BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

KOHLER EDUCATION ASSOCIATION

and

KOHLER SCHOOL DISTRICT

Case 16
No. 54778
MA-9785

Appearances:

Mr. Charles S. Garnier, Field Representative, Wisconsin Education Association Council, 550 East Shady Lane, Neenah, Wisconsin 54956, for the Association.

Mr. Paul C. Hemmer, Davis & Kuelthau, S.C. Attorneys at Law, 605 North 8th Street, P.O. Box 1287, Sheboygan, Wisconsin 53082-1287, for the District.

ARBITRATION AWARD

The Association and the District are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Association requested and the District concurred, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute as set forth below. The Commission appointed Dennis P. McGilligan, a member of its staff. Hearing on the matter was held on July 8, 1997, in Kohler, Wisconsin. The hearing was transcribed, and the parties filed briefs and reply briefs by September 23, 1997.

ISSUE

The parties were unable to stipulate to the issues. The Association framed the issue as:

> Did the Employer violate Section 2.1 and Appendix A of the collective bargaining agreement when it did not include Rebecca Bruder and Ann Hoppert in the professional staff bargaining unit during the 1996-97 school year?

The District framed the issues in the following manner:

Is the Arbitrator without procedural and/or substantive jurisdiction over the dispute for the reasons that:

A. The grievance was not filed within the time period, prescribed by the contractual grievance procedure; and

B. Long-term substitute teachers are excluded from the collective bargaining agreement pursuant to the specific terms of the recognition clause?

If the Arbitrator has both procedural and substantive jurisdiction over the dispute, did the School District violate the terms of the collective bargaining agreement through failing to apply its terms to long-term substitute teachers Rebecca Bruder and Ann Hoppert? If so, what is the appropriate remedy?

Having reviewed the entire record, the Arbitrator frames the issues as follows:

1. Is the grievance procedurally arbitrable?

2. Is the grievance substantively arbitrable?

3. If the grievance is both procedurally and substantively arbitrable, did the District violate the terms of the collective bargaining agreement when it failed to apply its terms to the grievants?

FACTUAL BACKGROUND

Facts Leading to the Instant Dispute

During the 1995-96 school year, a high school Spanish teacher and an elementary school music teacher requested that the Board of Education approve one year leaves of absence for each teacher, to occur during the 1996-97 school year. The requests were approved. The District publicly advertised for applicants to accept one year appointments to the open positions. Specifically, by letter dated June 7, 1996, the District asked The Sheboygan Press to run a Classified Ad for a Long Term Substitute Teacher as follows: "The Kohler School District is seeking a Long Term Substitute teacher for a part-time (60 percent of fulltime) elementary/middle school vocal music teacher (K-8) for the 1996-97 school year. . . ." By letter dated June 25, 1996, the District asked The Sheboygan Press to run a Classified Ad for another Long Term Substitute Teacher as follows:

"The Kohler School District is seeking a teacher for a full-time high school Spanish position for the 1996-97 school year."

Rebecca Bruder and Ann Hoppert, hereinafter grievants, applied for, were considered, and appointed to the Spanish and music positions, respectively. Neither Bruder nor Hoppert were offered individual teaching contracts. Rather, in July, 1996, both teachers received letters that welcomed them to the staff of the school system and indicated that they were being hired into "one-year, temporary position(s)." Both letters also indicated that the teachers would be placed "on Step 1 of the A Schedule of the teachers' negotiated contract salary schedule," but that their actual salary amount was unknown because "negotiations for the 1996-97 fiscal year have not been completed." Said letters also informed the teachers that their positions were covered by the Wisconsin Retirement System, and that they would have to "make a .03 percent contribution for this benefit; the Board will pay the remaining required 6.2% contribution as well as the required 6.6% employer contribution." The letters further indicated that "no other benefits apply" to said positions.

Both individuals were also told that they would be replacing teachers on leave and that their assignments would have a duration of one year.

During the process that led to their employment, neither Bruder nor Hoppert were informed that teachers were organized into a collective bargaining unit; that there was a union that represented same; and that there was a collective bargaining agreement that covered the wages, hours and conditions of employment for all bargaining unit members. Neither of the grievants were given a copy of the collective bargaining agreement by the District.

Neither Bruder nor Hoppert were considered to be members of the bargaining unit by the District. However, they were never specifically informed of same by the District at any time material herein.

The grievants did not receive health insurance, dental insurance, group life insurance, long-term disability insurance or participate in the District's tax-sheltered annuity program.

Hoppert requested, and was granted, the opportunity to participate in the District's health insurance coverage with the proviso that she pay the full cost of the yearly premium. Bruder did not request access to health insurance; nor was it offered to her. Therefore, she remained uninsured for the 1996-97 school year.

The grievants did not have fair share, nor dues deductions made and forwarded to the Association on their behalf. They were authorized and did receive certain compensated time-off benefits, including sick leave and personal leave.

During the 1996-97 school year, Bruder worked a full workweek, Monday through Friday; and also worked the full 190 day school year. She also worked 100% of a full teaching load as defined in the parties' collective bargaining agreement.

