STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MT. HOREB EDUCATION ASSOCIATION, Complainant, vs. MT. HOREB JOINT SCHOOL DISTRICT NO. 6 AND BOARD OF EDUCATION OF MT. HOREB JOINT SCHOOL DISTRICT NO. 6, Respondents.	Case I No. 18478 MP-403 Decision No. 13160-A

Appearances:
Lawton & Cates, Attorneys at Law, by Mr. Bruce F. Ehlke, appearing on behalf of the Complainant.
Ela, Esch, Hart and Clark, Attorneys at Law, by Mr. Ronald A. Kotnik, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Mt. Horeb Education Association having filed a complaint with the Wisconsin Employment Relations Commission alleging that Mt. Horeb Joint School District No. 6 and Board of Education of Mt. Horeb Joint School District No. 6 have committed certain prohibited practices within the meaning of Section 111.70(3) of the Wisconsin Statutes; and the Commission having appointed George R. Fleischli, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Orders as provided in Section 111.07(5) of the Wisconsin Statutes; and hearing on said complaint having been held at Madison, Wisconsin on January 7, 1975 before the Examiner; and the Examiner having considered the evidence and arguments of record and being fully advised in the premises makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Mt. Horeb Education Association, hereinafter referred to as the Complainant, is a labor organization within the meaning of Section 111.70(1)(j) of the Municipal Employment Relations Act (MERA) and, at all times material herein, the voluntarily recognized bargaining representative of certain teaching personnel in the employ of the Mt. Horeb Joint School District No. 6.

2. That Mt. Horeb Joint School District No. 6, hereinafter referred to as the Respondent District or District, and the Board of Education of Mt. Horeb Joint School District No. 6, hereinafter referred to as the Respondent Board or Board, are, respectively, a public school district organized under the laws of the State of Wisconsin and a public body charged under the laws of the State of Wisconsin with management, supervision and control of the Respondent District and its affairs.

3. That, at all times material herein, the Complainant and Respondent Board were parties to a collective bargaining agreement which contains the following provisions relevant herein:

"SECTION II - RECOGNITION

. . .

The Board of Education recognizes the Bargaining Agent as the exclusive bargaining representative for all full-time employees of the District engaged in teaching, including classroom teachers, librarians, counselors, speech therapists, remedial reading teachers, physical education traveling teachers and LVEC, but excludes nurses, teacher aides, substitute teachers, fulltime principals, supervisors and all other employees and administrative personnel. The bargaining agent and the board agree to negotiate in good faith on matters relating to wages, hours and conditions of employment.

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SECTION VI - TEACHER RIGHTS

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C. MEDICAL LEAVE.

1. A teacher, upon request, shall be granted a medical leave of absence for the period of time during which the teacher is physically or emotionally unable to perform regular duties due to a non-occupational disability. The teacher will be paid full salary for any contract days missed during the period of such absence up to the number of unused sick leave days credited to such teacher's reserve prior to the date such absence commences. The teacher shall have the right to use all or any part of accumulated unused sick leave. The number of days for which the teacher elects to receive salary shall be charged against the number of unused sick leave days accumulated.

2. Prior to receiving medical leave, the teacher must file a letter stating he is physically or emotionally unable to perform his regular duties and his intentions of continuing or discontinuing employment following the medical leave.

3. The teacher shall notify the district after becoming aware of the need for a medical leave. The date the leave commences shall be the date at which the teacher's doctor certifies that the teacher is unable physically or emotionally to teach. The teacher shall furnish the district with a doctor's certificate to that effect.

4. The teacher shall be eligible to return to duty after the disability, provided: (a) The teacher has previously indicated an intent to return to duty following the disability and (b) the teacher files evidence of medical fitness with the administration prior to the teacher's return.

5. The district reserves the right at any time to require the teacher requesting and/or on medical leave to be examined by a doctor of the district's choosing indicating whether the teacher is physically and emotionally able or unable to perform his regular duties. The cost of this examination shall be paid by the district.

