STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LANCASTER EDUCATION ASSOCIATION, Complainant,

vs.

LANCASTER SCHOOL DISTRICT, Respondent.

Case 17
No. 58119
MP-3570

Decision No. 29777-A

Appearances:

Ms. Joyce Bos, Executive Director, South West Education Association, P.O. Box 722, Platteville, Wisconsin 53818-0722, on behalf of the Lancaster Education Association.

Kramer, Brownlee & Infield, LLC, by **Ms. Eileen A. Brownlee**, 1038 Lincoln Avenue, P.O. Box 87, Fennimore, Wisconsin 53809, on behalf of the Lancaster School District.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Lancaster Education Association, on October 25, 1999, filed a complaint with the Wisconsin Employment Relations Commission alleging that the Lancaster School District had committed prohibited practices within the meaning of Secs. 111.70(3)(a)4 and 5, Stats. On December 16, 1999, the Lancaster School District filed an answer wherein it denied it had committed the alleged prohibited practices and raised certain affirmative defenses. The Commission appointed David E. Shaw, a member of the Commission's staff, to act as Examiner and make and issue Findings of Fact, Conclusions of Law and Order in the matter. Hearing was held before the undersigned on January 11, 2000 in Lancaster, Wisconsin. A stenographic transcript was made of the hearing and the parties completed the submission of post-hearing briefs on March 14, 2000. Having considered the evidence and the arguments of the parties, the Examiner now makes and issues the following Findings of Fact, Conclusions of Law and Order.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

FINDINGS OF FACT

1. The Complainant Lancaster Education Association, hereinafter Association, is a labor organization having its principal offices located c/o South West Education Association, P.O. Box 722, Platteville, Wisconsin. At all times material herein, the Association has been the recognized exclusive bargaining representative for "the professional teaching staff of the Lancaster Community School District, excluding the district administrator, building principals and C.E.S.A. employes. . ."

2. The Respondent Lancaster School District, hereinafter the District, is a municipal employer having its principal offices located at 925 West Maple Street, Lancaster, Wisconsin.

3. At all times material herein, the Association and the District have been parties to a series of collective bargaining agreements setting forth the wages, hours and conditions of employment of the District's professional teaching staff, including the parties' 1997-1999 Agreement. Said Agreement included, in relevant part, the following provisions:

> II. RECOGNITION CLAUSE –
>
> The Lancaster Education Association is recognized as the exclusive bargaining group for the professional teaching staff of the Lancaster Community School District, excluding the district administrator, building principals, and C.E.S.A. employees.
>
> . . .

The parties' 1997-1999 Agreement expired on June 30, 1999.

4. In the Spring of 1999, the District became a part of a consortium with three other school districts for the purpose of staff development in the area of educational technology. The consortium applied for, and obtained, a $200,000 grant, part of which funds an Instructional Technology Coordinator position. The Instructional Technology Coordinator position was posted as follows:

> **TLCF Grant Job Description**
>
> This is a ONE-YEAR POSITION, 1999-2000 school year

Position Title: Instructional Technology Coordinator

Primary Function: Provide training and staff development in the integration of technology into curriculums and to S.W.E.E.T. consortium schools (Lancaster, Potosi, Prairie du Chien, River Ridge)

Illustrated Duties:

* Provide daily training sessions to assist teachers in designing, preparing, implementing and evaluating lesson plans to integrate technology into the curriculum
* Provide leadership and resources in the integration of technology
* Collaborate with S.W.E.E.T. consortium administrators to integrate technology into curriculum
* Assist S.W.E.E.T. consortium school districts to implement the Wisconsin Information and Technology Literacy Standards
* Identify and eliminate technical barriers to the effective use of technology in schools
* Provide weekly assistance to S.W.E.E.T. consortium communities through "open lab" instruction
* Provide "help desk" support to S.W.E.E.T. consortium staff members

Relationships

Reports to and Works with: S.W.E.E.T. Consortium Administrative Committee (one representative from each district)

Qualifications: 3+ years teaching experience, preferred; experience in varied levels of instruction and technology

Education: Minimum: Bachelor's degree and teacher's license in state of Wisconsin

Skills, Knowledge, Abilities:

* Demonstrates effective use of educational technology with students, teachers and professional staff
* Demonstrates effective interaction and leadership among educators
* Demonstrates initiative and ability to follow through on projects
* Demonstrates the ability to organize and schedule time effectively
* Demonstrates an understanding of instructional, organizational and technological change
* Demonstrates an understanding of learning styles
* Demonstrates an understanding of an educators work day and responsibilities

* Demonstrates the ability to communicate effectively
* Demonstrates facilitation skills with large groups and small groups
* Demonstrates knowledge of curriculum and instruction in all content areas, including Wisconsin Model Standards
* Demonstrate ability to plan and implement in an unsupervised environment
* Demonstrates ability to assist the low-end user

Send letter of application, resume, and list of references by May 28, 1999 to:

Attn: **Jamie Kline**

925 W. Maple Street
Lancaster School District
Lancaster, Wisconsin 53813

Cheryl Hefty was employed by the District as a regular full-time mathematics teacher at the District's high school for the 1998-1999 school year, and a number of prior years. Hefty applied for the Instructional Technology Coordinator (ITC) position with the consortium and was eventually awarded the position. Thereafter, on June 23, 1999, Hefty submitted the following request for a one-year leave of absence:

June 23, 1999

Lancaster School District
Lancaster, WI 53813

Dear Lancaster School Board:

This letter is to request a professional, one year, leave of absence. I have been offered a position as an Instructional Technology Coordinator through a TLCF grant that was awarded to Lancaster, Potosi, Prairie du Chien and River Ridge School Districts. During this time, I will be providing training and staff development in technology curriculum integration.