During the 1996-97 school year, Hoppert worked a full work week, Monday through Friday; and also worked the full 190 day school year. She worked 68% of a full daily teaching load as defined in the aforesaid agreement.

During the course of the 1996-97 school year, Rebecca Bruder had her salary adjusted upward after the contract settlement was reached between the District and the Association. She was also given a separate contract to perform an extra-curricular duty during said school year (SEC Curriculum Chair - Non-Core Area Year 2); she was evaluated by her immediate supervisor on several occasions; she was expected to attend school events such as open houses, parent-teacher conferences and faculty meetings like other teachers – and she did, in fact, attend such functions. She also was granted sick leave and personal leave with pay during the school year; and she attended inservice programs with other teachers. She was further given the task of rewriting the District's Spanish curriculum. Regarding the treatment of Ann Hoppert, the District stipulated at the hearing that the evidence presented regarding Bruder's duties and responsibilities was 95% accurate when applied to Hoppert.

Dr. Egan testified that long-term substitute teachers like the grievants are evaluated under different standards than regular teachers, and are not subject to continuing education require-ments.

Both Bruder and Hoppert were expected to perform at the same level and to perform the same duties as regular classroom teachers. They fully participated in the life of the District during the aforesaid school year and were expected to do so.

Rebecca Bruder was re-employed by the District for the 1997-98 school year and was granted one-year's experience on the salary schedule which, according to her teaching contract, "is non-precedent setting." She is currently fully covered the collective bargaining agreement. Ann Hoppert was not reemployed by the District.

Past/Present Contract Language Regarding "Substitute" Teachers

The 1978-80 collective bargaining agreement between the parties contained no reference in the Recognition clause to "substitute" teachers of any type.

The 1980-83 agreement between the parties contained for the first time language excluding "All substitute teachers" from the bargaining unit recognized by the District. There is no testimony or evidence in the record that deals with the intent of the parties when they

included this language as part of the agreement in 1980. There is no record evidence that this matter has been brought up at the bargaining table since that time. No grievances have been filed by the Association or by individual bargaining unit members regarding the question of whether or not long-term substitutes are bargaining unit members before the filing in the instant case.

The aforesaid agreement does not define the term "All substitute teachers." The current collective bargaining agreement does not define the term. There is no evidence in the record that the parties have previously sought to define this term.

The term "long-term substitute" is not found in the current collective bargaining agreement.

Past Practice Regarding "Substitute" Teachers

The District does not have any written policies dealing with the matter of substitute teachers. Nor does it have any written or unwritten administrative rules dealing with the matter of substitute teachers. With respect to long-term substitute teachers, the District approaches the matter of setting terms and conditions of employment on a case-by-case basis making arrangements based on what the District Administrator considers fair and appropriate.

Edel Reilly was hired by the District to replace Jack Rosenthall while he was on leave for the entire 1992-93 school year; she was given a regular teaching contract in the form contained in the professional staff collective bargaining agreement; she received all of the employment benefits authorized under the terms of the aforesaid agreement; she was covered by all of its terms except the recognition clause; and deductions for Association dues were made on her behalf.

Kenneth Roeder was hired by the District to replace Jack Rosenthall while he was on leave for the 1993-94 and 1994-95 school years. Roeder was given a regular teaching contract and all of the terms of the professional staff collective bargaining agreement, except the recognition clause, were applied to him. Deductions for Association dues were also made on his behalf. Following this term of employment as a long-term substitute, Roeder was employed as a regular full-time teacher, assuming the position of Rosenthall who retired. Thereafter, representatives of the Association approached the District Administrator and requested that he consider giving Roeder credit, at least in part, toward the regular teacher probation period, based on his prior service. The Association did not make a demand for this action or file a grievance. By letter dated June 13, 1995, District Administrator John R. Egan wrote as follows:

> In an attempt to resolve your concern, which will not be considered by the School District or the Kohler Education Association as establishing a precedent or past

practice of any type with regard to future probationary requests for long term substitute teachers, the following has been agreed upon and accepted by Ms. Herbst and Mr. Buhr, KEA Grievance Committee members.

> You will be granted one year credit for your probationary period. The year credited will be the 1993-94 school year, which also gives you one year of seniority. There will be two years remaining on your probationary period, which is 1995-96/1996-97. Any sick days, not used during the 1993-94 school year, will accrue to your sick days for the 1995-96 school year.

William Kohler was hired by the District for a term of 93 days for the second semester, 1992. He was paid "on a days worked basis." He was not authorized and did not receive any of the insurance coverage benefits included under the terms of the collective bargaining agreement. Association dues were not deducted and forwarded on behalf of Kohler. Kohler also substituted for shorter periods of time (four to six weeks) prior to his service to the District noted above under the same or similar terms and conditions of employment.

The District often hires individuals to replace teachers who are absent on a day-to-day basis because of personal or family illness or emergency, or because they have taken a personal leave under provisions of the collective bargaining agreement. Such absences are on an irregular, intermittent and/or short term basis. Individuals who are hired to replace such absent teachers are paid a daily rate by the District and are afforded no other wages or benefits that would normally be provided to regular classroom teachers. Such individuals are not required to attend faculty meetings, inservice sessions, or school open houses. Nor are they required to remain on duty after the last class of the day for students. No payments are made by the District into the Wisconsin Retirement System on behalf of such individuals; such individuals are not members of the professional staff bargaining unit; and they do not have Association dues deducted on their behalf.