6. A teacher on medical leave for more than two (2) years forfeits all benefits under this contract.

. . .

SECTION XI -- CONDITIONS OF EMPLOYMENT RELATIVE TO SALARY SCHEDULE IN SECTION X

. . .

C. The salary schedule will credit up to nine (9) years for experience as a degree teacher outside the district. One-half year's experience as a degree teacher within the district will be counted as one year. One half year's experience as a degree teacher outside the district will be dropped. This condition becomes effective in September, 1972, and is not retroactive.

. . ."

4. That on or about September 5, 1973, Patricia A. Curtis, a junior high English teacher and a member of the bargaining unit represented by the Complainant, requested medical leave under Section VI, C of the collective bargaining agreement due to pregnancy; that by letter dated November 16, 1973, Curtis' request for medical leave was approved to begin on or before November 30, 1973; that Curtis began her medical leave on November 19, 1973; that at the time that Curtis requested medical leave, she advised the Respondent District that it was her intent to resume her employment "in August, 1974" and would "therefore like her position maintained"; that on February 8, 1974, due to her health at that time, Curtis' medical leave was extended to at least August, 1974 pursuant to the provisions of Section VI, C; that sometime prior to March 15, 1974, Curtis was tendered an individual teaching contract to teach junior high school English during the 1974-1975 school year; that sometime before April 15, 1974, Curtis accepted said individual teaching contract; that Curtis subsequently taught junior high school English pursuant to said individual teaching contract during the 1974-1975 school year; that during Curtis' absence due to her medical leave, Marjorie Trumbower, a teacher who made herself available as a substitute teacher for the Respondent District, taught the classes and performed nearly all of the related duties that would otherwise have been performed by Curtis.

5. That on or about October 24, 1973, Mary Ann Berger, a high school English and French teacher and a member of the bargaining unit represented by the Complainant Association, requested medical leave under Section VI, C of the collective bargaining agreement due to pregnancy; that by letter dated December 13, 1973, Berger's request for medical leave was approved to begin on January 14, 1974; that Berger began her medical leave on January 14, 1974; that at the time that Berger requested medical leave, she advised the Respondent District that it was her intent to resume her employment after the birth of her child when she was "physically and emotionally capable of teaching"; that sometime prior to March 15, 1974 Berger was tendered an individual teaching contract to teach high school English and French during the 1974-1975 school year; that sometime before April 15, 1974, Berger accepted said individual teaching contract; that on or about April 22, 1974, Berger tendered her resignation "effective June 6, 1974"; that at a regular Board meeting on May 9, 1974, the Respondent Board accepted Berger's resignation "effective June 6, 1974"; that during Berger's absence due to her medical leave and prior to the effective date of her resignation, Peggy Roth nee Feller, a teacher who had made herself available as a substitute teacher for the Respondent District, taught the classes and performed nearly all of the related duties that would have otherwise been performed by Berger; that sometime after April 22, 1974, and before May 29, 1974, the Respondent Board selected Roth from among a number of applicants to teach high school English and French during the 1974-1975 school year; that on or about

May 29, 1974, Roth was tendered and signed an individual teaching contract to teach high school English and French in place of Berger and she taught those subjects during the 1974-1975 school year.

6. That on or about February 27, 1974, Colleen Miner, a teacher of high school English and related subjects and a member of the bargaining unit represented by the Complainant Association, requested medical leave under Section VI, C of the collective bargaining agreement due to pregnancy; that by letter dated March 8, 1974, Miner's request for medical leave was approved to begin on or before March 18, 1974; that Miner began her medical leave on March 13, 1974; that at the time Miner requested medical leave, she did not specifically state in writing that she intended to resume her employment after the expiration of such leave but implied as much by asking that the leave continue "until August, 1974"; that sometime prior to March 15, 1974, Miner was tendered an individual teaching contract to teach high school English and related subjects; that sometime before April 15, 1974 Miner accepted said individual teaching contract; that on or about May 23, 1974, Miner tendered her resignation "effective at the close of the 1973-1974 school year"; that at a regular Board meeting on June 6, 1974, Respondent Board accepted Miner's resignation "to be effective immediately"; that during Miner's absence due to her medical leave and prior to the effective date of her resignation, Lorraine Andrews, a teacher who had made herself available as a substitute teacher for the Respondent District, taught the classes and performed nearly all of the related duties that would have otherwise been performed by Miner; that sometime after May 23, 1974, and before June 11, 1974, the Respondent Board selected Andrews from among a number of applicants to teach high school English and related subjects in the 1974-1975 school year; that on or about June 11, 1974, Andrews was tendered and signed an individual teaching contract to teach high school English and related subjects in place of Miner and she taught those subjects during the 1974-1975 school year.