At the conclusion of one year, I would like to return to my current position as a High School Math Teacher. I enjoy teaching in Lancaster and do not want to leave, but this opportunity is too great to pass up. If I am allowed to return, the Lancaster School District will continue to benefit from my experience. I

would be able to serve as a resource to students and staff in areas of technology integration. This experience will also allow me to expand the use of technology into my Math Curriculum.

Sincerely,

Cheryl Hefty /s/
Cheryl Hefty

On June 30, 1999, the District's Board of Education granted Hefty's request for a professional leave of absence.

5. The District, Hefty and the Association entered into negotiations for a contract to cover the wages, hours and conditions of employment of Hefty while in the ITC position. Those parties reached agreement on such a contract. Said contract reads as follows:

INDIVIDUAL EMPLOYMENT CONTRACT
Instructional Technology Coordinator
(S.W.E.E.T. Consortium)

It is hereby agreed by and between the Board of Education of the Lancaster Community School District (Board), the Lancaster Education Association (Union), and Cheryl Hefty, a professionally trained educator legally qualified in the State of Wisconsin and an employee of the Lancaster School District (Consultant), that the Consultant is to take a leave of absence from her current full-time teaching position for a term of one year, beginning July 1, 1999, and ending June 30, 2000. During that one-year term, Consultant will perform the duties and responsibilities of Instructional Technology Coordinator (ITC) as established by the S.W.E.E.T. Consortium (Consortium). Such duties and responsibilities are outlined in the TLCF Grant Job Description which is attached and incorporated hereto by reference.

It is further agreed that the term of this Contract is one calendar year beginning July 1, 1999, and ending June 30, 2000. The LCSD agrees to employ the Consultant as ITC for this period, subject to the terms and conditions set forth in this Contract.

It is further agreed that Consultant will remain a full-time employee of the Lancaster Community School District (LCSD) while performing the above-named ITC services. As such, Consultant will be covered by the terms and conditions set forth in the 1997-99 Master Agreement and this Individual Employment Contract, which shall be subject to the Master Agreement; this Contract is entered into to ascertain the rights of the Consultant pursuant to such Agreement.

The 1997-1999 Master Agreement between the parties shall apply in all respects to this employment relationship, with the following *exceptions*:

1. Article VI, A – Compensation: Salary Schedule: Consultant will be compensated according to the rate of pay established by the Consortium for performance of the ITC duties and responsibilities. The salary schedule established within Article VI, Section A, shall not be applied to the Consultant during her leave of absence.
2. Article VI, B – Compensation; Extra Duty Schedule: Consultant will be compensated according to the rate of pay established by the Consortium for performance of the ITC duties and responsibilities. The extra duty schedule established within Article VI, Section B, shall not be applied to the Consultant during her leave of absence; Consultant shall not be eligible for extra-duty pay during the term of this agreement.
3. Article VI, C – Compensation; Miscellaneous Duties: Consultant will be compensated according to the rate of pay established by the Consortium for performance of the ITC duties and responsibilities. The compensation schedule established within Article VI, Section C, for miscellaneous duties shall not be applied to the Consultant during her leave of absence.
4. Article VI, F – Compensation: Placement on the Salary Schedule: Consultant will be compensated according to the rate of pay established by the Consortium for performance of the ITC duties and responsibilities. The criteria for placement on the salary schedule referenced in Article VI, Section F, shall not be applied to the Consultant during her leave of absence. As such, during the term of her leave, Consultant will not accrue the right to progress on the salary schedule beyond her current salary schedule status. Specifically, because the Consultant is currently on BS + 12, Step 11, of the Salary Schedule, she will return to her teaching position in 2000-2001 at BS + 12, Step 12.
5. Article VII – Work load: Consultant will perform the duties and responsibilities of ITC as established by the Consortium and as reflected in the TLCF Grant Job Description attached hereto. Teacher assignments and work loads as identified in Article VII shall not be applied to the Consultant during her leave of absence.
6. Article VIII – Evaluations: Consultant's performance of the ITC duties and responsibilities will be informally evaluated by the Consortium on an on-going basis. The evaluation guidelines and procedures identified in Article VIII shall not be applied to the Consultant during her leave of absence.
7. Article XII – Layoffs: Consultant will not be subject to layoff under the terms of Article XII during her leave of absence. In addition, Consultant's status with the Lancaster Community School District,

> including seniority status, shall not be affected during her leave of absence such that her teaching position with the District is compromised under the terms identified by Article XII. Consultant shall retain her seniority with the LCSD as it exists on the day this Contract term begins, that being July 1, 1999.

All of the terms and conditions of the 1997-99 Master Agreement between the LCSD and the Lancaster Education Association not specifically exempted above will apply to the Consultant's employment with the LCSD while she is performing the duties and responsibilities of ITC. Further, this Contract is specifically made subject to and will be amended and modified by the terms and provisions of any applicable Master Agreement between the above-named parties entered into subsequent to the tender of this Contract.

Upon the specified termination date of this Contract, Consultant will have immediate rights to the full-time teaching position from which she is taking leave. At such time, she will enjoy the full benefits provided her under the terms and conditions set forth in the effective Master Agreement and an individual teaching contract; the terms and conditions of this Contract will no longer be applicable.

The LCSD agrees to pay Consultant an annual salary of fifty-thousand dollars ($50,000) to be paid in installments consistent with the District's current payment practices. The LCSD will bill the Consortium for the compensation which the Consultant receives as ITC. In addition, the LCSD will bill the Consortium for the cost of benefits the Consultant will receive under the terms and conditions of the effective Master Agreement governing her employment relationship with the LCSD.

