-profit corporation with a facility and principal office located in Gilroy, California and facilities located in Santa Clara, Santa Cruz and San Benito counties, where it is engaged in providing childcare development centers for low income families. During the past 12 months, the Employer, in the course and conduct of its business operations, has had gross revenues in excess of $1,000,000 for the performance of its services, including funding in excess of $250,000 received directly from the State of California which in turn receives a portion of that funding from the United States Government. In such circumstances, I find the assertion of jurisdiction appropriate herein.

3. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of the Act.

4. The Petitioner claims to represent certain employees of the Employer, and, should the Petitioner timely notify the Region that it is seeking an election in the unit set forth below, a question affecting commerce will exist concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time, regular part-time, and regular seasonal master teachers, teachers, associate teachers, teacher assistants, cooks, program specialists, community outreach specialists, school community liaisons, maintenance specialists, janitors, custodians, resource coordinators, and education coordinators employed by the Employer at its Gilroy, Morgan Hill, Hollister, Soquel, and Watsonville, California facilities; excluding all other employees, clerical employees, managers, guards, and supervisors as defined by the Act.

CONTINGENT DIRECTION OF ELECTION

If the Petitioner provides timely notice that it is willing to proceed to an election in the unit found appropriate above, the National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 715. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote in the election are those full time and regular part time employees who were employed by the Employer during the payroll period ending immediately before the date of the issuance of this decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off, and the Employer's regular seasonal employees.

Otherwise eligible employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, otherwise eligible employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Otherwise eligible unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who quit or are discharged for cause after the designated payroll period; (2) striking employees who have been discharged for cause since the

strike began and who have not been rehired or reinstated before the election date; (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced; and (4) employees whose regular seasonal employee status was terminated at the end of the 2005 season.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that, once the Region notifies the Employer that the Petitioner has provided timely notice that it is seeking an election in the unit found appropriate in this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all those employees who are then eligible to vote under the above-described formulas. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). These lists must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc

To be timely filed, the eligibility list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5211, within seven days of the date on which the Region sends the Employer written notice that the Petitioner has filed timely notice of its intent to seek an election in the unit found appropriate in this Decision**.** No extension of time to file this list will be granted except in extraordinary

circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (510) 637-3315. As I will make the list available to all parties prior to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **February 10, 2006.** The request may **not** be filed by facsimile. In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with the Board in Washington, D.C. If a party wishes

to file one of these documents electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance regarding electronic filing can also be found under "E-Gov" on the National Labor Relations Board website: www.nlrb.gov.

Dated: January 27, 2006

Alan B. Reichard, Regional Director
National Labor Relations Board
Region 32
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Oakland, CA 94612-5211

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