BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**HARTLAND-LAKESIDE SCHOOL DISTRICT EMPLOYEES UNION,
AFSCME LOCAL 3833, AFL-CIO**

and

HARTLAND-LAKESIDE SCHOOL DISTRICT

Case 23
No. 64250
MA-12851

Appearances:

Eileen Brownlee, Kramer & Brownlee, LLC, Attorneys at Law, 1038 Lincoln Avenue, P.O. Box 87, Fennimore, Wisconsin 53809-0087, appearing on behalf of Hartland-Lakeside School District.

Lee Gierke, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 727, Thiensville, Wisconsin 53092-0727, appearing on behalf of Hartland-Lakeside School District Employees Union, AFSCME Local 3833, AFL-CIO .

ARBITRATION AWARD

Hartland-Lakeside School District Employees Union, AFSCME Local 3833, AFL-CIO ("the Union") and the Hartland-Lakeside School District ("the District") are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the District concurred, that the Wisconsin Employment Relations Commission appoint a member of its staff to hear and decide a grievance relating to the terms of the agreement relating to the definition of employees, postings, layoff and recall, and management rights. The Commission designated Stuart Levitan to serve as the impartial arbitrator. Hearing in the matter was held on February 22, 2005; a transcript was prepared by March 9. The parties filed written arguments and replies, the last of which was received on May 3.

STATEMENT OF THE ISSUE

The Union states the question as follows:

"Did the Hartland-Lakeside School District violate the collective bargaining agreement when special education aide Rebecca John was laid off and a temporary employee, Paula Jensen, was retained to fill a special education aide position for the 2004-205 school year? If so, what is the appropriate remedy?

The District states the question as follows:

"Did the District violate the collective bargaining agreement when it did not recall Rebecca John to work in the special education aide position from which an employee was on leave during the 2005-05 school year? If so, what is the appropriate remedy?"

I frame the issue as follows:

"Did the District violate the collective bargaining agreement when it hired a non-bargaining unit employee as a special education aide for the 2004-2005 school year while Rebecca John was on lay-off? If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 5
EMPLOYEE DEFINITIONS

A. Regular Full-Year, Full-Time Employees: A regular full-year, full-time employee is hereby defined as an employee working at least thirty-five (35) hours per week on a calendar year basis, forty (40) hours for maintenance and custodial employees.

B. Regular Full-Year, Part-Time Employees: A regular full-year, part-time employee is hereby defined as an employee working less than thirty-five (35) hours per week, on a calendar year basis.

C. School Year Full-Time Employee: A school year full-time employee is hereby defined as an employee working at least thirty-five (35) hours per week during the period when school is in session. Employees may be required to begin work prior to school opening and/or remain after school closes.

D. School Year Part-Time Employees: A school year part-time employee is hereby defined as an employee working less than thirty-five (35) hours per week, during the period when school is in session. Employees may be required to begin work prior to school opening and/or remain after school closes.

E. Temporary Employees: A temporary employee is hereby defined as an employee hired to work for a specified period of time, or to perform on a specific project, not to exceed sixty (60) work days and who will be separated from the payroll at the end of such period or project. Temporary employees are not covered by the terms of the Agreement. Prior to the time a temporary employee is hired for six (6) consecutive work days or longer in any department, a laid off employee within that department shall be offered the temporary work provided that such employee is capable of performing the work that becomes available.

F. Seasonal Employees: A seasonal employee is defined as an employee working during summer vacation, or winter or spring break.

G. The District shall not reduce an employee's hours for the sole purpose of cutting that employee's level of benefits.

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ARTICLE 8
JOB POSTINGS AND TEMPORARY ASSIGNMENTS

A. Vacancies: Whenever any vacancy occurs, which the District deems is necessary to fill, due to the retirement or termination of the incumbent employee, the creation of a new position, or for whatever reason, the job vacancy shall be made known to all employees through job postings.

B. Posting: Job vacancies shall be posted on the Union bulletin board in each school for ten (10) consecutive workdays unless the District determines that exigent circumstances require that the posting be reduced in time. At no point will the position be posted for less than eight (8) calendar days. Jobs shall be posted simultaneously in all locations, and shall include the date that the posting goes up, and the date that the posting is to be taken down. The local Union president will be given a copy of all job postings when they are posted. All job postings will be posted on the District's website effective (*the parties will insert the date that the District's website has this ability*).

C. Notice: The job posting shall set forth the job title, work location, schedule of hours, rate of pay, and a brief description of the job requirements as set forth by Board policy, and the qualifications desired.

D. Applications: Any employee interested in such vacancy shall make application to the designated administrator by the date specified.

E. Selection: The selection of an applicant to fill a job vacancy shall be made on the basis of skill, ability, and seniority; provided that if two (2) or more employees are relatively equal in skill and ability, the employee with the greatest District-wide seniority shall be chosen. Any question about the qualifications of an employee shall be resolved through the grievance procedure.

1) Probationary Period: All jobs applied for through the posting procedure shall carry a thirty (30) working day probationary period. The applicant chosen for the position shall receive a fair trial period. An employee may elect to return to his former position at any time during the thirty (30) working day probationary period. If the employee proves unable to perform the job during the probationary period, the employee shall be returned to his former position. In the event that an employee returns or is returned to his former position during the thirty (30) working day probationary period, selection shall be made from among the remaining applicants who signed the posting in accordance with the criteria set forth in Section 8(E) above.

2) Pay Upon Promotion or Movement to a Lower Pay Range: If an employee attains a promotion through the job posting procedure, he/she shall be placed on the step closet to, but higher than his current rate of pay. If the job posting movement is to a lower range, the employee shall be placed at his/her current step in the new range, for both probationary and permanent purposes.

F. Outside Recruitment: The District may fill a vacancy with an applicant outside the bargaining unit in the event there is no qualified bargaining unit applicant.

G. Temporary Assignment: The Employer may temporarily assign an employee to any job on the same shift, and shall not be required to follow the procedures set forth in Section 8(A) and (B) above.

1) Employees temporarily assigned to a job in a lower rate range will retain their regular rate of pay.

2) Employees temporarily assigned to a higher rate range shall be placed on the step closest to, but higher than his current rate of pay.