This contract may be modified or terminated at any time during the term hereof by the mutual, written agreement of the parties hereto, except that the Board reserves the right to terminate said contract upon thirty (30) calendar days written notice should the services of the Consultant as ITC no longer be necessary. Further, the Board reserves the right to terminate said contract upon five (5) calendar days written notice if just cause exists to do so. If the ITC position is eliminated under any of the above circumstances, the Consultant will be immediately returned to the regular teaching position with the LCSD from which she is taking leave.

The parties agree that this Contract, and the documents attached and incorporated hereto by reference, constitutes their complete agreement concerning these matters and further agree the terms of this Contract shall not be construed to set any precedent for future employment matters or interpretation of the current or any future Master Agreement or negotiations for any future Master Agreement.

By their signatures, the undersigned agree to be held and governed by the terms and conditions set forth in this contract and any supplemental documentation incorporated hereto by reference.

Cheryl Hefty /s/	7/22/99
Cheryl Hefty	Date
Steven E. Schneider	
Board	Date
Pam Brerhcta	9-9-99
Union	Date

The provision in Hefty's contract which permits her to immediately return to her teaching position with the District upon termination of the contract or her employment in the ITC position was proposed by Hefty and the Association. Pursuant to said provisions, Hefty has the right to return to her teaching position during the 1999-2000 school year if her ITC position or the ITC contract is terminated during that time period.

6. The District posted Hefty's vacant position for the 1999-2000 school year as follows:

LANCASTER COMMUNITY SCHOOL DISTRICT

Teaching Position Available

Math (Geometry and Modern Math)

(Revised Posting)

School:	Lancaster High School
Position Opening:	1999-2000 1-year position to start on August 18, 1999 (Long-Term Substitute)
Certification and Qualifications:	Wisconsin DPI Certification (Prefer High School Math)

Other Requirements: The application must include:

* A letter requesting an application form
* A completed application form
* Transcript and credentials from college/university
* A current resume
* A copy of current license (or evidence of eligibility)
* Statement of philosophy

Application deadline: Applications will be accepted until **August 2, 1999** or until filled

Candidates with appropriate certification may send required materials to:

Mr. Gary Swanstrom, Principal
Lancaster High School
806 Elm Street
Lancaster, WI 53813
(608) 723-2173

Michael Van Handel was hired by the District in August of 1999 to replace Hefty during her absence from her teaching position in the 1999-2000 school year and was issued the following "Substitute Teacher's Agreement" by the District:

LANCASTER COMMUNITY SCHOOL DISTRICT
925 West Maple Street
Lancaster, WI 53813
SUBSTITUTE TEACHERS AGREEMENT
1999-2000

It is hereby agreed that Michael T. VanHandel will work as a substitute teacher at the Lancaster High School according to the following provisions:

1. Michael T. VanHandel will begin employment as the long term substitute teacher effective August 19, 1999.

2. Michael T. VanHandel will receive a per diem salary of One Hundred Thirty Eight Dollars and Twenty Eight Cents ($138.28) for each full day of actual employment.

3. Michael T. VanHandel as a substitute teacher, is not included under the collective bargaining agreement between the Lancaster Board of Education and the Lancaster Education Association, as substitute teachers are not included in the recognition clause of the Master Agreement.

4. Michael T. VanHandel as a substitute teacher, will not receive the following personal benefits:

a. Dental Insurance
b. Hospitalization Insurance
c. Sick Leave
d. Emergency Leave
e. Group Life Insurance
f. Long Term Disability Insurance
g. Contributions by the School Board for STRS (State Teachers Retirement System)

This agreement calls for Michael T. VanHandel to serve as a substitute teacher for Cheryl Hefty and when Cheryl Hefty returns, or at the end of the current school year this temporary employment of long-term substitution is terminated.

DATED THIS 23rd DAY OF Aug., 1999.

Michael T. VanHandel /s/
Substitute Teacher Signature

Thomas I. Benson /s/
Superintendent Signature

7. Michael VanHandel has performed the same daily teaching duties, and has the same attendant responsibilities in that regard, as the District's regular full-time teaching staff. VanHandel has been paid pursuant to the "Substitute Teacher's Agreement" he was issued and has not received the wages, hours and conditions of employment provided to the District's professional staff under the parties' collective bargaining agreement.

8. On at least two occasions the District has issued a one-year regular teaching contract to an individual hired to replace a teacher on a one-year leave of absence. In those cases, the teacher on the leave of absence did not have the right to return to his/her teaching position with the District during the leave of absence period. There have also been several instances in past years where a teacher in the District was granted a long-term medical leave of absence of indeterminate length, in two instances lasting an entire school year, and the District replaced the absent teacher with a substitute teacher who was not treated as being a member of the bargaining unit, nor covered by the parties' collective bargaining agreement. Said instances were not grieved or challenged by the Association. Said instances constitute a practice of hiring long-term substitute teachers to replace teachers who are off work for indeterminate periods that might be as long as, or exceed, a school year, and not considering such long-term substitutes to be members of the bargaining unit nor covered by the parties' collective bargaining agreement. Said practice constituted the *status quo* in that regard at the time VanHandel was hired as a long-term substitute to replace Hefty.

9. The District's hiring of Van Handel as a long-term substitute to replace Hefty during her absence, issuing him a substitute teacher contract, and not treating him as being covered by the parties' collective bargaining agreement, is consistent with the past practice set forth in Finding 8, and therefore does not constitute a change in the *status quo* in that regard.

Based upon the foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. The Lancaster School District's hiring of Michael Van Handel as a long-term substitute teacher to replace District teacher Cheryl Hefty during her leave of absence from her teaching position with the District is consistent with the existing *status quo*. Therefore, the Lancaster School District, its officers and agents, did not refuse to bargain or engage in individual bargaining within the meaning of Sec. 111.70(3)(a)4, Stats., by its conduct in that regard.

