STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of KENOSHA EDUCATION SUBSTITUTE ASSOCIATION Involving Certain Employes of KENOSHA UNIFIED SCHOOL DISTRICT NO. 1	Case XLVIII No. 20362 ME-1317 Decision No. 14908

Appearances:
Perry & First, Attorneys at Law, by Mr. Richard Perry, appearing on behalf of the Petitioner.
Mr. Gary Covelli, Coordinator of Staff Relations, appearing on behalf of the Municipal Employer.

DIRECTION OF ELECTION

Kenosha Education Substitute Association, hereinafter referred to as the petitioner, having, on April 7, 1976, filed a petition with the Wisconsin Employment Relations Commission requesting the commission to conduct an election, pursuant to section 111.70(4)(d) of the Municipal Employment Relations Act, among certain employes of Kenosha Unified School District No. 1, to determine whether said employes desire to be represented by said petitioner for the purposes of collective bargaining; and a hearing on such petition having been held at Kenosha, Wisconsin, on May 24, 1976 Kay Hutchison, Hearing Officer, being present; and the commission having considered the evidence and being fully advised in the premises, and being satisfied that a question has arisen concerning the appropriate bargaining unit and representation of certain employes of said municipal employer;

NOW, THEREFORE, it is

DIRECTED

That an election by secret ballot be conducted under the direction of the Wisconsin Employment Relations Commission within sixty (60) days from the date of this Directive in the collective bargaining unit consisting of all substitute teachers employed by Kenosha Unified School District No. 1 as of September 14, 1976, provided they have taught at least ten (10) days or more during the 1975-1976 school year, or ten (10) days or more during the present school year as of September 14, 1976, but excluding those substitute teachers who resigned or were discharged for cause prior to the conduct of the election, and further excluding all other substitute teachers, all other employes, supervisors, and administrators for the purposes of determining whether a majority of said employes desire to be represented by Kenosha Education Substitute Association on questions of wages, hours and conditions of employment.

Given under our hands and seal at the City of Madison, Wisconsin this 14th day of September, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Herman Torosian, Commissioner

Charles D. Hoornstra, Commissioner

KENOSHA UNIFIED SCHOOL DISTRICT NO. 1, XLVIII, Decision No. 14908

MEMORANDUM ACCOMPANYING DIRECTION OF ELECTION

Kenosha Education Substitute Association, hereinafter referred to as the association, filed a petition with the Wisconsin Employment Relations Commission requesting that an election, pursuant to Section 111.70, Wisconsin Statutes, be conducted among "all regularly employed substitute teachers excluding other employes, supervisors and administrators," in the employ of Kenosha Unified School District No. 1, hereinafter referred to as the municipal employer. The municipal employer operates and maintains a public school system serving approximately 20,000 students and employing 1,150 regular teachers and a number of substitute teachers, which number varies during the school year.

During the course of the hearing conducted in the aforementioned petition on May 24, 1976 issues arose with respect to the status of the petitioner as a "labor organization," the appropriateness of the unit petitioned for and the determination of employe eligibility.

The municipal employer was unwilling to stipulate that the association is a labor organization within the meaning of section 111.70. The executive director of the petitioner testified that said organization has participating members and exists, in whole or part, for the purpose of representing employes in matter relating to wages, hours and conditions of employment.

Section 111.70(1)(j) of MERA defines "labor organization" as:

> ". . . any employe organization in which employes participate and which exists for the purpose in whole or part, of engaging in collective bargaining with municipal employers concerning grievances, labor disputes, wages, hours or conditions of employment."

The petitioner, herein, meets such statutory criteria, and accordingly, the commission is satisfied that the association is a labor organization.

At the onset of each school year, the municipal employer compiles a list of names of individuals approved to serve as substitute teachers. Substitutes are employed to fill day to day or long term vacancies among the regular teaching staff. The list of substitute teachers reflects the teaching qualifications of the substitutes and any limitations in terms of day of the week or school location in which a given substitute is willing to accept assignment.