H. Date of Selection: The Employer shall make its selection pursuant to the provisions of Section 8(E) above, and shall notify the successful applicant of its selection within ten (10) work days following the date that the posting is removed. The successful applicant must be placed in his/her new position within twenty (20) work days of said notification or be paid at the rate for the new classification on the 21st day.

I. Union Notification: A copy of each posting, including a list of the employees who signed said posting, shall be provided to the President of the Union. The President of the Union shall be notified inn writing of the name of the successful applicant when selection is made pursuant to Section 8(E) above.

ARTICLE 9
LAYOFF AND RECALL

A. Layoff Procedures: Should the reduction of personnel or the number of hours in a given position in any department (i.e., custodians, secretarial, food service, special educational assistants, computer assistants and teacher assistants) become necessary, the following procedure shall be utilized.

1) Temporary and Seasonal: All temporary and seasonal employees shall be terminated or have his/her hours reduced before any bargaining unit employees are scheduled for reduction. In the event that an additional reduction is necessary, the District may consider reducing personnel or the number of hours in a given position.

2) The bargaining unit employee in the affected department with the least District-wide seniority shall be the first person identified for layoff or reduction in hours, provided, however, that the remaining employees are capable of carrying out the usual functions of that department. An employee identified for a layoff or reduction in hours, shall have bumping/replacement rights.

B. Replacement: In the event that a bargaining unit employee is laid off or had his/her hours reduced under Section 9(A) above, and he/she possesses more District-wide seniority than another bargaining unit employee, said laid off or reduced employee may replace the employee with the least District-wide seniority in a particular department who most nearly meets the schedule of hours and hours worked of the laid off or hours-reduced employee, provided that:

1) the employee is qualified and capable of performing the usual functions of that position and/or additional work;

2) a part-time employee cannot bump a full-time employee and a school year employee cannot bump a full-year employee; and

3) the more senior employee may only replace a less senior employee whose position classification salary schedule is at or below the schedule for his/her current position.

If an employee is unable to replace the employee with the least District-wide seniority in his/her department who most nearly meets the schedule of hours and hours worked of the laid off or hours-reduced employee, he/she may replace the employee with less District-wide seniority in another department who most nearly meets his/her current schedule of hours and hours worked, subject to limitations specified in points 1), 2) and 3), above, and provided the employee has worked in the other department within the last five (5) years. For example, a Special Education Assistant who is unable to bump an employee within his/her department would be permitted to bump a Teacher Assistant, subject to the limitation identified in points 1), 2) and 3), above, if the employee worked as a Teacher Assistant within the last five (5) years.

C. Recall Procedures: Employees shall be eligible for recall for up to two (2) years from the date the layoff begins. When work again becomes available, a full position or an increase in hours, the following procedure shall be utilized:

1) Bargaining Unit Employees: In the event a vacancy occurs or a new position is created while employees are on layoff, the District shall first attempt to fill the position utilizing Article 8. In the event a bargaining unit member is not selected for the position after the completion of procedures in Article 8 the last employee laid off shall be the first employee recalled, provided that he or she is qualified and capable of performing the usual functions of the available position and/or additional work. An exception to the above process in Article 8 shall be made where an employee on recall status was laid off or bumped from the vacated position being posted pursuant to this paragraph and Article 8. In such circumstance, the laid off employee will be offered the right of recall prior to the position being posted under Article 8.

2) Temporary and Seasonal: Temporary and seasonal employees shall not be recalled to work until all bargaining unit employees have been recalled or had their work hours restored.

3) Notice: The notice of recall to any employee who has been laid off shall be sent by certified mail to the last known address of the employee on file in the Administration office, and shall constitute sufficient notice to the employee.

   It shall be the responsibility of the employee to report any change in address to the Administration office.

4) Recall Notification Procedure: Employees shall have up to three (3) working days from the date of receipt of notification of recall during which to notify the Superintendent of Schools in writing of their intent to accept the District's offer of reemployment or to indicate in writing their intent to waive their option to be reemployed in the position offered.

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ARTICLE 27
MANAGEMENT RIGHTS

The Board possesses the sole right to operate the school system and all management rights repose in it. These rights include, but are not limited to, the following:

A. To direct all operations of the school system;

. . .

C. To create, combine, modify and eliminate positions within the school system;

D. To hire, promote, transfer, schedule and assign employees in positions within the school system;

. . .

F. To relieve employees from their duties because of lack of work or other legitimate reasons;

G. To maintain efficiency of school system operations;

. . .

I. To introduce new or improved methods or facilities or to change existing methods of facilities; the Union reserves the right to negotiate the impact on wages, hours and working conditions;

J. To determine the kinds and amounts of services to be performed as pertains to school system operations; and the number and kind of classifications to perform such services; the Union reserves the right to negotiate the impact on wages, hours and working conditions;

K. To subcontract or contract out for goods or services, provided no unit employee shall be laid off or suffer a reduction in regularly scheduled hours as a result of such contracting or subcontracting;

L. To determine the methods, means and personnel by which school system operations are to be conducted;

M. To take whatever action is necessary to carryout the functions of the school system in situations of emergency;

The Board agrees it will exercise the rights enumerated above in a fair and reasonable manner. Further, nothing contained in this Article shall be considered as divesting an employee of rights granted elsewhere in this Agreement or under statutes, and the rights contained herein shall not be used to discriminate against any employee or to undermine the Union.

BACKGROUND

The grievant, Rebecca John, has worked for the District since 1997. Hired as a noontime supervisor, in 1999 she posted into the position of special education aide, and held that position continuously until she was reduced to .75 of a full time position for the 2003-2004 school year.