2. As the parties' 1997-1999 Collective Bargaining Agreement had expired at the time this dispute arose, there is no violation of Sec. 111.70(3)(a)5, Stats.

Upon the basis of the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

The complaint filed in this matter is hereby dismissed in its entirety.

Dated at Madison, Wisconsin this 9th day of May, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/

David E. Shaw, Examiner

LANCASTER SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Association's complaint alleges that the District violated Secs. 111.70(3)(a)4 and 5, Stats., by individually bargaining with Michael VanHandel, and by failing to recognize VanHandel as a member of the bargaining unit and accord him the rights under the parties' collective bargaining agreement. As relief, the Association requests "that Respondent be ordered to cease from committing such prohibited practices; that Respondent be ordered to rescind its October 13, 1999 vote which failed to recognize Mr. VanHandel as a bargaining unit member; that a teaching contract be issued with salary, benefits and rights as defined by the mutually-negotiated agreement. Further, Mr. VanHandel shall be made whole for any loss of wages or benefits which has occurred or may occur as a result of Respondent's unlawful conduct; that Respondent be ordered to reimburse Complainant for its attorneys' fees which has or may occur as a result of Respondent's unlawful conduct; and that Respondent be ordered to post the appropriate compliance notices and take whatever other remedial action is deemed appropriate. . ."

The District's answer denies that VanHandel was hired for the certain term of a school year and denies the District's conduct violates MERA. The District also asserts as affirmative defenses that VanHandel was hired as a substitute teacher, that substitute teachers are not included in the bargaining unit represented by the Association, and that the Association lacks standing to pursue its complaint.

Association

First, the Association asserts that it is well settled that questions of inclusion in the bargaining unit and compensation under the collective bargaining agreement are issues an arbitrator has the authority to address and resolve. Citing, SCHOOL DISTRICT OF LODI (Knudson, 3/81). The Association also notes that the relevant collective bargaining agreement was in effect from August 16, 1997 through June 30, 1999 and therefore arbitration of the grievance was not available due to the contract having expired. The grievance was brought in a timely fashion and there was no procedural issue in that regard.

The Association asserts that VanHandel was entitled to the wages, benefits and rights provided under the parties' collective bargaining agreement for the entirety of the 1999-2000 school year. VanHandel performed the same teaching duties throughout the school year that were performed by a regular contract teacher. The term "substitute" is a word of educational parlance and must derive its meaning from function, not form. A substitute replacing a teacher who is absent for a day or two is far from a complete replacement, however, the distinction begins to blur as the period of the absence increases. With the extension of time, the educational expectations placed upon the teacher increases. Eventually, the responsibility of

educating children is fully upon the shoulders of the replacement teacher, whatever name is used to designate the position. At such a point, there has been a change in the quality of performance and the expectations of the employer and the students are the same as with a regular, full-time teacher. According to the Association, often the term "per diem substitute" is used to denote the temporary employment relationship which does not carry the full responsibility of educating children. Since long-term absences are relatively infrequent, it is the short-term employment relationship that provides the "ordinary and usual" meaning that defines "substitute" teacher. The District provided five examples of employment contracts spanning a period of 22 years. The District only gave substitute contracts to those replacement employes who replaced a District employe on sick leave. The District could not know if the employe on sick leave would return to work at any time definite, as only the employe and her doctors would know if the employe had sufficiently recovered to permit them to return to work. The District's Administrator, Benson, testified that the only time the District gave a substitute contract to an employe was for the specific reason of substituting for an employe on medical leave. Here, VanHandel was hired to replace Hefty while she fulfilled a one-year contract as an Instructional Technology Coordinator for a consortium of the District and three other districts. Her job description indicates that her position is for one year, and emphasizes that concept by use of bold print "ONE YEAR POSITION". Benson testified that $200,000 of the grant was received and that part of it was for Hefty's salary and fringes. Hefty signed a contract with the consortium for a one-year position and has an expectation to fulfill her role for that program for one year. It is not a leap of faith for VanHandel to expect to replace Hefty as a regular, full-time teacher for the duration of that year. Benson described VanHandel's position as "it's a full-time position in the Math department at Lancaster High School." (Tr. p. 19). It is clear from the record that the District placed the same expectations on VanHandel that it placed upon regular full-time staff; expectations and responsibilities not given to "substitute" teachers, as that word is ordinarily and usually used.

The duration and the certainty of the duration, the tender and acceptance of a contract, and the District's unilateral determination of status are meaningless. The distinction between a substitute and a regular full-time teacher must be based upon responsibility attached to the position. A way to illuminate the distinction is by showing that the replacement teacher has a "community of interest" with full-time teachers or is performing bargaining unit work. The record clearly shows that VanHandel has sufficient "community of interest" to be eligible to be included in this bargaining unit. MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NO. 14161-A, NO. 6746-C (WERC, 1/77); WINNEBAGO COUNTY (DEPARTMENT OF SOCIAL SERVICES), DEC. NO. 10304-A, 10305-A (WERC, 9/79). Another question is whether the parties' recognition clause contemplates inclusion of VanHandel as part of the "professional teaching staff" or exclusion as a "substitute teacher". The District's designation and treatment of VanHandel as a substitute is not controlling. MOUNT HOREB SCHOOL DISTRICT, DEC. NO. 13160-A (WERC, 8/75). The focus must be on the employe's duties, not his/her title. BANGOR SCHOOL DISTRICT, DEC. NO. 14699 (WERC, 6/76).