7. That sometime in May, 1971, the Respondent Board had adopted a policy with regard to the pay for substitute teachers which read in relevant part as follows:

"Policy No. 2003D
Adopted May 1971

SUBSTITUTE TEACHERS' SALARY SCHEDULE

Substitute teachers from the approved list are paid at the following rates:

0-30	$25.00 per day
31st day	$28.00 per day

After 30 days of consecutive teaching for one teacher - $30.00 per day"

8. That sometime shortly after Berger began her medical leave on January 14, 1974, representatives of the Complainant Association became aware that Trumbower and Roth were being compensated according to the Respondent Board's Policy No. 2003D set out above and were not receiving any of the fringe benefits provided for in the collective bargaining agreement and were not being required to contribute dues pursuant to the fair-share agreement; that by letter dated January 31, 1974 a representative of the Complainant Association requested the opportunity to present its position on the matter at the Respondent Board's next regular meeting which was scheduled for February 6, 1974; that the Complainant Association presented its position at said meeting

which was, in effect, a request that teachers replacing staff members on medical leave be treated as included in the collective bargaining unit represented by the Complainant Association, placed on the regular salary schedule and granted all fringe benefits (on a pro-rated basis) provided for in the collective bargaining agreement; that after referring said request to its Salaries and Personnel Committee, the Respondent Board, at a special meeting on February 18, 1974, took the position that teachers replacing staff members on medical leave were substitute teachers and therefore excluded from the bargaining unit but agreed to consider revising Policy No. 2003D at its next meeting; that at a regular meeting on February 25, 1974, the Respondent Board considered and adopted a revised version of Policy No. 2003D which reads as follows:

"Policy No. 2003D
Revised February 25, 1974

SUBSTITUTE TEACHERS' SALARY SCHEDULE

Substitute teachers from the approved list are paid at the following rates:

0-30	$25.00 per day
31st day	$28.00 per day

When circumstances are such that a substitute teacher will be employed to fill one (1) teaching position for a relatively long time, the above rates can be increased by the Board of Education. Such increased rates shall not be higher than the base column applicable to the column for which that teacher qualifies and except for those substitute employees at the time of adoption of this policy, shall not be retroactive."

9. That thereafter, at a regular meeting on March 7, 1974, the Respondent Board reaffirmed its position that teachers replacing staff members on medical leave were substitute teachers and excluded from the collective bargaining unit but agreed to apply the rates set out in its revised Policy No. 2003D retroactively to Trumbower and Roth; that thereafter Trumbower, Roth and Andrews were all compensated according to the revised Policy No. 2003D during the balance of the 1973-1974 school year; that when Roth was placed on the negotiated salary schedule during the 1974-1975 school year, she was not given any credit under Section XI, C above for the teaching experience that she received while replacing Berger during the second half of the 1973-1974 school year.

Based on the above and foregoing Findings of Fact, the Examiner makes and enters the following

CONCLUSION OF LAW

That Marjorie Trumbower, Peggy Roth nee Feller and Lorraine Andrews were substitute teachers during the 1973-1974 school year and as such, were excluded from the collective bargaining unit represented by the Complainant Association and not entitled to any of the benefits or subject to any of the obligations set out in the 1973-1974 collective bargaining agreement between Complainant Association and the Respondent Board.