Filing of the Grievance

Dan Buhr, Association Grievance Committee Co-Chair, found out by "word of mouth" on September 19, 1996 that the grievants were being denied full benefits under the collective bargaining agreement. Buhr scheduled a meeting with the District Administrator on September 30, 1996. The grievance was presented orally to the District on September 30, 1996, by representatives of the Association. Thereafter, the grievance was processed through the steps of the grievance procedure. At Step 2 of the grievance procedure, the District Administrator denied the grievance, in part, because "The grievance is barred by reason of the failure to follow the time line for filing alleged grievances at Step 1. Grievances must be promptly submitted orally within fifteen working days of the alleged grievance having arisen."

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE II - RECOGNITION

2.1 The Board recognizes the Kohler Education Association as the exclusive bargaining representative on wages, hours and conditions of employment for all regular full-time employees and all regular part-time (one-half time or more) employees of the District engaged in teaching, including classroom teachers, librarians, reading specialists, and guidance personnel, but excluding the following:

A. Administrators, coordinators, principals, supervisors and those department heads having evaluative responsibilities over other staff members.
B. Extra-curricular personnel not on the regular teaching staff.
C. Non-instructional personnel such as nurses and social workers.
D. Office, clerical, maintenance and school lunch workers.
E. All teacher aides, expressly including, without limitation by enumeration, Title I aides.
F. All substitute teachers.
G. All interns.

. . .

ARTICLE V - TEACHER EMPLOYMENT POLICIES

5.8 Fair Share

A. The Association, as the exclusive representative of all employees in the bargaining unit, will represent all such employees, members and non-members, fairly and equally. Each employee in the unit will be required to pay, in accordance with the terms of this Article, his or her fair share of the costs of representation by the Association. No employee shall be compelled to join the Association, but membership in the Association shall be made available to all employees who apply, consistent with: a) the Association constitution and bylaws and b) applicable law.

. . .

ARTICLE IX - GRIEVANCE PROCEDURE

9.1 Purpose:

The purpose of this procedure is to provide an orderly method for resolving differences arising during the term of this Agreement. A determined effort shall be made to settle any such grievance through the use of the grievance procedure.

. . .

9.3 Steps of Grievance Procedures:

Step 1 Grievances must be promptly submitted orally to the building level administrator within fifteen (15) working days of the alleged grievance having arisen. If the grievance is not adjusted in a manner satisfactory to the grievant within five (5) working days from the time it was orally submitted to the building level administrator, the grievant may proceed with Step 2.

Step 4 If not satisfied with the response of the Board, the Association, within fifteen (15) working days after receipt of the response, may request arbitration of the dispute by written notice delivered to the office of the District Administrator. After the request is so delivered, the parties shall attempt to select an impartial arbitrator. . . . The arbitrator shall neither add to, detract from, amend, nor modify any language of this collective bargaining agreement. A decision of the arbitrator shall, within the scope of his/her authority, be binding upon the parties.

PARTIES' POSITIONS

Association's Position

The Association initially argues in its brief that the grievance was orally submitted by the Association on behalf of the grievants in a timely manner on September 30, 1996. In support thereof, the Association first maintains that because neither the grievants (because they had not been given any information regarding their unit status from the District) nor the Association (because the District neither informed the Association at any time that it did not consider the grievants to be members of the unit or supply the Association with an updated copy of the seniority list for professional staff which would have provided the Association with notice that the District did not consider them to be bargaining unit members) knew on a timely basis that the District had not granted the grievants bargaining unit status, there was no knowing failure

to object by these parties. The Association adds that as soon as the Association's co-grievance chair learned on September 19, 1996, by "word of mouth" from other teachers that the grievants were being denied full benefits under the agreement he scheduled a meeting with the District Administrator on the aforesaid date, which is within fifteen days after he found out that the grievants were not receiving insurance benefits. Thus, according to the Association, it complied with the grievance procedure's requirements notwithstanding said procedure's lack of a "knew or should have known" standard.

The Association next argues that there is no evidence to support a claim that the Association ever accepted the District's current contention that professional employes it identifies as "long-term substitutes" are not members of the professional staff unit. In this regard, the Association avers that the parties have not dealt with this issue before; no grievances had been previously filed regarding this matter; no record exists regarding bargaining history as to what the parties meant when they excluded "All substitute teachers" from the unit; and the contract does not define the term. Therefore, the Association avers that the Arbitrator must look elsewhere in making a determination in the instant case.

In this regard, the Association claims that past practice in at least two instances supports its position that "long term substitutes" are properly members of the professional staff unit. In support thereof, the Association notes that on at least two occasions since John Egan became District Administrator individuals have been included in the professional staff unit even though they were replacing another individual who was on medical leave of at least one year's duration.