In determining whether VanHandel is included under the recognition clause, the following factors must be analyzed:

(1) The language of the recognition clause;
(2) The relevant bargaining history and past practice;
(3) The effect its placement would have on the parties.

Under the plain meaning of the words of the parties' recognition clause, VanHandel is a professional teacher and therefore properly included in the bargaining unit. A "substitute" is defined as "a person who takes the place, or acts instead of another." *Webster's Third New International Dictionary*, unabridged. In this case, VanHandel was not "taking the place or acting instead" of any teacher. The District was replacing a teacher who had, in effect, resigned her current teaching job with the District in order to be able to sign a new contract with the consortium. Section 118.22, Stats., prohibits a board to "enter into a contract of employment with a teacher for any period of time as to which the teacher is then under a contract of employment with another board." Even if the term "substitute" is defined broadly to include any situation where a teacher temporarily fills a vacant position, VanHandel can still not be considered a substitute teacher. The record clearly demonstrates that Hefty was hired for a one-year position, as indicated in her job description, and that VanHandel was hired to replace her without any meaningful limitation on his employment status. Except for the District's self-serving action in not providing him with full bargaining unit rights, VanHandel's employment was no different than any other new teacher. The District argues that VanHandel was employed for an indefinite period of time, contingent upon Hefty's termination of her consortium job and return to the District. However, the Association's position in that regard, is buttressed considerably by the regulations of the Department of Public Instruction (DPI), which supervises the administration of public elementary and secondary education in this state. Under Section 3-31 of the DPI Administrative Code, a "substitute teacher" is defined as: "A licensed teacher who occupies temporarily the position of an absent teacher." (Emphasis added). A "teacher" is defined as a "licensed member of the professional staff whose work includes the exercise of any educational function for compensation, in an elementary/secondary school instructing pupils, or administering, directing, or supervising any educational activity." Section 34. "Long-term substitutes" are defined as "teachers employed for 21 or more consecutive days in the same teaching assignment." While that definition does not set a maximum limit on the number of days a substitute teacher can be employed, the regulations define "regularly-employed" as "employment by a school system as a teacher at a fixed or uniform level for at least one semester." Section 3-25. Under that definition, VanHandel, having taught since the first day of school through the current date, is a regularly-employed teacher.

While there is no clear bargaining history, past practice reinforces the Association's position. Teachers replaced on medical leave have been replaced by a substitute teacher when the uncertainty of an unexpected absence, due to illness, did not provide a date certain for the teacher to return. While contracts may be written to terminate upon the occurrence of some contingent event such as the return of the employe, without prejudice to the District under that occurrence, and the Association understands that it was the intent of the District to release VanHandel from his employment upon Hefty's return, that intent does not alter his regular,

full-time status, nor does it release the District from its responsibility to provide him with all of his rights under the parties' Agreement. VanHandel was expected to carry out the responsibilities and duties of a regular full-time teacher, rather than the role expected of a substitute.

Last, the Association asserts that excluding VanHandel from the bargaining unit would encourage unjust results and frustrate the policies and purpose of MERA. It asserts that ambiguous language should be construed to advance reasonable and equitable results. In this case, the District's interpretation of the recognition clause would allow them to obtain an inequitable tactical advantage over the teachers, and permit them to engage in unilateral bargaining with relatively powerless individuals. Here, VanHandel entered into an agreement with the District that was individually-bargained and which called for fewer fringe benefits and salary than the collective bargaining agreement. On its face, that is a nullity. The District cannot individually bargain a contract that is inconsistent with the negotiated agreement. Further, the Agreement does not exclude substitute teachers. Although the District has a practice in three cases in the past 22 years of hiring a substitute teacher for an extended period of time in the case of a teacher on medical leave, that is not a conclusive practice regarding future long-term medical leaves. The recognition clause is not ambiguous on its face, but the District apparently argues that it is ambiguous with regard to the prior practice. Arbitrators have noted that it is rare that an arbitrator will construe clear and unambiguous language to be ambiguous through collateral evidence. In this unit, VanHandel's bargaining unit status is wholly dependent upon the meaning of the recognition clause and VanHandel's position falls within that bargaining unit and is covered by the Agreement's provisions.

In its reply brief, the Association asserts that while the District correctly states that the Agreement's recognition clause is silent on the issue of substitute teachers, the fact that the District designated VanHandel as a substitute teacher is not controlling. Rather, the evidence must be reviewed in order to determine whether he had a sufficient community of interest with full-time teachers so as to be included in the bargaining unit. VanHandel was hired at the beginning of the school year to fill a position left vacant when Hefty signed a contract with the consortium for a term of one year. VanHandel is not temporarily substituting for an absent teacher; rather, he is filling a vacant position. The District attempts to evade that distinction by arguing that Hefty has the right to return to her position during the current school year, however, the substitute contract issued to VanHandel clearly identified the District's intent to terminate his employment at the end of the year, or when Hefty returned. Further, the fact that Hefty's contract was bargained through at least two drafts with the Association before reaching a final agreement, is not relevant, since it is VanHandel's contract that is at issue. The argument that VanHandel was a substitute because the Board failed to offer him a contract is self-serving. Under that theory, a teacher is to be considered a "substitute" until the District decides to offer the teacher a contract, i.e., decides the teacher should be treated as a regular teacher. Such a position seriously interferes with stable labor relations, as it allows the District to unilaterally determine the size of the bargaining unit. Under the District's theory, all of the teaching positions could be occupied by non-bargaining unit personnel (long-term substitutes) until the Board decided to issue them contracts. Further, the recognition clause in

the Agreement does not distinguish employes included in the bargaining unit from those not included on the basis of the length of their employment; rather, it distinguishes employes included in the unit from those who are not only on the basis of their professional teaching status. Since VanHandel is a certified professional teacher, and employed as such by the District, and all professional teaching staff of the District are included in the bargaining unit, the only evidence in the record that distinguishes VanHandel from the rest of the professional teaching staff is the indication that his contract could be terminated mid-term upon the return of Hefty. This only means the District wished to offer VanHandel employment for a period of time that may be less than a full school year. Had his employment been discontinued because of Hefty's return, the Association would argue that his salary and benefits would have to be pro-rated on that basis.

The Association also asserts that the District has failed to establish a past practice of the hiring of a replacement teacher to a vacant position and labeling them as a substitute teacher. In this case, Hefty effectively resigned her contract with the District in order to sign a new contract with the consortium. She had to do this in order to avoid violating Section 118.22(2), Stats., referenced earlier. By its own evidence, the District has only given substitute contracts for long-term substitutes to teachers who are substituting for teachers on a medical leave. In all other long-term absences, when a position was vacated the District did not hire a substitute. Regardless of the label used by the District, the facts and circumstances of VanHandel's employment duties and responsibilities clearly establishes that he belongs in the bargaining unit. Thus, the District should be found to have committed a prohibited practice, and be ordered to give VanHandel full back pay and all other benefits provided by the parties' collective bargaining agreement.

District

The District takes the position that there are two issues in this dispute, the first being whether or not VanHandel is a substitute teacher. In that regard, the District asserts that VanHandel is a substitute, rather than a replacement teacher. While there is no question that Hefty was granted a leave of absence which can extend through the entirety of the 1999-2000 school year, there is also no question that she has at all times had the right to immediately return to her teaching position, in the event that the position she currently holds is terminated, in the event just cause exists to terminate her contract in that position, or in the event that there is mutual agreement to terminate the position. The District has a long-standing practice of hiring substitute teachers to fill positions for teachers who are on a leave of absence and has only deviated from that practice and hired replacement teachers as regular full-time teachers when teachers being replaced have planned to leave for a full year without any opportunity to return during that year. There have been two such instances in which replacement teachers were hired. In the first case, which occurred in the 1978-79 school year, a replacement teacher was hired to replace a teacher taking a full year leave of absence and the contract specifically noted that fact. In the second case, a replacement teacher was hired in the 1993-94 school year to replace a teacher who took a leave of absence for a year to care for a new child.

Again, the contract specifically stated it was for a period of one year, and for the purpose of replacing a teacher on a leave of absence. In contrast, the District has also hired substitutes rather than replacement teachers at the commencement of school years. The critical difference has been whether or not the teacher being replaced has the right to return to his/her position during that school year. In those instances, the substitute teacher was hired at the start of the school year to replace a teacher who was suffering from a terminal illness, and the contract specifically provided that the position would end at such time as the ill teacher returned from medical leave. No different contract was used in this case when VanHandel replaced Hefty at the start of the 1999-2000 school year. The contract specifically provided that the position was available through either the end of the 1999-2000 school year or the date upon which Hefty returned to teaching. The District determined to hire a substitute in this case only after executing the contract with Hefty, which contained the provision enabling her to return to her teaching position during the school year under a number of circumstances. The District asserts that its practice in hiring substitute teachers has been consistent over a substantial period of time, and that it is also consistent with reasonable management practices in that the parties' Agreement does not permit the District to lay off a teacher on less than 90 days' notice. Hiring substitute teachers for teachers who are on an indeterminate leave of absence insures that the District will not find itself in the position of having more than one teacher in the same position for up to three months. Finally, in this regard, the Association has presented no evidence to controvert the District's evidence that VanHandel was hired as anything other than a substitute teacher and there is no ambiguity in his contract in that regard. The burden is on the Association to show that VanHandel is a replacement, rather than a substitute, as it alleges, and to sustain such burden "by a clear and satisfactory preponderance of the evidence." Section 111.07(3), Stats. The District asserts that the Association has failed to meet that burden.

The District asserts that the second issue in this dispute is whether or not VanHandel is a member of the bargaining unit represented by the Association. In that regard, it asserts that because substitute teachers are not a part of the bargaining unit, the Association has no standing to pursue its prohibited practice complaint in this case. At no time has the Association claimed that substitute teachers are properly considered part of this bargaining unit. Although the parties' Agreement is silent on the question of whether substitute teachers are included in the unit, the Association presented no evidence to support a contention that they have ever been included as part of this unit. If the Association is now contending that the recognition clause in the Agreement does include substitute teachers, the burden of proof is on the Association as set forth above.

In contrast, the District's position that substitutes have not been considered a part of the bargaining unit is unrefuted. The substitute teacher's contract utilized by the District for years specifically states that substitute teachers are not a part of the collective bargaining unit. Further, substitute teachers have consistently been offered these contracts regardless of whether they are long-term or short-term. The only time the contracts have not been used is when replacement teachers were hired for a term certain of not less than a year. Finally, the Association produced no witnesses or other evidence to support a conclusion that substitutes

have been treated as members of the bargaining unit, or included in the bargaining process, or that they otherwise have a "community of interest" with bargaining unit members. Since substitute teachers are not members of the bargaining unit, the Association lacks standing to pursue this complaint and the Commission lacks jurisdiction to render a decision on it. The filing of a prohibited practice complaint is limited to parties in interest. Section 111.70(4)(a), Stats., incorporating Section 111.07, Stats., by reference. The rationale for that limitation is similar to grievance language in collective bargaining agreements limiting the right to file grievances to bargaining unit members who are aggrieved and/or their representative, or the bargaining unit itself.