On April 20, 2004, the District school board voted unanimously as follows:

RESOLUTION ORDERING REDUCTION OF SUPPORT STAFF (SPECIAL EDUCATION AIDES) AND LAYING OFF SPECIAL EDUCATION AIDES IN CONNECTION THEREWITH

WHEREAS, this Board has received the report of the District Administrator as to the necessary staffing levels for the 2004-05 school year;

WHEREAS, the report of the Administration shows that budgetary and fiscal constraints necessitate the reduction of support staff personnel;

WHEREAS, it further appears to this Board that said budgetary and fiscal constraints permit the reduction of the special education aides department by eliminating two special education aide position;

WHEREAS, the District Administrator has reviewed the staff involved in order to advise this Board as to his recommendations and said report has been considered by the Board;

WHEREAS, as a part of the review the Administrator reported as to the ability of the District to accomplish such reduction through normal attrition or reassignment of students;

WHEREAS, said report detailed the application of the criteria set forth in Article 9 (Layoff and Recall) of the master agreement of the District with the Arrowhead Area School District Employees Union Local 3833;

NOW, THEREFORE, BE IT RESOLVED BY THE SCHOOL BOARD OF THE
HARTLAND/LAKESIDE JOINT NO. 3 SCHOOL DISTRICT AS FOLLOWS:

1. This Board hereby determines that it is necessary to reduce the special education aide department by eliminating one 75% of full time and one 69% of full time special education aide positions due to budgetary and fiscal constraints that necessitate the reduction of support staff personnel;

2. The above determination requires the elimination of one 75% of full time and one 60% of full time special education aide positions.

3. This Board hereby determines that after application of the criteria from Article 9 of the master agreement aforesaid to the staff reduction,, the indicated personnel for layoff are Rebecca John and April Theriault.

4. It is hereby determined that in proceeding to these layoffs the Board shall apply the requirements of Article 9 of the master agreement aforesaid.

5. The Board hereby determines to and hereby does order the layoff of Rebecca John and April Theriault

6. Written notice of layoff shall be given to each staff member. The District Clerk of this school district is hereby directed to give said written notice on behalf of this Board.

7. This action constitutes layoffs resulting from a reduction of staff and said staff members are eligible for the recall rights set forth in Article 9 of the collective bargaining agreement between the District and the Arrowhead Area School District Employees Union Local 3833. Said written notice shall advise each staff member of this fact.

On April 30, 2004, the District wrote John as follows:

NOTICE OF LAYOFF

TO: Ms. Rebecca John

You are hereby notified that the School Board of the Hartland/Lakeside Joint No. 3 School District, by a majority vote of the full membership of the Board at a legally held meeting has determined to lay you off for the 2004-05 school year. The reason for the layoff is that the district is experiencing budgetary and fiscal constraints, which necessitates the staff reduction. You have been identified as one of the persons to be laid off as a result of this determination.

The purpose of this notice is to give you written notice of our determination to lay you off for the 2004-05 school year.

Due to the fact that this is a layoff resulting out of a reduction in staff, you will be eligible for recall rights as provided for in Article 9 of the collective bargaining agreement between the District and the Arrowhead Area School District Employees Union Local 3833.

This notice is made and given by order and direction of the School Board of the Hartland/Lakeside Joint No. 3 School District.

Dated this 30 day of April 2004.

By:
School District Clerk

Also on or about April 30, 2004, Becky Zingler, a full-time special education aide with nine years seniority, wrote superintendent Gruber as follows:

Dear Dr. Gruber:

I am writing a letter to inform you of my plans for the 2004/2005 school year. I am intending to take an extended leave of absence for the entire school year. I

> will be taking this leave to stay at home and care for my two children. My wish is to return to my job at the time of the 2005/2006 school year.
>
> I understand that this leave needs to be approved by the school board before it can be granted. I also am under the impression that I can keep the health insurance for sixty days from the start of my family/medical leave. With my calculations this will bring me to June 17th. However I have set aside money in my flex spending account for the summer insurance payment so therefore I would like to use this money to carry the insurance through the end of June.
>
> I also would like some assurance as to which school I would be assigned to work at upon my return. My wish is that I would be able to return to -------- in the -------- program where I am currently assigned. I hope that things will work out and I will be able to take this 1 year leave. I really enjoy working for the Hartland/Lakeside school district and am looking forward to returning for the 2005/2006 school year. Please contact me if you have any questions.

Zingler had already been on leave, starting on April 6 and continuing through the end of the school year. On May 30, 2004, Gruber wrote Zingler to inform her he was recommending to the board that it grant the requested year's leave of absence, which it did.

Following the layoff of John and the granting of the leave to Zingler, the District hired Paula Jensen, a non-unit special education teacher aide to work the entire 2004-2005 school year. Jensen was also the aide who assumed Zingler's position for the last portion of the 2003-2004 school year. Jensen was paid $11.23 per hour during the 2003-2004 appointment and $11.66 for 2004-2005, the contractual rate for new employees; she was not provided with any of the other fringe benefits in the collective bargaining agreement. Based on her tenure, John would have earned $13.53 per hour in 2004-2005, plus benefits.

Upon learning of the District's action to replace Zingler with Jensen for the entirety of 2004-2005, the Union on September 7, 2004 filed a grievance alleging a violation of Article 9:C(2), and requesting the temporary employee be removed from the Special Education class in the North building and John be made whole.

On November 16, 2004, the district responded as follows:

> Pursuant to Article 4 of the master contract between the Arrowhead Area School District Employees Union Local 3833 and the Board of the Hartland/Lakeside Jt. No. 3 School District, this memorandum is the Board's written response to the grievance filed on behalf of Rebecca John alleging violations of Articles 8 and 9 of the contract.
>
> The discussion between the Board and the Union was held on November 5, 2004, at 9:00 a.m.

Mr. Gierke stated that Rebecca John, who has been employed as a special education aide since 1999, was laid off effective at the end of the 2003-04 school year. She was offered several part-time jobs through the recall process but elected not to take them. In July 2004, another special education aide took a leave of absence for the entire 2004-05 school year. Mr. Gierke stated that the District hired a brand new employee for the position rather than recalling Ms. John.

Mr. Gierke then provided the Board with information relating to seniority and job classifications under the collective bargaining agreement. He reviewed the contract language pertaining to the posting and filling of vacancies. He stated that the new employee has been described as a "substitute" by the Administration. He stated that the new employee is not really acting in that capacity because the collective bargaining agreement addresses the circumstances under which a temporary employee (which includes substitutes) can be hired and retained. Because this is a position for a full year, it should be treated as a vacancy, and the posting and recall provisions of the collective bargaining agreement should apply.

Sherry Brown noted that the new language relating to layoff and recall, which are now done by department, was included in the last collective bargaining agreement.