During the summer recess, the municipal employer solicits previously employed substitutes to ascertain interest in substitute teaching for the coming school year. Names of new qualified applicants are also added to the list. The municipal employer estimates that 25 to 30% of the substitutes employed in the previous school year respond that they are interested in substitute teaching during the following year. All substitutes are asked to participate in an annual, brief orientation prior to the commencement of the school year. Substitutes are provided with a handbook, entitled "Harmony in Substitute Teaching", which sets forth the basic conditions of employment including an evaluation procedure, the rates of pay, job duties and selection criteria. The substitute list does not remain static during the school year. It is revised periodically as names are added to or deleted from the substitute list according to changes in the availability of individuals.

Substitutes are offered work on an "as needed" basis, ranging from one day or a half day in a single teaching assignment to almost an entire school year. Some individuals listed on the substitute roster may

actually never work during a given school year. An offer of employment may be tendered at "a moment's notice" or may be conveyed substantially in advance of the date of an anticipated vacancy. As absences among the regular teaching staff become known, the substitute teacher answering service contacts and offers teaching assignments to qualified substitutes. Substitutes may decline any or all assignments offered. Substitutes are not precluded from simultaneous employment as substitutes in other school systems besides that of the municipal employer.

Compensation for substitutes varies with the qualification of the individual and the duration of the substitute teaching assignment. A non-degreed substitute receives $24.50 per day. Individuals holding college degrees are compensated at the rate of $26.50 per day. In the event that the substitute remains in the same teaching assignment for twenty or more consecutive days, an additional $2.00 per day is placed on the respective rates after the twentieth day. Furthermore, if the substitute is employed in one, continuous assignment over a lengthy period of time, the individual is placed under a letter of appointment and is compensated according to experience and training on the regular teacher salary schedule.

POSITIONS OF THE PARTIES:

The municipal employer, contrary to the petitioner, argues that all substitute teachers are casual or temporary employes and thereby, do not constitute an appropriate collective bargaining unit within the meaning of section 111.70. The substitutes, according to the municipal employer, have no expectation of continued employment from day to day or from school year to school year. The municipal employer avers that substitutes are employed on an "on call" rather than regular basis. The municipal employer suggests that there is significant turnover of substitutes throughout and between the school years. The municipal employer urges the commission to dismiss the petition herein on the basis that the substitutes, having no regularity in or expectation of continued employment, are casual or temporary employes. In light of the fact that the substitutes work "on call" only in the absence of a regular employe, the municipal employer reasons that the substitute teachers do not constitute an appropriate collective bargaining unit.

Although the municipal employer urges the commission to find that all substitutes are casual employes outside the purview of section 111.70, it is further the position of the municipal employer that should the commission find substitutes to be employed within the meaning of MERA, that a distinction should be drawn between substitutes in terms of regularity of employment. The municipal employer asserts that substitutes who are seldom or possibly never employed by the district do not share a community of interest with those individuals who substitute regularly or on a prolonged basis. The municipal employer proposes that in the event that the commission rejects the municipal employer's argument that none of the substitutes are regular employes, only those substitutes who have been employed 25 percent or more of the previous school year (45 days) should be found to be "regular employes".

The petitioner argues that substitute teachers are employes within the meaning of Section 111.70. The substitutes, according to the petitioner, have an interest in the wages, hours and conditions of employment. The petitioner notes that the commission in Milwaukee Board of School Directors (8901) 2/69, established a unit of substitute teachers as an appropriate collective bargaining unit and adopted a criterion of 30 days employment in the previous year for inclusion in said unit. The petitioner argues that the 30 day period was established in 1969 during a period characterized by teacher shortages and the resultant employment of uncertified individuals in substitute teaching positions.

The petitioner asserts that the 30 day criterion was adopted in response to the high rate of turnover experienced among substitutes during the aforementioned teacher shortage. Moreover, the petitioner urges the commission to reduce the 30 day period to 20 days in order to reflect the current stability in substitute employment and the municipal employer's 20 day distinction between short term and long term substitute assignments.