Here, the underlying complaint does not meet the contractual definition of a grievance for purposes of arbitration. The Agreement defines a "grievance" as "any dispute regarding the interpretation and application of a specific provision of this Agreement." The provision alleged to have been violated in this case is the recognition clause. Since substitute teaching positions are not recognized as part of the bargaining unit, the rest of the Agreement is wholly inapplicable. The District cites arbitral decisions it asserts hold that if the grievance does not meet the contractual definition of a "grievance" and deals with the position outside of the bargaining unit, the employer cannot be required to arbitrate. Similarly, the employer cannot be found to have committed a prohibited practice under Section 111.70(3)(a)4, Stats., for issuing an individual contract to a person not in the bargaining unit. Similarly, Section 111.70(3)(a)5, Stats., is wholly inapplicable where the issue is whether the District violated the collective bargaining agreement by contracting with the person who is neither a member of the unit nor eligible for inclusion in it. Thus, the Association should be found to lack standing to pursue this complaint, and the complaint itself should be dismissed.

Finally, the District asserts that it did not violate either Section 111.70(3)(a)4 or 5, Stats., when it offered VanHandel a substitute teaching contract. Under the Management Rights provision in the parties' Agreement, the District has the right to determine "the kinds and amounts of services to be performed as pertains to District operations; and the number and kind of classification to perform such services", and "to determine the methods, means and personnel by which District operations are to be conducted." There is no language in the Agreement prohibiting the District from hiring substitute teachers for bargaining unit members who are on a leave of absence. Similarly, there is no practice that limits the District's flexibility in hiring substitutes other than cases where the bargaining unit member is on a leave of absence for at least a full year, and for a time certain. The District has had a consistent practice of hiring substitute teachers for teachers on a leave of absence for an uncertain term even when that term has been the entirety of a school year. There has been no evidence presented demonstrating that the District refused to bargain within the meaning of Section 111.70(3)(a)4, Stats. Further, the District did bargain the ITC contract with Hefty and the Association and, at their request, accepted a provision in that contract enabling Hefty to return to her teaching position at any time during the 1999-2000 school year. Thus, the fact that the District should seek to protect itself against the possibility of having overlapping personnel occupying the same teaching position, as it has in the past, should not surprise the Association. There also has been no evidence presented to support a contention that the

District violated the parties' Agreement. The Association has not pointed out any language in the Agreement prohibiting the District from hiring substitutes for teachers on a leave of absence, and the Management Rights clause in the Agreement limits the exercise of those Management Rights only to the extent that the "specific and express terms" of the Agreement creates such a limitation.

In its reply brief, the District asserts that the Association characterizes Hefty's contract as being between the consortium and Hefty, and further characterizes Hefty as having effectively resigned from her math teaching position. Neither is the case. Hefty's contract as the ITC is between Hefty, the Association and the District. Except as specifically modified by the terms of that contract, the terms and conditions of Hefty's employment were the same as for bargaining unit members. Absent that contract however, Hefty would have been required to resign her position as a math teacher in the District. She was not required to do so, since the negotiated contract provided her with all of the benefits of being a bargaining unit member and enabled her to take the position without risking her re-employment rights with the District, her seniority, and most importantly, her ability to resume her regular teaching position at any time. It was not the District that proposed this unfettered right of reinstatement; rather, the Association and Hefty wanted the broadest and most flexible arrangement possible to ensure that there would be no employment gap. It is ironic that in negotiating that right, the Association lacked the certainty that the position would be for one year that it now argues was virtually a sure thing. The Association now ignores that reinstatement provision in its entirety and brushes it aside as an eventuality that has little likelihood of occurring. For the Association to now argue that the District should not have protected itself against exactly the same risk by hiring a substitute, is inconsistent at best and hypocritical at worst.

The Association also argues that the District's history of hiring substitutes has been exclusively for teachers on long-term medical leave. The Association asserted this made sense, since only the employe and his/her physician determine the length of the leave, however, that assumes that employes are entitled as a matter of right to extended medical leaves of indeterminate duration. Nothing in the Agreement supports that argument. Under Article VI(G) of the Agreement, once an employe has exhausted his/her sick leave, the decision of whether or not to grant additional leave is discretionary with the District. Nothing in the Agreement prohibits the District from requiring employes to take a leave of a definite or minimum duration as a condition of granting such extended leave. However, the District has chosen to permit employes to take medical leaves of indefinite duration and facilitates this by hiring substitute teachers. This serves both the needs of the employes and protects the District. The District does not find it surprising that the past practice has extended only to sick leave, since the Agreement does not provide for extended leave for any other purpose. Here, the District followed that practice that it had consistently used with respect to sick leave and applied it to a new situation that presented the same circumstance as those presented under an indeterminate medical leave in accommodating Hefty's desire to take the new position and her and the Association's concern with respect to reinstatement.

Finally, it appears the Association is not claiming that the recognition clause includes substitutes, and is instead arguing that VanHandel was not a substitute. While the Association asserts that VanHandel performed all the tasks that a regular teacher ordinarily performs, it presented no evidence that those same tasks had not been performed by other substitute teachers who have been employed to replace teachers on a long-term leave, or that VanHandel did more than any other substitute teacher. In this case, VanHandel was hired as a substitute, and had no expectation of continuing employment and was performing another teacher's duties for an indefinite period. The District asks that the prohibited practice complaint be dismissed.