The Association also points out that the grievants did not function in the same fashion as individuals who are hired to replace teachers who are absent on a day-to-day basis because of illness, personal leave requests, and/or emergencies. In this regard, the Association notes that unlike the grievants individuals who are hired on an irregular, day-to-day basis are paid a daily rate, receive no benefits, are not evaluated, do not participate in open houses, in-service programs, faculty meeting, extra-curricular duties, or parent-teacher conferences. The Association adds that the District knew well in advance that the grievants would be working for at least one year and the District never has such advance notice that teachers will be absent because of illness, personal leave or emergency. The Association concedes that the District has a legitimate interest in insisting that casual workers such as short-term substitutes not become unit members but claims the District has no such interest in preventing the grievants from same because the teachers the grievants were replacing were on unpaid leave and paying their own benefit costs so there was no chance of having to pay benefit costs for both sets of teachers. The Association adds that if and when the teachers on leave returned, the grievants could have been laid off pursuant to the terms of the agreement; thus protecting the District from having to find other positions for them for the ensuing school year.

The Association further argues that the term "long-term substitute" was unilaterally coined by the District without the approval of the Association and is an easy way for the District to claim that because it contains the word "substitute" this fact in itself is a legitimate reason to be excluded from the unit. The Association asks the Arbitrator to reject this type of reasoning out of hand. The Association claims that the real issue in this case is whether or not the grievants should have been included in the unit based on appropriate criteria, not on what title this type of employe is given.

In support thereof, the Association first argues that the grievants share a community of interest with regular classroom teachers.

The Association next argues that the grievants meet the criteria contained in the recognition clause of the agreement for inclusion in the unit. In this regard, the Association notes that it is undisputed that the grievants were engaged in teaching, and that they taught one-half time or more. Therefore, according to the Association, they met these criteria contained in the recognition clause for inclusion in the unit. A question remains, according to the Association, as to whether or not they were regular employes within the meaning of said clause. (Emphasis supplied)

Since the agreement does not define the term "regular employe," the Association avers that it would be appropriate to look at applicable Wisconsin Statutes and/or Administrative Code as well as WERC decisions to give meaning to the aforesaid term.

Citing Examiner Sherwood Malamud in FENNIMORE COMMUNITY SCHOOLS, DEC. NO. 18811-A (1/83), the Association argues that the Arbitrator should rely on the definitions provided by the Department of Public Instruction in the Wisconsin Administrative Code. The Association claims that there is no doubt that the grievants fit the definition of "regularly employed" teacher contained in Chapter PI 3.01(33) which provides that such a teacher is one who is employed for fixed intervals for the equivalent of at least one hour per day for at least one semester. At the same time, the Association claims that the grievants do not fit the DPI definition of a "substitute teacher" because they had the same expectation of continued employment as a regular classroom teacher in the District. The Association also claims that even though the grievants were replacing teachers on leave they were considered probationary teachers. The Association points out that the expectation of continued employment for any probationary teacher in the District is far more limited than for "regular" teachers who have successfully completed their probationary period, yet there is no dispute that probationary teachers who are not replacing someone are in the unit. (Emphasis supplied)

The Association also avers that several other WERC decisions are applicable herein. In this regard, the Association cites MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NO. 14161-A P.6 (WERC, 1/77) for the proposition that teachers under temporary contract have a community of interest with "regular" teachers. The Association also cites KENOSHA UNIFIED SCHOOL DISTRICT NO. 1, DEC. NO. 14908 (WERC, 9/76) for the proposition that substitute teachers who had taught at least 10 days in the present or prior school year were eligible to vote in the representation election and that teachers under a temporary contract who work on a more continuous basis than substitute teachers are also regular employes.

In its reply brief, the Association makes the following principal arguments. One, even though a "knew or should have known" standard is not present in the Kohler agreement, the Association and the grievants were not negligent by their delay in filing the grievance because the District failed to provide information vital to that determination. In support thereof, the Association cites an Award by Arbitrator Sharon Gallagher, in a case in which the agreement also contained a statement that a grievance must be initiated within fifteen days after the occurrence or event upon which the grievance is based, wherein she ruled that there was no knowing failure for the union to object to the employer's actions because the employer had failed to inform the grievants or the union of information vital to such decision. The Association opines that in the instant case, as noted above, the record is clear that neither the grievants nor the Association were informed that the District had determined that the grievants were not bargaining unit members. In this regard, the Association claims that it is incorrect to claim, like the District, that the timeline started when the grievants received their letters of appointment since said letters did not contain any indication that the grievants were not unit members. To the contrary, the Association points out that both letters contain references to "negotiations for the 1996-97 fiscal year." In addition, the Association notes that Bruder testified that she assumed that she was a member of the union, along with other faculty members. The Association adds that the grievants would not have known that they were not unit members until receipt of their first paychecks on September 15, 19956, because such paychecks did not contain Association dues deductions or "fair share" deductions as would have been the case if they were considered to be unit members. The Association also adds that even though the grievants knew that certain insurance benefits were being denied to them, they did not know that they were not considered to be unit members by the District. The Association concludes that it would be unreasonable to expect the grievants to file grievances before they became aware of their unit status, and therefore, the District's timeliness argument should be rejected because the District failed to provide the vital information to anyone material herein.