Ms. John stated that she was pursuing the grievance because of its potential impact on a large group of employees. She said she initially wasn't told she could apply for the position and that communication generally was not there. She was also concerned that, when she did apply for the position, she was not told why she didn't get it.

Mr. Balzer responded that the District has consistently used substitutes in the past to replace custodians, secretaries and food service workers. To his knowledge, the "temporary employee" language of the contract has only been used once; i.e., only one person has been hired specifically as a temporary employee in the past. He noted that the issue is whether the District has the right to bring in a substitute to replace an absent employee rather than the callback language.

Ms. Brown stated that she perceived there to be a problem with language. One management person calls a replacement employee "temporary" and another calls the employee a "substitute".

Mr. Balzer stated that, in the fourteen years the contract has been in existence, substitutes have consistently been used.

> It appears to the Board that a consistent past practice exists in which the District has hired substitutes to replace absent employees. There is no language in the collective bargaining agreement that prohibits this practice.
>
> Because there has been no violation of any provision of the master contract, it is the Board's unanimous determination that the grievance should be denied.

While a special education aide, John's evaluations were uniformly positive, and she was never disciplined. While in the aide position, she was at various times assigned to all three of the district's schools. Since being laid off, she has worked three-and-a-half hours daily as a parent educator in kindergarten and first grade for the Wales/Kettle Moraine School District, earning $9.25 an hour with no benefits. Prior to accepting this position, John was offered and declined employment with the Hartland-Lakeside district as a playground supervisor and custodian. She also started receiving unemployment compensation in December 2004.

Sharon Brown, who has worked for the district as a custodian I since October, 1978, has been president and chief steward of Local 3833 since its inception in 1987, and has been involved in all contract negotiations since then. She testified that the district has on occasion used temporary employees for longer than 60 days without the union filing a grievance because allowing the person to remain seemed in the best interest of the affected children, but that there were no instances in which a temporary employee was hired while a qualified member of the bargaining unit was on layoff.

Peter Balzer has worked fifteen years as the Director of Business Services for the district, with responsibilities that include dealing with support staff employees on layoff. At some point following an auto accident involving superintendent Jeff Gruber in early March, 2004, Balzer also served as acting superintendent, although the determination in this matter was made by Gruber. Balzer testified that his input involving not recalling John following the approval of the Zingler leave was that the district had "the right to hire substitutes," and that the district did not "want to use the language in the contract of a temporary employee for those periods of time, because they have to be separated after sixty days." He testified "that is not a good use, and we have not used the language in the contract for temporary employees." It was Balzer's understanding that "under the contract, a leave of absence does not create a vacancy," and, "as long as we don't have a vacancy, we have the right to hire a substitute for that duration." Balzer further testified there was no dispute about John' being qualified for the Zingler position.

Balzer testified that when an incumbent is absent from work, either short-term or long-term, but is presumed to be returning, the district contacts persons it calls substitutes, who are not members of the union and are hired outside the terms of the collective bargaining agreement, with none of the benefits of a bargaining unit position.

Balzer testified to the following circumstances of employees on leave in recent years, and the manner their duties were assumed:

- Special education aide Maddy Posluszny, on leave from October, 2002 through the end of the school year, was replaced by non-unit personnel;

- Special education aide April Theriault, also on leave during the 2002-2003 school year, was replaced by non-unit personnel;

- During the 2002-203 school year, there was a special education aide, Nicole Lanko, and a teacher assistant-clerical, Joan Nowacki, on layoff status with recall rights, neither of whom was offered either of these positions;[1]

- Posluszny was on leave November 1 to December 10, 2003, and was replaced by a non-unit employee;

- Teacher Assistant-Special Needs Becky Zingler was absent approximately Apri1 1, 2004 through the end of the school year, and was replaced by Paula Jensen, who was not a bargaining unit employee;

- During 2003-2004, the district had a number of custodians out for extended periods of time, none of whom were replaced by bargaining unit personnel;

- Special education aide Carol Landwehr was absent for a little more than two-and-a-half months in 2004-2005, replaced by a bargaining unit employee working as a substitute;

- Special education aide Becky Zingler, on leave the entirety of the 2004-2005 school year, was replaced by non-unit personnel;

- The district uses non-unit personnel to replace employees on vacation, and, to Balzer's recollection, has never recalled an employee on layoff to fill in for an employee on leave, vacation or sick leave;

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Union asserts and avers as follows:

> The collective bargaining agreement is clear and unambiguous in its terms regarding the use of temporary employees; the District's introduction of the term "substitute" has no basis. Buying into the District's argument would make a mockery of the contract language and render seniority meaningless as the

[1] As noted below, the union asserts that Lanko was a probationary employee without recall rights.

District claims it can designate employees as substitutes, who under its interpretation effectively have more rights than members of the bargaining unit by virtue of super seniority.

The collective bargaining agreement defines at length all the various categories of employees, and never defines or even references the term "substitute." Under accepted concepts of contract interpretation, the inclusion of these other categories without reference to substitutes indicates the exclusion of substitutes.

The agreement acknowledges the need for temporary or seasonal employees, but always in a way that supplements, never replaces, bargaining unit members. The District has blatantly violated that intent.

The District's attempted argument that past practice supports its action fails on two grounds. First, the collective bargaining agreement is clear and unambiguous, and not subject to interpretation through past practice. Further, the District has failed to meet the standard for a binding past practice, in that the practice has not been consistent or frequent, and was not validated through mutual agreement. Such a situation as this has happened only once, and there is no evidence the Union was aware of it at the time.

Further, the District has the contractual obligation to exercise its rights in a fair and reasonable manner. There was no practical reason why the bargaining unit employee was not retained to perform this work; she had the skill and ability, and there was no emergency.

The District's argument that the leave of absence did not create a vacancy is non-sensical, and refuted by the contract language that refers to vacancies being created "for whatever reason…" The District decided to grant a year's leave in a position covered by the labor agreement, and to fill the position; the District is paying the non-unit employee the wage rate for a new hire for this position.

The District should have done one of two things, neither of which would have created a hardship for it: either assign the grievant to the school in question initially, or recall the grievant.