DISCUSSION:

In Milwaukee the commission was confronted with a claim by the employer that substitute per diem teachers were not employes and were not entitled to collective bargaining rights under the law. The commission rejected that claim and concluded that substitute teachers some of whom teach nearly as many days as teachers teaching under an individual teaching contract, were employes and entitled to collective bargaining rights under the law. Having concluded that the substitute per diem teachers in the employ of the Milwaukee Board of School Directors were entitled to an election to determine whether they desired to be represented for purposes of collective bargaining by Milwaukee Teachers Education Association (MTEA), the commission went on to establish its "30-day rule" for purposes of voting eligibility. Thereafter, in certifying the MTEA as the bargaining representative of the substitute teachers in question, the commission included the requirement that a substitute teacher have taught 30 days in the prior year in order to be included in the bargaining unit.

Our direction of election and certification in the Madison case 2/ was merely an application of the approach taken in the Milwaukee case, based on a stipulation of the parties. Thereafter both parties filed petitions to clarify the certified bargaining unit because of problems which had arisen in determining who was included in the bargaining unit on any given date. Our order in that case clarified the certified unit to make it clear that any substitute teacher who teaches 30 days in any 365 day period becomes eligible for inclusion in the certified bargaining unit. 3/

Upon reconsideration the commission concludes that the approach taken in the Milwaukee and Madison cases should be modified. Neither of those cases drew a clear distinction between eligibility to vote in the election and the scope of the bargaining unit established. Because of the unique nature of the working circumstances of substitute teachers the commission is satisfied that the failure to give adequate recognition to that distinction has created an unworkable bargaining arrangement.

The commission concluded in the Milwaukee case that substitute teachers are employes and entitled to exercise their rights to bargain collectively with regard to their wages, hours and working conditions, and we reaffirm our decision in that regard. Furthermore, in determining who should be allowed to vote in the representation election the commission concluded, consistent with prior cases, that employes who would otherwise be included in the bargaining unit should not be allowed to vote in the representation election if their employment relationship is of an attenuated or recent nature.

Applying these concepts to the employes herein, the commission concludes that the collective bargaining unit should consist of all

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2/ Madison Jt. School Dist. No. 8 (12747 and 12747-B) 6/74, 10/74.

3/ Madison Jt. School Dist. No. 8 (13734-B and 13781-A) 9/75.

substitute teachers employed by the Kenosha Board of Education regardless of the number of days taught but that only those substitute teachers who meet some minimal standards of prior and present employment status should be allowed to vote. Unless a substitute teacher has taught a minimum number of days in the recent past and is available to teach in the future said teacher is deemed to have insufficient interest in the wages, hours and working conditions to be deemed eligible to vote.

For these reasons, the commission has determined that the largest possible number of substitute teachers should be deemed eligible to vote consistent with the requirement that they have a sufficient interest in wages, hours and working conditions. In this case the district had 113 teachers on its substitute list shortly after the beginning of the 1975-76 school year. The composition of the list changed considerably during the year but averaged in excess of 100 teachers. A total of 184 substitute teachers had their names on the list at some time during the year.

If the commission were to apply the 30 day rule which it applied in the Milwaukee and Madison cases on the facts in this case, only 58.7% of the 184 teachers who had their names on the 1975-76 list would be eligible to vote and then only if they were still listed as substitutes for the 1976-77 school year. If the commission were to lower the requirement to 20 days, only 67.4% of the 184 teachers would be eligible. Lowering the requirement to 10 days makes 75.5% of that group eligible. 4/

On these facts the commission concludes that in order to insure that the vote is representative of the wishes of the substitute teachers it has established a requirement that a substitute teacher have taught 10 or more days in the 1975-76 school year or in the present school year as of the eligibility date established herein and remained on the substitute list as of the date of the election.

The commission has given consideration to establishing a fixed rule, such as a 10 day or 20 day threshold, to be applied in all cases. We decline to do so at this time, however, until further experience is obtained throughout the state. This record, for example, may prove to be totally unique in the state in respect to the proportion of substitutes who teach more than ten days in a school year. Therefore, at least until we gain further experience, we will decide voting eligibility among substitute teachers on a case-by-case basis using the seventy-five per cent and 10 day factors as guides to our decision making process and not as absolutes.

Dated at Madison, Wisconsin this 14th day of September, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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4/ Of the remaining 45 employes 14, or 7.6%, did not teach at all and 31, or 16.8%, taught less than 10 days.