Two, the definition of the word "substitute," not the word "all" is determinative in the instant case. For all the reasons contained in its brief, the Association claims that the grievants were not substitutes despite the District's self-serving use of the term "long-term substitute" when referring to them.

Three, despite the District's attempts to confuse the issue, the record is clear that Kenneth Roeder replaced Jack Rosenthall when he was on extended medical leave and that he received a regular teacher's contract during this period of time. The Association also notes that the District's treatment of William Kohler is distinguishable from the instant dispute in that he was granted far fewer benefits, was on a "days worked" basis, and was employed for less than one school year.

Four, the agreement is not clear and unambiguous regarding the matter of the usage of the term "substitute" when applied to the grievants. In this regard, the Association argues that while it is clear that the agreement excludes "all substitute teachers" it is not correspondingly clear that the grievants were substitute teachers. Because the agreement does not further define the terms "substitute teacher," "long-term substitute" and/or "temporary employe," the Association opines that the agreement is ambiguous. Based on this ambiguity, the Association claims that the Arbitrator should look at past practice i.e. the District's actions regarding Reilly and Roeder to interpret same. The Association concludes that past practice supports its position. The Association admits that the term "substitute" applies to those individuals who are hired on a day-to-day basis to replace teachers who are absent on a very short-term basis but claims the agreement is not clear regarding individuals like the grievants who are not temporary employes by either DPI or WERC definition. The Association avers that there is a widespread practice to include definitions of such terms as "long-term substitutes" or "temporary employes" in agreements to avoid ambiguities such as in the Kohler situation.

Five, the arbitral precedent from NEOSHO JOINT SCHOOL DISTRICT NO. 3 which the District cited to support its claim that the grievance in the instant case is not substantively arbitrable is not relevant tot he instant case. In this regard, the Association avers that the fact situation in that case differed substantially from that in the present dispute.

Six, the arbitral precedent from MONONA GROVE EDUCATION ASSOCIATION is not relevant herein because that case is distinguishable from the instant dispute. Also, the WERC's decision in BRISTOL SCHOOL DISTRICT NO. 1, ET AL. does not fit the Kohler fact situation.

In conclusion, the District's assertions notwithstanding, the grievants had the same expectation of continued employment and the same community of interest as other probationary teachers in Kohler. In support thereof, the Association first claims that under the District's interpretation of the disputed contract language it could unilaterally declare that <u>any</u> newly-hired teacher was a "long-term substitute;" fail to issue them a regular employment contract; and declare them to be not included in the agreement. (Emphasis supplied) The Association argues that the Arbitrator should avoid such an interpretation which "could cause an unintended diminution of the bargaining unit in Kohler." The Association next claims that the grievants had the same community of interest as other classroom teachers in Kohler because they participated in a shared purpose through their employment, they functioned in the same fashion as all other

Kohler teachers, they were treated that way by both the public and the District, and they were hired for the subsequent school year. The Association adds that it is not trying to establish a "limited purpose bargaining unit member" in the instant case. Rather, according to the Association, it is simply trying to gain equity for the grievants in a situation that was created by an erroneous interpretation of the agreement by the District. Finally, the Association avers that the situation in FENNIMORE is most closely related to the instant case rather than MONONA GROVE or BRISTOL if the Arbitrator places any reliance on previous arbitral dicta.

Based on all of the above, the Association opines that the grievants are clearly more closely related to probationary regular teachers in Kohler than they are to substitutes that are hired on a per-diem basis in the District; and, therefore, the grievants should be considered to be unit members in Kohler for the 1996-97 school year. For a remedy, the Association requests that the Arbitrator sustain the grievance and include the grievants as members of the professional staff unit with their first day of employment for the 1996-97 school year and make them whole for their losses of wages, hours and working conditions as a result of the District's action.

District's Position

The District initially argues in its brief that the Arbitrator is without procedural jurisdiction over the dispute because the grievance was not filed within the time period prescribed by the grievance procedure. In this regard, the District notes that Step 1 of the grievance procedure provides in part: "Grievances must be promptly submitted orally to the building level administrator within fifteen (15) working days of the alleged grievance having arisen." The District points out that the appointment letter of Hoppert is dated July 16, 1996 while the appointment letter of Bruder is dated July 24, 1996. The District concludes that since the grievance in this matter was not presented until September 30, 1996 it was presented beyond the date specified at Step 1 of the grievance procedure.

In support of the above, the District argues that the contract is very clear in providing that the time period for filing a grievance begins to run at the time the grievance arises, not at the time one or more Association representatives may have notice of the grievance. The District points out that unlike grievance procedures in other collective bargaining agreements, the time period for filing a grievance does not begin when the Association "knows or should have known," or "learns or should have learned" of the grievance. In addition, the District notes that the Association was aware of the employment of the two people in question, together with the circumstances that they were employed on a one year basis to replace certain teachers yet failed to act on that knowledge.

The District also argues that the great preponderance of arbitral decisions hold that time limits should be enforced and that the grievance procedure herein should be applied as negotiated, consistent with its written terms.

The District next argues that the Arbitrator is without substantive jurisdiction over the dispute since long-term substitute teachers are not members of the bargaining unit and are not subject to the terms of the agreement. The District concludes, therefore, that a grievance may not be presented on behalf of long-term substitute teachers.