Based on the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and enters the following

ORDER

That the complaint in the instant matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 4th day of August, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The issue presented herein is whether the three teachers who replaced Berger, Miner and Curtis during their absence on medical leave were covered by the recognition clause contained in the collective bargaining agreement. If they were not, the Respondents were under no enforceable obligation to provide them with any of the negotiated benefits contained in the collective bargaining agreement, nor were they under any duty to deduct "fair-share" contributions from their pay.

The recognition clause, which is set out in Finding of Fact No. 3, includes all "full-time employees of the district engaged in teaching . . ." but specifically excludes "substitute teachers". It is the Complainant's contention that Trumbower, Roth and Andrews were "full-time teachers" since they reported for work every day during the regular hours of work and performed all of the duties that would otherwise have been performed by the absent teachers during an extended period of time. It is the Respondents' contention that they were "substitute teachers" since they were replacing absent teachers during the period of their absence on medical leave.

In support of its contention that the three teachers in question were "full-time teachers" and not "substitute teachers". The Complainant relies on a number of facts and arguments which can be summarized as follows:

1. The three teachers in question taught all of the classes and performed all of the related duties which would otherwise have been performed by Curtis, Berger and Miner including hall duty, attending faculty meetings and parent-teacher conferences and, in the case of Roth, extra-curricular duty as the Forensics coach. The Complainant points out that only on one occasion in the past has the Employer hired a person other than a regular member of the teaching staff to perform extra-curricular work.

2. They were not paid on the same per diem basis as other substitute teachers and they were not subject to the same call-in and reporting requirements as other substitutes.

3. A teacher who was hired (probably during the 1969-1970 school year) to replace George Johnson, a vocational agriculture teacher who was on a leave of absence for a full year, was given an individual teaching contract and provided with all of the negotiated fringe benefits.

4. On another occasion (probably during the 1969-1970 school year) a high school chemistry teacher, Pladziedwicz, was given an individual teaching contract for the second half of the school year and provided with all of the negotiated fringe benefits. In the following year he was given one year's credit for purposes of placement on the salary schedule.

5. The recognition clause makes no reference to the length of a teacher's employment but only refers to the duties performed. In this case, the duties were the same as those of other full-time classroom teachers.

In support of their position, the Respondents rely on the fact that the teachers in question were substituting for the three absent teachers, who continued to be employes of the District and whose return to teaching could occur at any time dependent upon certification of a medical doctor as to their fitness to teach. The Respondents point out that, in the absence of a mutual understanding to the contrary, words used in a collective bargaining agreement ought to be given their ordinary and usual meaning, which can be found in any reliable dictionary. In addition, the Respondents cite the Commission's case involving the Greendale Board of Education 1/ wherein the Commission held that "replacement teachers" (21 consecutive days or more) were excluded from a voluntarily recognized bargaining unit consisting of "full-time certified employees of the District engaged in teaching . . ." Finally the Respondents cite the Commission's case involving the Milwaukee Board of School Directors 2/ wherein it found that substitute teachers who taught more than 30 days in a given school year constituted a separate department or division from regular teachers.

Motion to Dismiss

At the conclusion of the Complainant's presentation of evidence, the Respondents moved to dismiss the complaint on the claim that the evidence presented by the Complainant did not establish a prima facie case of contract violation. The Examiner deferred ruling on said motion, which was renewed by the Respondents at the conclusion of the hearing. Although the evidence and arguments advanced by the Complainant in support of its contention that the teachers in question were included in the collective bargaining unit and therefore covered by the terms of the collective bargaining agreement are not found to be persuasive, the Examiner is satisfied that the Motion to Dismiss ought to be, and hereby is, denied.

Exclusion of Substitutes

On the face of it, the recognition clause would seem to exclude all substitute teachers from coverage under the provisions of the collective bargaining agreement regardless of the frequency or duration of their performance of such duties during the school year or the similarity of their duties to the duties of bargaining unit employes. However, as the Complainant points out, the fact that the Respondent District may have designated the teachers in question as substitute teachers and treated them as substitute teachers is not controlling.