DISCUSSION

It must be initially noted that this is not a grievance arbitration nor a unit clarification; rather, it is a contract hiatus case, as the dispute arose after the expiration of the parties' 1997-1999 Agreement and before a successor agreement was reached. As the Commission held in WASHBURN PUBLIC SCHOOLS, DEC. NO. 28941-B (WERC, 6/98):

> It is well settled that during a contract hiatus, absent a valid defense, a municipal employer violates Sec. 111.70(3)(a)4, Stats., if it takes unilateral action as to mandatory subjects of bargaining in a manner inconsistent with its rights under the dynamic status quo. ST. CROIX FALLS SCHOOL DIST. V. WERC, 186 WIS.2D 671 (1994) AFFIRMING DEC. NO. 27215-D (WERC, 7/93); RACINE EDUCATION ASSOCIATION V. WERC, 214 WIS.2D 352 (1997); VILLAGE OF SAUKVILLE, DEC. NO. 28032-B (WERC, 3/96); MAYVILLE SCHOOL DISTRICT, DEC. NO. 25144-D (WERC, 5/92) AFFIRMED MAYVILLE SCHOOL DISTRICT V. WERC, 192 WIS.2D 379 (1995); JEFFERSON COUNTY V. WERC, 187 WIS.2D 647 (1994) AFFIRMING DEC. NO. 26845-B (WERC, 7/94); CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84). The dynamic status quo is defined by relevant language from the expired contract as historically applied or as clarified by bargaining history, if any. CITY OF BROOKFIELD, SUPRA; SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85); VILLAGE OF SAUKVILLE, SUPRA.
>
> (At pp. 5-6)

In this case, the Association asserts that VanHandel was essentially hired to teach full-time for the entire 1999-2000 school year in Hefty's place and therefore should have been treated as a member of the bargaining unit represented by the Association with all of the rights under the collective bargaining agreement covering the members of the unit. In other words, the question in this case is whether the District altered the wages, hours and conditions of employment of a bargaining unit member by treating VanHandel as a substitute teacher, rather than as a regular teacher. To decide that issue requires the determination of the *status quo*. 1/

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1/ In that regard, the Examiner would note that whether this dispute meets the definition of a grievance under the parties' contractual grievance procedure is not relevant to a determination of whether the District has altered the status quo.

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In noting that the parties in that case had tended to litigate their dispute as though it were a grievance arbitration, the Commission explained in WASHBURN:

> "(A) status quo analysis is different than a grievance arbitration analysis. The language of the expired agreement, any practice, and any bargaining history are all to be considered when determining the parties' rights under the status quo. SAINT CROIX FALLS SCHOOL DISTRICT, DEC. NO. 27215-D, SUPRA; CITY OF BROOKFIELD, SUPRA; SCHOOL DISTRICT OF WISCONSIN RAPIDS, SUPRA; VILLAGE OF SAUKVILLE, SUPRA.
>
> (At p. 8)

Looking first to the wording of the parties' Agreement, Article II, Recognition Clause, states that the Association is recognized as the exclusive representative of the "professional teaching staff" in the District, and excludes the "district administrator, building principals, and C.E.S.A. employes." On its face, that wording is certainly broad enough to include individuals hired under such circumstances as was VanHandel. However, as the Commission points out in its decision in WASHBURN, in determining the existing *status quo*, the wording of the expired agreement is not the only factor to be considered; there is also past practice and bargaining history.

The parties have not presented any evidence as to bargaining history. There is, however, sufficient evidence in the record from which to conclude that historically the District has not treated individuals who have been hired to replace an absent teacher for a lengthy, but indeterminate, amount of time that may span the entire school year, as members of the bargaining unit covered by the parties' collective bargaining agreement. There is no indication in the record that the Association ever challenged the District's actions or otherwise indicated its disagreement in that regard until now.

The Association would argue that VanHandel's situation is the same as those instances where individuals were hired to replace teachers who were on a one year's leave of absence. In those instances, the replacements were issued regular teaching contracts for one year and covered by the collective bargaining agreement and the teachers on leave of absence did not have the right to return during that period. The distinction between those situations and VanHandel's circumstances is evidenced by the individual employment contract negotiated between Hefty, the Association and the District for the ITC position. 2/ That document provides, in relevant part:

> This contract may be modified or terminated at any time during the term hereof by the mutual, written agreement of the parties hereto, except that the Board reserves the right to terminate said contract upon thirty (30) calendar days written notice should the services of the Consultant as ITC no longer be necessary. Further, the Board reserves the right to terminate said contract upon five (5) calendar days written notice if just cause exists to do so. If the ITC position is eliminated under any of the above circumstances, the Consultant will be immediately returned to the regular teaching position with the LCSD from which she is taking leave.
>
> (Joint Exhibit No. 5)

2/ The Association's argument regarding the application of Sec. 118.22, Stats., is misplaced, as it is clear from Hefty's ITC contract that she remains an employe of the District in the ITC position.

That provision in Hefty's ITC contract makes VanHandel's situation more akin to those prior instances where teachers had been granted a medical leave of absence with the right to return to their positions when they were able. The individuals hired to replace them were issued substitute teacher contracts and were not covered by the collective bargaining agreement. In two of those three instances, the replacement taught for the entire school year, as it is possible VanHandel will also do in this case.

It is concluded that the *status quo* with regard to replacing teachers who have been granted a leave of absence with a right to return to their teaching positions during the school year is to hire a long-term substitute that is not included in the bargaining unit, nor covered by the parties' collective bargaining agreement. That being the case, the District did not violate the *status quo* when it hired VanHandel as a substitute to replace Hefty and did not apply the terms and conditions of employment in the parties' expired Agreement to him. As VanHandel is not a member of the bargaining unit represented by the Association, it was not individual bargaining for the District to deal with him directly.

As the parties' 1997-1999 Agreement had expired by its terms when this dispute arose, the District's conduct could not violate an existing collective bargaining agreement. Therefore, the alleged violation of Sec. 111.70(3)(a)5, Stats., has also been dismissed.

Dated at Madison, Wisconsin this 9th day of May, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/
David E. Shaw, Examiner

DES/gjc
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