As remedy, the District should immediately reinstate the grievant to the position of special education aide and make her whole for all losses. Given the uncertainty about future employment due to the fluctuating special education census, there should not be any deduction for the unemployment compensation the grievant has already received.

In support of its position that the grievance should be denied, the District asserts and avers as follows:

It is well-settled that the Union has the burden of proof in cases involving contract interpretation.

Substitute employees are not temporary employees as that term in used in the collective bargaining agreement, which is silent on the question of substitutes. Substitutes are typically not hired to work either for a specified time or on a specified project, but rather to work in place of a specified person. It is undisputed that at least in the 2002-2003 school year, substitutes have been hired for bargaining unit employees who have taken both short and prolonged leaves of absence. The Union now seeks to subsume substitutes under the category of temporary employees.

The District has consistently hired substitute employees to replace those who are on leaves of absence. The Union has been unable to cite a single instance in which an employee on layoff had been recalled to fill the position of an employee on leave. There is a long-standing practice, which has never been grieved, of the District hiring substitute employees to work for bargaining unit employees on leave. At no time has the Union ever sought to modify this practice through the collective bargaining process. Clearly, substitute employees are not temporary employees under the collective bargaining agreement.

Further, the layoff and recall provisions of the collective bargaining agreement are inapplicable to the hiring of substitutes for employees on leave. The District has consistently engaged in the practice of hiring substitutes for employees on leave without objection from the union even while Union members were on layoff, which is consistent with the collective bargaining agreement. The District, with acquiescence from the Union, has never recognized an employee being on leave of absence as creating a vacancy. When employees are on leave there is neither a vacancy nor a new position; the recall provisions are inapplicable to the hiring of employees as substitutes for employees on leave.

The Union's theory would also lead to an absurd result in that any employee who was laid off would be able to lay claim to the position of any employee on sick leave or vacation, whether a vacancy existed or not.

Further, the collective bargaining agreement prohibits modification of its terms through the arbitration process. By asking the arbitrator to insert language that would require the district to treat absences as vacancies and substitute employees as temporary employees, the Union is attempting to do just that. Despite having never negotiated substitute language, and being aware that the district has consistently hired substitutes to replace absent employees without recalling laid off employees, the Union is asking the arbitrator to add to the recall provision of the collective bargaining agreement a provision that would create an entitlement

by employees to substitute positions and restrict the board's right to determine what positions should be created, in direct contradiction of the contractual provisions for management rights and limits to arbitration.

If the District violated the collective bargaining agreement by failing to recall the grievant, the remedy is to recall her for whatever time may remain in the Zingler leave of absence. Because the grievant declined numerous offers of work from the District, any backpay award would be inappropriate. But because the Union has failed to meet its burden, the grievance should be denied.

In its reply brief, the Union further asserts as follows:

The District distorts the facts by attempting to create a scenario of multiple instances of employees on layoff being bypassed for temporary employees, when in fact there was only one situation similar to the case at hand with an employee on layoff being qualified for the position that became open. None of the other situations the District cited are similar to the one at issue. Likewise, the arbitration which the District cites is not on mark, in that it involved ambiguous contract language and bargaining history which clearly supported the employer; neither circumstance is reflected in this case.

Further, the Union's actions in this case were reasonable, contrary to the District's unfounded speculation that the Union knew about and acquiesced in similar situations. The Union has members at three separate locations, and may not have been aware of all situations; there is no evidence the Union was aware of any previous situations, if such existed. The District complains if the Union grieves too many things, then tries to paint the union as derelict for not filing grievances; this is an unrealistic expectations and one the District would not want practiced.

Moreover, the District is attempting to modify language in the agreement. The agreement's carefully constructed language consistently protects the right of qualified employees to fill positions before they are offered to temporary or seasonal employees; the District's position negates this language. Contrary to the District's assertion and twisted logic, it is the District which is seeking to have the arbitrator modify the terms of the agreement.

Contrary to the District's assertion, the language is realistic and workable. Under common understanding, a vacancy is when there is an unoccupied position; there is nothing in the contract stating the language regarding vacancies doesn't apply when the incumbent is on leave of absence. The absurd examples the District gives of other situations totally misrepresents the Union's position.

Finally, the District has never explained why the grievant – a qualified and dedicated employee -- was bypassed. Instead, the District laid off a seven-year employee, paid her unemployment compensation, and brought in a new employee for a position the grievant was totally qualified to fill. The District's actions are arbitrary and capricious.

As to remedy, the District failed to enter exhibits on the record documenting alleged jobs the grievant was offered. There is no such thing as a "split-shift custodial position," as the District claims it offered. The grievant should be recalled and made whole, with a deduction for income the grievant received from her new and from unemployment compensation.

In its reply brief, the District further asserts as follows:

Contrary to the Union's argument, when employees are on leave of absence, their positions are not vacant, as the positions remain filled by that employee pending their return. There is nothing in the collective bargaining agreement which would suggest that the term "vacancy" is intended to include the positions of employees on leaves of absence; rather, the intent clearly was to define "vacancy" as existing when there was, in fact, an open position. The entire history of the administration of the collective bargaining agreement supports the District's interpretation, with not one case in which the position of an employee on leave was filled by anyone other than a substitute employee.

Further, contrary to the Union's claim, the record evidence clearly and unambiguously shows that the District has consistently used substitutes when individuals have been on leaves. The Union attempt to bolster its position mischaracterizes the hearing testimony.

The facts are that both parties have acceded to using substitutes in all cases in which bargaining unit employees were absent from work; the Union can cite no contrary case. It is disingenuous, at best, for the Union to now claim surprise and lack of knowledge, when it clearly has been aware of the practice of using substitutes irrespective of the term of their employment or the fact that other employees were on layoff.

DISCUSSION

This grievance examines whether the collective bargaining agreement lets the district give a one-year contract as a special education teacher aide to someone from outside the bargaining unit while a qualified and accredited special education teacher aide in the bargaining unit is on layoff.

I conclude it does not.

The district is correct that the union bears the burden of persuasion in an arbitration of this nature, and that it is put to its proof first. Having done so, as explained in greater detail below, I agree with the union that the language of the collective bargaining agreement is clear and unambiguous, both in defining temporary employees and excluding substitutes; that aide Becky Zingler's year-long leave of absence created a vacancy that triggered the grievant's Article 8 recall rights, and that there is insufficient experience to establish a binding past practice. Accordingly, I have sustained the grievance.

I begin my analysis with the understanding that the work of a special education teacher aide is bargaining unit work covered by the bargaining agreement, which is defined by both its text and its established practice. Because the district is paying the so-called "substitute" employee Paula Jensen to perform bargaining unit work, the employment relationship between the district and Jensen must be consistent with the bargaining agreement (again, as defined by text and practice).

Article 27 of the agreement grants the district the right to manage the school system, including the rights to direct all operations; create, combine, modify and eliminate positions; hire, promote, transfer, schedule and assign employees; relieve employees for lack of work; maintain efficiencies; introduce new or improved methods; determine and kinds and amounts of services to be provided, and the number, kind and classifications needed; subcontract or contract out for goods and services, provided no unit employee is laid off or suffers reduction in hours; determine its methods, means and personnel, and address emergency situations by any means necessary, all in a manner consistent with employee rights which the agreement also grants. Under this article, the district has discretion to determine the nature and amount of special education services it will provide; but once it sets a certain level of special education teacher aide services, its subsequent personnel actions must mesh with other articles of the agreement, particularly Articles 5, 8 and 9.

Article 5 of the agreement establishes six categories of employees: regular full-year, full-time, regular full-year part-time, school year full-time, school year part-time, temporary and seasonal. Jensen must satisfy the terms of one of these categories, or she is not an employee under the agreement.

Clearly, she fails all six standards. Indeed, the district declares as much when it describes her as a "substitute" employee. Jensen's existence, therefore, begins outside the agreement.

Article 5, Section E provides that if there is a qualified laid-off employee within a department, a temporary employee can work for only five consecutive days in that department before the temporary work is offered to the permanent employee on layoff. That paragraph also provides that temporary employees can work for a specified period of time, or on a specified project, for no more than sixty days.

The district maintains that it was not bound by the terms of this paragraph is hiring Jensen to replace Zingler for the remainder of the 2003-2004 year and the entirety of 2004-2005 because she was not a temporary employee, but rather a "substitute" employee.

The collective bargaining agreement, however, makes no mention of "substitute" employees. While this absence of explicit authority to employ such a category of workers is not in and of itself dispositive, it presents a serious challenge to the district's position.

As the union asserts, the explicit listing of six separate kinds of employees establishes that the parties were aware of the topic and competent to address it, and that the exclusion from that list of any other kind of employee – especially the so-called "substitutes" – was done knowingly. This exclusion from Article 5 is not completely conclusive in rejecting the employer's argument, but it is hurtful to the claim of legitimacy for "substitute employees."

The district, which elsewhere in its argument cautions me against "inserting language into that agreement," here suggests that since the collective bargaining agreement "is silent on the question of substitutes," I should read into the contract an understanding based on an ongoing past practice.

The standard to establish a past practice has been well-settled for more than fifty years. In its most famous articulation, to become binding on both parties, a practice must be "unequivocal; clearly enunciated and acted upon; readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both Parties." CELANESE CORP. OF AM., 24 LA 168, 172 (Justin, 1954). Or as the U.S. Supreme Court held in a seminal case, a practice "must be shown to be the accepted course of conduct characteristically repeated in response to the given set of underlying circumstances. (I)t must be accepted in the sense of being regarded by those involved as the normal and proper response to the underlying circumstances presented. UNITED STEELWORKERS OF AMERICA V. WARRIOR & GULF NAVIGATION CO., 363 U.S. 574, 581-581 (1960). As the distinguished arbitrator Richard Mittenthal explained in an influential exegesis on the topic, a course of conduct must have clarity and consistency, longevity and repetition, and mutual acceptability "before it can legitimately be regarded as a practice." [2]

The district cites the several instances over the past few years, where short and long term leaves were uniformly addressed by the hiring of substitutes. The union counters that the number of instances is low and their duration short. To enshrine such an understanding in the contract – in order to be the activist arbitrator the district asks me to be – the instances the district cites must be clear and unambiguous. They aren't.

The district asserts the practice has "continued over the course of not only the existing collective bargaining agreement but at least one predecessor agreement." That means that there

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[2] Richard Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements," *Proceedings of the Fourteenth Annual Meeting of the National Academy of Arbitrators* (BNA Books, 1961), p. 32.

has only been one round of bargaining after the initiation of the purported practice. Again, absent a very clear indication that the parties mutually understood a practice was being put in place, I do not find one round of bargaining to be sufficient for establishing a binding past practice. No such clear understanding is evident from the record.

I believe the district is correct that the union had a general awareness that some jobs were going to individuals who were not in the bargaining unit. But given the totality of the evidence (the relatively brief duration of the experience, the unique nature of each leave, the lack of direct communication from the district to the union), I do not find this general awareness of the use of non-unit personnel to be sufficient to establish a binding past practice.

The district cites five instances involving special education aides and/or special needs assistants that happened prior to the August, 2004 execution of the agreement. It assigns particular importance to the situation during the 2002-2003 school year, when it says there were two employees on layoff with recall rights while Posluzny and Theriault were on leave, namely special education aide Nicole Lanko and teaching assistant-clerical Joan Nowacki. The district relies primarily on the Posluszny/Lanko situation as establishing the practice. Indeed, Business Manager/Acting Superintendent Balzer testified that he based his conclusion that John did not have recall rights on the earlier Posluszny/Lanko situation. “That, as far as I’m concerned,” Balzer testified, “established the practice or the tendency that we would use in this case.”

It really should go without saying that a single incident is hardly the stuff of which past practice is ordinarily made. While there no doubt could be an instance that was so obvious, overt and explicit that it served to create a practice, that is not the case here. First, there is the question of Lanko’s recall rights. Balzer testified and the district asserts that she had them; but as the union correctly notes, exhibit 17 establishes that Lanko had no seniority at the time. The union interprets this to mean she was a probationary employee without recall rights, a point the district does not rebut in its written arguments. Further, Posluszny was a full-time “Teacher’s Assistant Special Needs – Cross Categorical,” while Lanko was a half-time “Special Education Assistant – Early Childhood.” Finally, there is also a slight difference in applicable time periods – Posluszny’s 2002-2003 leave began a month or so into the school year, while Zingler’s 2004-2005 leave was approved several months before the year began. In isolation, none of these discrepancies are conclusive in rejecting the district’s argument, but they do create an ambiguity that argues against the notion that the parties’ experience here has been so clear and unequivocal that this single episode can support a modification of the terms of the agreement.

There are other differences as well, particularly between the previous instances in which the district used so-called “substitutes” and the Zingler-Jensen-John situation. In sum, the situation before me is the *only* instance in which there was a permanent employee with seniority who was kept on lay-off when the district replaced an employee on a full year’s leave, when the laid off employee had the precise qualifications, credentials and job classification of the employee on leave.

It may very well be that the district has never recalled an employee on layoff to replace an employee on leave, and that indeed most likely is the case. Certainly, there is no evidence that ever *has* happened. But that does not necessarily mean that such a course of action is consistent with the agreement; it just means that the district followed such a course in 2002-2003, and the union didn't challenge its conduct.

Other than three cases cited in support of the well-accepted understanding that the Union bears the burden of proof in this non-disciplinary matter, the District cites only one arbitral precedent, CITY OF MENASHA (UTILITY), NO. 59320, MA-11250 (Greco, 5/8/2002). Contrary to the District's assertion, the case before me does not present "a remarkably similar situation" to that which Arbitrator Greco addressed.

In the MENASHA case, the record evidence established that the practice of having student help perform meter-reading duties had begun in 1985; although the award does not provide a date for the filing of the grievance, the text indicates it was sometime during the year 2000 (at least, it was after September 1999 and before January 2001). Thus, the past practice before arbitrator Greco had existed for about 15 years. In the case before me, the only past instances the District cites occurred in the 2002-2003 and 2003-2004 school years, with the grievance being filed in 2004. Notwithstanding questions about the applicability and relevance of all the prior occurrences, it is simply fanciful to assert, as the district does, that a practice 15 years long is "remarkably similar" to one that occurred, if at all, for one or two years.

As the district noted in its layoff resolution and notice, John has recall rights under Article 9 of the collective bargaining agreement. Section C of that article provides that "(w)hen work again becomes available, a full position or an increase in hours," a certain procedure "shall be utilized," as defined under subsection C-1.

John was laid off from the position as a special education teacher aide. Shortly thereafter, the district granted Zingler a full year's leave of absence from her position as a special education teacher aide. Rather than leave Zingler's position vacant, the district decided to replace Zingler with someone to perform the same work. On the surface, this certainly seems a situation in which work – bargaining unit work -- again became available, thus triggering the procedures of 9/C/1, which refer back to the job posting provisions of Article 8.

To rebut the union's claim that the layoff and recall language of Article 9 should apply, the district contends there was no vacancy. I find that there was.

In its argument, the district quotes selectively from the collective bargaining agreement, and cites an arbitral precedent which doesn't entirely support its position.

In its reply brief, the district writes: "In the collective bargaining agreement, the term 'vacancy' is defined as existing 'due to the retirement or termination of the incumbent employee, the creation of a new position, etc.'" But that is not how the contract reads; instead, the phrase omitted by the district continues, "*or for whatever reason…" (emphasis* added). The

district – which elsewhere asks me to read into the agreement the concept of "substitute employees"—asserts that because there is "nothing in the collective bargaining agreement that would suggest that the term 'vacancy' is intended to include the positions of employees who are on a leave of absence," I should conclude that the intent of the parties was "clearly" to limit the definition of vacancies to situations "when there was, in fact, an open position."

Contrary to the district's assertion, it is far from clear that this was in fact the parties' intent; indeed, the very case which the district cites to support its argument actually serves to diminish it.

The district suggests I look for guidance to the award by commission arbitrator Dennis McGilligan, RICHLAND COUNTY, Dec. No. 62365 (2/24/2004). However, the open-ended phrase in the agreement at issue here stands in sharp contrast to the contract language before Arbitrator McGilligan, which specifically defined "a vacancy" as "a job opening not previously existing or a job created by the termination of employment, promotion, or the transfer of existing personnel, when the need for such job continues to exist." The language before McGilligan thus *explicitly* limited vacancies to one of four specific, unambiguous conditions – far different from the all-inclusive criterion "for whatever reason" in the language before me.

The district further quotes approvingly from McGilligan's commentary that unless there is an indication that the parties intended a special meaning for a word, arbitrators are to use the ordinary and popular meaning of words, and that the ordinary interpretation of the word "vacancy" is unfilled or unoccupied.

I agree. As defined by the *New College Edition of the American Heritage Dictionary of the English Language* (Houghton Mifflin, 1981), a vacancy is "a position, office or accommodation that is unfilled or unoccupied."

And that is what the position which Zingler held in 2003-2004 was for the ensuing school year – unfilled and unoccupied. As soon as the district granted Zingler a full year's leave, that became the state of the special education aide position for 2004-2005. For the 2003-2004 school year, the district adopted a budget which included funds for a special education teacher aide, a post held that year by Zingler. When Zingler went on leave for 2004-2005, the district did not reduce its budget or eliminate the position Zingler had held. The position still existed, but with Zingler on a full year's leave of absence, the position was vacant.

In an employment setting where the job status routinely changes on an annual basis – an individual annual contract is the standard operating procedure in Wisconsin public schools – a leave which encompasses a full school year creates a vacancy under Article 8, Section A. This award does not address whether leaves of shorter duration may also create a vacancy; they may or they may not, depending on several factors.

Article 8, Section A requires the district to publish a job posting "whenever any vacancy occurs, which the District deems is necessary to fill, due to the retirement or termination of the incumbent employee, the creation of a new position, or for whatever reason." Pursuant to its management rights, it is the District that determines whether or not a vacancy is to be filled; but once the decision has been made to fill a vacancy, the district must act in conformity with the remainder of Article 8.

Under section 9/C.1), the district "shall first attempt" to fill the position utilizing the job posting procedure of Article 8; if "a bargaining unit member is not selected," by which I understand the agreement to mean a unit member in active status, then "the last employee laid off *shall be the first employee recalled*," provided that employee be qualified and capable of performing the job. (*emphasis* added). As noted above, the district agrees that John was qualified to perform Zingler's duties.

In its resolution ordering reduction in support staff and laying off John and another special education aides, the district declared that "budgetary and fiscal constraints permit the reduction" of the aides and the elimination of their positions. The district certainly had an economic incentive to act as it did; the district paid Jensen $11.66 an hour without benefits, compared to the $13.53 an hour, plus benefits, it would have paid John. The fact that the district saved several thousand dollars does not automatically make its action invalid, of course, just as these savings would not make allowable what the terms of the agreement otherwise prohibit.

As was explained in her notice of layoff, John was eligible for recall rights as provided for in Article 9 of the agreement. That Article has several applicable provisions.

Paragraph A.1) provides that "*all* temporary and seasonal employees *shall be terminated* or have his/her hours reduced before any bargaining unit employees are scheduled for reduction." (*emphasis* added). Paragraph C.1) provides that whenever "a vacancy occurs or a new position is created while employees are on layoff," the district shall first attempt to fill the position through the job posting provisions of Article 8; if that process does not produce a bargaining unit member for the job, the last employee laid off "*shall* be the first employee recalled, provided that he or she is qualified and capable of performing" the work. An exception provided that where an employee on recall status was laid off or bumped from the vacated position being posted, that employee "will be offered the right of recall prior" to the position being posted. Paragraph C.2) provides that temporary and seasonal employees "*shall not be recalled* to work until all bargaining unit employees have been recalled or had their work hours restored." Under this article, the district should have recalled John and any other bargaining unit employee on layoff before offering the special education aide position to a non-unit employee.

The district declares that there is "no evidence that the collective bargaining agreement covers substitute employees, restricts the hiring of substitutes to replace employees on leave or requires the District to replace absent employees with bargaining unit employees." It also

asserts that there is nothing in the agreement, the bargaining history or past practice to suggest "that the positions of absent employees must be treated as vacancies," or that the definition of "temporary employee" was intended to include substitutes.

The district is correct that the agreement does not compel the replacement of absent employees; that is a determination reserved to the district under Article 27. The district is also correct that the agreement does not cover so-called "substitute employees," and that "temporary employees" are not "substitute employees." And inasmuch as the collective bargaining agreement does not provide "substitute" employees, the district is obviously correct that the recall provisions of the agreement do not apply to the hiring of these so-called "substitutes."

The district is wrong, however, when it declares that the agreement does not restrict its ability to hire from outside the bargaining unit.

It is a well-worn adage that arbitrators are not to impose their own brand of industrial justice, but rather issue awards that draw their essence from the collective bargaining agreement. STEELWORKERS V. ENTERPRISE CORP., 363 U.S. 593, 597 (1960). There are several provisions in the agreement before me which have as their essence the preservation of job security for unit employees.

Article 5 has two such provisions. The first caps at a maximum of sixty days the length of time a temporary employee can remain on the payroll. The second bars the district from even employing a temporary employee for more than five consecutive work days without first offering the temporary work to a qualified employee on lay off from the affected department.

Article 8 bars the district from filling a vacancy with an applicant from outside the bargaining unit without first following a detailed posting procedure and determining "there is no qualified bargaining unit applicant."

Article 9 mandates that "*all* temporary and seasonal employees *shall be* terminated" or reduced in hours before any bargaining unit employees are scheduled for reduction. (*emphasis* added). This article also provides employees with two years of recall rights, and again mandates that temporary and seasonal employees "*shall not be recalled* to work until *all* bargaining unit employees have been recalled or had their work hours restored." (*emphasis* added).

Even Article 27, establishing the district's management rights, codifies the contract's concern for the job security of unit employees, by allowing the district to subcontract or contract out for goods and services only when "no unit employee shall be laid off or suffer a reduction in regularly scheduled hours as a result of such contracting or subcontracting."[3]

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[3] On the surface, hiring an employee to perform the work of a special education teacher aide in place of a permanent employee on a year's leave seems very close to contracting or subcontracting for such services. Since

The district also claims implementation of the association's position would lead to an absurd result. But the example the district cites on page 14 of its brief is based on unambiguous language which clearly differentiates between situations where the laid off employee is from the same department in which the temporary work arises, and situations where the departments are different. While this difference makes operational sense to me, if the district finds the distinction absurd, it can seek changes in subsequent negotiations.

As further support for its contention that the Article 5 recall provisions do not apply to so-called "substitutes," the district says it would "find itself in violation of the contract because it permitted a temporary employee to work six days or more in the same department even when it did not know that such an event would occur until the sixth day." Leaving aside the odd notion that the employer could somehow be taken by surprise at the length of service of the employees whom it directs and assigns, this argument just makes no sense at all. The collective bargaining agreement is clear and unambiguous on this point – before a temporary employee is hired for six consecutive work days or longer in any department, "a laid off employee within that department *shall* be offered the temporary work" provided the employee is capable of performing the work available (*emphasis* added). To hold that a non-unit employee is not subject to this six-day rule, or the earlier 60-day rule, because they are a so-called "substitute" employee is to violate both the spirit and letter of the agreement.

The district asserts that the association's theory would let an employee on layoff claim the position of any other employee on sick leave or vacation extending more than one week. I find nothing in the association's written arguments to support that claim; to the contrary, the association expressly disavows such a position, claiming that a laid off employee would have a right to such a position *only* if the district chose to fill it.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the positions of the parties, it is my

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there was another qualified permanent employee on lay off at the time, Article 27, Section K would have barred the district from using an employment agency to provide the services of special education teacher aide; I fail to see how hiring Jensen directly is functionally any different.

AWARD

That the grievance is sustained. The district shall make Rebecca John whole as though it had recalled her for the 2004-2005 school year, offset by John's earnings and other revenue she received due to being laid off. In order to resolve any disputes that may arise as to the remedy, I shall retain jurisdiction for not less than 60 days from the date of this award, unless prior to that time the parties jointly inform me they have agreed on a remedy.

Dated at Madison, Wisconsin, this 14th day of November, 2005.

Stuart D. Levitan /s/

Stuart D. Levitan, Arbitrator

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