In support thereof, the District first argues that the terms of the recognition clause are clear and unambiguous in their exclusion of "All substitute teachers" from the unit. The District maintains that the contract's use of the word "all" is completely comprehensive and encompassing, and the Arbitrator should give this word its ordinary and popularly accepted meaning. The District adds that if the parties intended to exclude certain categories of substitute teachers, they would have done so, but their use of the words "All substitute teachers" indicates they had no such intention.

The District next argues that the record is clear that the grievants served as substitute teachers during the 1996-97 school year. In this regard, the District notes that there is no dispute that Bruder and Hoppert were employed to temporarily fill vacancies in the positions ordinarily held by the high school Spanish teacher and elementary music teacher. The District adds that these temporary vacancies were created by the extended leaves of absence of these teachers during the aforesaid school year, and that both teachers were expected to return from leave to positions reserved for them for the 1997-98 school year.

The District also argues that through the 1980 amendments, the parties intended to exclude, not include, a group of persons from the unit i.e. "All substitute teachers." (Emphasis supplied) In this regard, the District maintains that the "Exclusion of all substitute teachers, both short and long-term, is entirely consistent with the decision of the parties to add persons to the excluded list.

The District further argues that a past practice does not exist between the parties of employing long-term substitute teachers as members of the unit subject to the terms of the labor contract. In this regard, the District points out that the practice has been inconsistent with some long-term substitute teachers being covered by the agreement and others being excluded from coverage. The District also points out that its practice with respect to the conditions of employment of long-term substitute teachers does not meet the definition of a practice which is binding on the parties, i.e., a practice that is clearly enunciated and unequivocal, and readily ascertainable over a reasonable period of time, as a fixed and established practice, accepted by both parties.

In any event, the District argues that the clear and unambiguous terms of the recognition clause control over any past practice which the Arbitrator may elect to recognize. The District adds that its equivocal and inconsistent practice with respect to terms and conditions of employment of long-term substitute teachers cannot be construed as reflecting an intent on the

part of the parties to modify the recognition clause. The District also adds that it has not waived its rights pursuant to the recognition clause to exclude all substitute teachers from the unit even though it has not always enforced that right in the past. Finally, the District claims that just because in the past it may have elected to engage the services of long-term substitute teachers under terms and conditions matching those of regular teachers, this fact does not establish a binding past practice citing Examiner Lionel L. Crowley in TOMAH AREA SCHOOL DISTRICT, DEC. NO. 26708-B (5/91) AFF'D BY OPERATION OF LAW, DEC. NO. 26708-C (WERC, 6/91) who in turn cited Umpire Shulman's discussion of past practice in FORD MOTOR CO., 19 LA 237, 241 (1952) for his conclusion that non-use of a right to change a work schedule did not create a binding past practice that the District could not exercise this right in the future. TOMAH AREA SCHOOL DISTRICT, SUPRA, AT 9.

The District adds that arbitral precedent confirms that a grievance may not be filed on behalf of long-term substitute teachers since they are not members of the unit citing Arbitrator Sharon A. Gallagher in NEOSHO JT. SCHOOL DISTRICT NO. 3, CASE 15, NO. 47090, MA-7173 (1992) and Arbitrator Christopher Honeyman in MONONA GROVE EDUCATION ASSOCIATION, CASE 31, NO. 32444, MA-3092 (1985) in support thereof. In NEOSHO, the District points out, Arbitrator Gallagher placed particular emphasis on the distinctly different treatment of substitute teachers, together with the commitment of the school district to hold jobs open for teachers who might return from leaves of absence, in holding that a long-term substitute teacher was not covered by the agreement and that the Union, representing regular full-time and part-time teachers, was not authorized to file a grievance on behalf of the substitute teacher. In MONONA GROVE, the District points out, Arbitrator Honeyman, in reaching his conclusion that the grievant substitute teacher was not subject to the terms of the agreement and therefore that he had no authority to determine the merits of the remaining issues in the case, found that the most significant facts were that the Association took no action in furtherance of the thirteen year collective bargaining unit inclusion which the Association claimed and that the bargaining history failed to demonstrate any discussion of the inclusion of certain substitute teachers within the unit.

In addition, the District also claims that the exclusion of all substitute teachers from the unit is confirmed by Commission decisions determining the appropriate scope of teacher bargaining units citing a number of cases in support thereof.

In rebuttal to Association arguments in its brief, the District makes the following points: one, the Association's "averments of fact" are nothing more than the asserted position of the Association; two, the District was under no obligation to inform any substitute teacher as to the existence of a collective bargaining agreement or of anything else relating to said agreement since substitute teachers are not members of the unit and "these issues are of no consequence to them"; three, since the language of the recognition clause excluding all substitute teachers from the unit is clear and unambiguous the Arbitrator should resist the Association's request that he look to bargaining history to interpret same; four, extension of the benefits of the agreement or the circumstance under which the District elected to employ Reilly and Roeder under standard

individual employment contracts which are subject to the terms of the agreement do not transform the status of these persons to that of members of the unit; five, the question of whether long-term substitute teachers share a community of interest with short-term substitute teachers is an inappropriate basis for inquiry in this case, rather the issue is whether said teachers share a community of interest with regular full-time and part-time teachers which they do not; six, the grievants had no expectation of continued employment following conclusion of the 1996-97 school year which is the criterion adopted by the Commission in consistently holding that substitute teachers do not share a community of interest with regular teachers; seven, the Administrative Code definitions referenced by the Association relate to licensing and are inapplicable to the instant dispute; eight, while it is true that in MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NO. 14161-A (WERC, 1/77) the Commission found that some substitute teachers served as long-term substitutes on a recurrent basis and as a consequence, long-term substitute teachers in effect became regular employes, these circumstances do not exist within the District and said decision has no application to this dispute; and nine, likewise the KENOSHA UNIFIED SCHOOL DISTRICT NO. 1 decision referenced by the Association at page 21 of its brief is inapplicable to this dispute since the issue in that case involved the basis upon which to determine which substitute teachers were appropriately included with a proposed unit of substitute teachers and not the question here which is a proposal to include substitute teachers within a unit consisting of regular full-time and part-time teachers.

Based on all of the above, the District requests that the Arbitrator find that he is without either procedural or substantive jurisdiction over the issues presented in this case and accordingly dismiss the grievance on its merits.

DISCUSSION

Timeliness Issue

A threshold issue in this case is whether the grievance is procedurally defective. In this regard, the District argues that the grievance is untimely filed while the Association takes the opposite position.

Article IX, Section 9.1 of the collective bargaining agreement states that the purpose of the contractual grievance/arbitration procedure "is to provide an orderly method for resolving differences arising during the term of this Agreement." Section 9.3, Step 1, of the aforesaid Article provides that a grievance "must be promptly submitted orally to the building level administrator within fifteen (15) working days of the alleged grievance having arisen." While it is true, as pointed out by the District, that the grievants received their appointment letters in July of 1996, nowhere in said appointment letter is there any notification that the District did not consider them members of the bargaining unit. Nor did the District notify the grievants during the interview process leading to their hire or at any time material herein that it did not

consider them members of the bargaining unit. In addition, the record is undisputed that the District did not notify the Association at any time material herein that it did not consider the grievants to be members of the bargaining unit.

The Arbitrator agrees with the District that it is important to enforce the time limits contained in the parties' contractual grievance/arbitration procedure. The agreement itself provides the rationale for same: to provide for the orderly resolution of disputes arising during the term of the agreement. However, the Association argues, citing WHITE LAKE SCHOOL DISTRICT, CASE 14, NO. 52740, MA-9087 (GALLAGHER, 12/95), that it would be unreasonable to require the Association or the grievants to comply with the time limits contained in Step 1 of the grievance procedure because there was no knowing failure for them to object to the District's action since the District had failed to inform the grievants or the Association of information vital to such a decision. The Arbitrator agrees. In WHITE LAKE SCHOOL DISTRICT, SUPRA, Arbitrator Gallagher reached her decision not to enforce the contractual grievance time limits because the grievants and Association in that case did not receive any notification of the actions on which the grievance was based at any time material therein. Arbitrator Gallagher was interpreting grievance contract language which provided that a grievance must be initiated within fifteen days after the "occurrence or event upon which a grievance is based." In the instant case, in the opinion of the Arbitrator, the contractual language in dispute is much broader than that. It provides, as noted above, that a grievance must be submitted orally to the District within fifteen (15) working days "of the alleged grievance having arisen." (Emphasis added) In the absence of bargaining history, past practice or contract language to the contrary, the Arbitrator opines that it is reasonable to interpret said language to mean that a grievance hasn't "arisen" until the Association and/or grievant(s) are provided notification by the District of the actions on which the grievance is based. Such a conclusion is consistent with the aforesaid contractual provision's mandate providing for an "orderly" method of resolving disputes arising during its term.

In the instant case, the record is clear that the District failed to provide the Association or grievants with this information at any time material herein. The record is also clear that as soon as the Association learned of the District's action in excluding the grievants from the bargaining unit it filed a grievance in a timely manner pursuant to Step 1 of the grievance procedure. (As noted in the Factual Background section of this decision, the Association learned of the District's action in excluding the grievants from the bargaining unit on September 19, 1996, and it filed a grievance on September 30, 1996, well within the fifteen day period required by Step 1 for orally filing grievances). Based on same, and all of the above, and absent any persuasive argument by the District to the contrary, the Arbitrator finds that the instant grievance was timely filed, and that the answer to the first issue as framed by the undersigned is YES, the grievance is procedurally arbitrable. A question remains as to whether or not it is substantively arbitrable.

Substantive Arbitrability

The District argues that the Arbitrator is without substantive jurisdiction over the dispute since long-term substitute teachers are not members of the bargaining unit and therefore are not subject to the terms of the agreement. The District concludes, therefore, that the Association may not present a grievance on behalf of said teachers.

The Association takes the opposite position.

In support of the above, the District initially argues that the clear language of the recognition clause excludes "All substitute teachers" from the unit. The District maintains that the contract's use of the word "all" is completely comprehensive and encompassing, and that the Arbitrator should give this word its ordinary and popularly accepted meaning. The Arbitrator agrees.

The American Heritage Dictionary of the English Language, New College Edition, (10th Ed., 1981), at page 94 defines "all" as follows: "1. The total entity or extent of: *all Christendom.* 2. The entire or total number, amount, or quantity of: *all the saints.*" In the opinion of the Arbitrator, this means that the parties intended to exclude "all" substitute teachers from the bargaining unit when they agreed in the recognition clause to exclude "All substitute teachers" from the unit. (Emphasis added)

The Association argues, however, that the definition of the word "substitute," not the word "all" is determinative in the instant case. To the contrary, as noted above, the agreement clearly excludes all substitute teachers from the unit no matter what type or category of substitute teacher is in question. In addition, as pointed out by the District, if the parties had intended to exclude certain categories of substitute teachers, they could have done so, but their use of the words "All substitute teachers" indicates they had no such intention.

The District next argues that the record is clear that the grievants served as substitute teachers during the 1996-97 school years. For the reasons discussed below, the Arbitrator agrees.

The American Heritage Dictionary of the English Language, supra, page 1213 defines "substitute" as "1. One that takes the place of another; replacement. . . . To take the place of another . . ., to substitute: *sub-*, in place of . . ." The record is undisputed that the grievants were employed on a temporary one-year basis to fill vacancies in positions ordinarily held by the high school Spanish teacher and elementary music teacher. The record is also clear that these temporary vacancies were created by the extended leaves of absence of these teachers during the aforesaid school year, and that both teachers were expected to return form leave to positions reserved for them for the 1997-98 school year. Thus, although the grievants performed

teaching duties on a one-half or more basis like other regular teachers included in the bargaining unit as pointed out by the Association, the record indicates they did so on a "substitute" basis.

The Association argues, contrary to the above, that the grievants did not function in the same fashion as individuals who are hired to replace teachers who are absent on a day-to-day basis because of personal reasons. Assuming arguendo that this is true, it is immaterial to the disposition of the instant dispute. As noted above, the agreement excludes all substitute teachers regardless of type or category.

The Association also argues that past practice supports its position that "long term substitutes" are properly members of the unit. Assuming arguendo that the Arbitrator may look beyond the clear contract language to past practice the Association's case still must fail. Past practice, to be binding on the parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. Elkouri and Elkouri, How Arbitration Works, Fifth Edition, page 732 (1997). In the instant case, past practice is mixed. While it is true, as pointed out by the Association, that two individuals (Reilly and Roeder) were treated as members of the unit even though they were replacing another individual who was on medical leave of at least one year's duration; another individual (Kohler) was not. And, contrary to the Association's assertion, the fact that Kohler did not substitute for as long a period of time as the other two teachers does not detract from the conclusion that the Association failed to establish a past practice in support of its position herein that long-term substitute teachers have been considered as part of the unit in the past by the parties.

The Association further argues that a better approach to deciding the instant dispute is to determine whether or not the grievants should have been included in the unit based on appropriate criteria, not on what title the employes have been given. The Association maintains that the grievants share a community of interest with regular classroom teachers and based on Commission decisions defining "regular employe" as well as the Wisconsin Administrative Code (DPI) definitions of "regular employe" and "substitute teacher" the grievants appropriately belong in the unit. The problem with this approach is that there is no evidence that the parties ever intended such a result or that they agreed that said definitions should be applied in arriving at a decision in the instant dispute. In addition, even if such definitions were applied to the grievants herein, and the Arbitrator were to find that they shared a community of interest with the unit, that would not resolve the instant dispute since the contract clearly provides, whether or not the grievants share a community of interest with other teachers in the unit or meet some DPI or WERC definition of "regularly employed" teacher, that the grievants are excluded from the unit.

Finally, contrary to the Association's assertion that there is no evidence it ever accepted the District's current contention that professional employes the District identifies as "long-term

substitutes" are not members of the professional staff unit, the contract provides "All substitute teachers" are excluded from the unit. (Emphasis added) The Association (and the District) agreed to same for the first time in the 1980-83 agreement. There is no evidence that the parties ever agreed to give said phrase anything other than its commonly accepted meaning as noted above.

Based on all of the above, and absent any persuasive evidence or argument to the contrary, the Arbitrator finds that the answer to the second issue as framed by the undersigned is NO, the grievance is not substantively arbitrable because the grievants, as long-term substitute teachers, are not covered by the terms of the recognition clause of the parties' agreement. Because the grievance is not arbitrable, the Arbitrator is precluded from exercising his jurisdiction to decide the merits of the grievance challenging the District's decision to treat the grievants as long-term substitute teachers, and not members of the bargaining unit.

In reaching the above conclusion, the Arbitrator has addressed the major arguments of the Association. All other arguments, although not specifically discussed above, have been considered in reaching the Arbitrator's decision.

In light of all of the foregoing, it is my

AWARD

That the grievance first presented to the District on September 30, 1996, and filed in written form at Step 2 of the grievance procedure on October 11, 1996 is hereby denied and the matter is dismissed.

Dated at Madison, Wisconsin this 30th day of December, 1997.

Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator

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