The Examiner must agree with the Respondents that, in the absence of evidence to the contrary, it is reasonable to assume that when the parties agreed to exclude substitute teachers, they intended to exclude all teachers hired from the list of substitutes to work in the place of an absent teacher regardless of the reason for the absence or the duration of the absence. An analysis of the evidence in this case indicates that the three teachers in question were hired to work in the place of absent teachers and that the parties did not intend to use the word "substitute" in any way other than its ordinary and usual meaning.

In this case, the absent teachers had requested medical leave and indicated their intent to return to the classroom as soon as their medical disability was terminated. Although both Curtis and Miner had originally asked that their medical leave extend to August, 1974, they

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1/ Decision No. 12611, 4/74.

2/ Decision No. 8901, 2/67.

clearly had no right to insist that their medical leave extend to August, 1974, unless they remained "physically or emotionally unable to perform regular duties." On the other hand, they did have the right to resume their employment at any time before that date upon presentation of evidence of medical fitness. Under these circumstances, it can hardly be argued that the three teachers in question were replacing rather than substituting for the absent teachers.

There is little in the evidence of past employment practices which supports the conclusion that the parties might have intended to use the expression "substitute teachers" in the special sense being urged by the Complainant. On at least three prior occasions, the Employer had used substitute teachers to fill in for teachers absent for periods ranging from five to nine weeks in duration due to medical reasons. While none of those cases involved medical leave due to pregnancy, that fact would seem to be immaterial to the question of whether a teacher replacing another teacher who is on medical leave is properly classified as a substitute teacher.

In the case of the high school chemistry teacher, Pladziedwicz, who was given an individual teaching contract in the middle of the year and provided with all of the negotiated benefits, the testimony indicates that he was hired to fill a vacancy rather than to replace an absent teacher. Consequently, the fact that he was given a year's credit for one-half year's teaching experience as a regular teacher likewise lends little support to the Complainant's argument.

Only the case of the vocational agriculture teacher, George Johnson, tends to support the Complainant's claim. However, that case involved an absence of a fixed duration (one full school year) rather than medical leave of an uncertain duration. Also, the fact that the District gave Johnson an individual teaching contract and provided him with all of the negotiated fringe benefits given to other teachers in the 1969-1970 school year does not necessarily constitute evidence that it was obligated to do so. There was no written collective bargaining agreement in the 1969-1970 school year and there is no evidence that the Complainant was recognized for purposes of negotiating on behalf of teachers in Johnson's situation at that time.

The conclusion that the teachers in question are not included within the voluntarily recognized bargaining unit is not to say that the Complainant does not have the right to seek to negotiate the changes in the recognition clause or other provisions of the agreement to eliminate any alleged inequities created by the situation of long-term substitutes. 3/ In fact, the Complainant has already had some

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3/ One such alleged inequity is the situation created by the fact that a degreed teacher who teaches in the District for one-half year under the negotiated salary schedule receives a full year's credit for purposes of advancement on the salary schedule; whereas a substitute teacher who, like Roth, has a degree and teaches in the District one-half year as a substitute teacher, under Policy No. 2003D before being hired as a regular teacher, does not receive a full year's credit for purposes of advancement on the salary schedule. However, the evidence discloses that the Respondent has never given any substitute teacher credit for their experience in the District even though it has hired at least five in recent years, and Section XI, C fails to give any credit to a degreed teacher who teaches one-half year under a salary schedule in another district.

success in that regard as reflected in the Respondent Board's revision of the Policy No. 2003D which was revised largely because of criticism raised by the Complainant's representatives. However, it is clear on the record presented that the Respondents have not violated the provisions of the collective bargaining agreement by refusing to provide them with any of the fringe benefits contained therein or failing to deduct "fair-share" contributions from their earnings.

For the above and foregoing reasons the complaint has been dismissed.

Dated at Madison, Wisconsin this 4th day of August, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner