

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**IOWA-GRANT EDUCATION ASSOCIATION OF  
PROFESSIONAL STAFF AND SUPPORT PERSONNEL**

and

**IOWA-GRANT SCHOOL DISTRICT**

Case 28  
No. 67763  
MA-14009

(Bus Driver Positions Grievance)

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**Appearances:**

**Thomas Fineran**, Executive Director, South West Education Association, 960 Washington Street, Platteville, Wisconsin, 53818, appeared on behalf of the Iowa-Grant Education Association of Professional Staff and Support Personnel.

**Shana R. Lewis**, Attorney at Law, Lathrop & Clark, LLP, 740 Regent Street, Suite 400, P.O. Box 1507, Madison, Wisconsin, 53701-1507, appeared on behalf of Iowa-Grant School District.

**ARBITRATION AWARD**

Iowa-Grant Education Association of Professional Staff and Support Personnel, herein the Association, and Iowa Grant School District, herein the District, are parties to a collective bargaining agreement which provides for the final and binding arbitration of certain disputes. The Association filed a request to initiate grievance arbitration with the Wisconsin Employment Relations Commission for arbitration of a grievance filed by the Association as an Association grievance that concerned the way the District subcontracted the work of certain bus driver positions that had been in the bargaining unit. From a panel the parties selected Paul Gordon, Commissioner, to serve as arbitrator. Hearing was held on the matter on May 6, 2008 in Livingstone, Wisconsin. A transcript was prepared. An additional exhibit was later received by agreement of the parties. The parties filed written briefs and reply briefs by July 8, 2008 and the record was closed.

## ISSUES

The parties did not stipulate to a statement of the issues. The Association states the issues as:

Did the District violate the terms of the 2007-2008 Master Agreement between the Iowa-Grant School District and the Iowa-Grant Support Staff when two limited term employee positions, which met the definition of bargaining unit work, existed for forty-six (46) consecutive regular work days and the District failed to hire the incumbents, or to post the positions so that it would have been possible to hire for the positions from outside the bargaining unit?

If so, what is the remedy?

The District states the issues as:

Did the District violate the collective bargaining agreement when it subcontracted the bus driver positions during the 2007-2008 school year?

If so, what is the remedy?

The Association's statement of the issues is adopted as that which most closely reflects the record and arguments of the parties.

## RELEVANT CONTRACT PROVISIONS

### ARTICLE I DEFINITIONS

A. Definition of terms used in this Agreement.

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8. "Limited Term Employee" shall be defined as an employee who works less than forty-six (46) consecutive regular work days in a particular position.

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### ARTICLE III RECOGNITION

The Board hereby recognizes the Iowa-Grant Education Association of Professional Staff and Support Staff personnel/South West Education Association, consisting of all regular full-time and regular part-time non-professional support staff employed by the Iowa-Grant School District including

custodial/maintenance, food service, teacher aide, clerical, and transportation employees, but excluding Supervisors, Managerial, and Food Service Supervisor, District Bookkeeper, bus Mechanic, High School Principal's Secretary, persons hired as substitutes for included positions, seasonal employees, and limited term employees, as their representative; and that pursuant to the provisions of Sec. 111.70 of the Municipal Employment Relations Act, said labor organization is the exclusive collective bargaining representative of all such employees for the purposes of collective bargaining with the above named Municipal Employer.

#### **ARTICLE IV MANAGEMENT RIGHTS**

The Board hereby retains and reserves unto itself all power, rights, authority, and responsibilities to manage and operate the school system. The exercise of such powers, rights, authority, duties and responsibilities by the Board; the adoption of policies, rules, regulations and practices in furtherance thereof; and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this agreement. The foregoing statement of the functions of the Board shall not be considered to exclude other functions of the Board not heretofore set forth, the Board retaining all functions and rights to act not specifically covered by the agreement including but not limited by enumeration:

1. To direct all operations of the school district
2. To examine, hire, classify, promote, train, transfer, assign, and schedule employees to jobs and positions within the school system.
3. To determine the number of employees to be employed, the duties of each of these employees, the nature and place of their work and to schedule the work of all employees.
4. To create, combine, or eliminate any job or position deemed advisable.
5. To suspend, demote, discharge, and take other disciplinary action against employees.
6. To relieve employees from their duties because of lack of work or because the District has fully or partially eliminated any service presently or hereafter performed by the District.
7. To direct the employees, including the right to assign work and overtime.
8. To establish and require observance of reasonable work rules and schedules of work.
9. To increase, reduce, change, modify, or alter the composition in size of the work force.
10. To increase or reduce the number of hours in any position.

11. To maintain efficiency and productivity in District operation, including the right to assign (temporarily or partially) an employee to serve in some other job classification or department.
12. To take whatever action is necessary to comply with state and/or federal law.
13. To contract for goods and those services, which are not currently provided by present staff members on a regular basis.
14. To take whatever actions are necessary to carry out the functions of the school system in situations of emergency.
15. To change or eliminate the existing methods, equipment, or facilities and to introduce new or improved methods or facilities.

The exercise of any of the retained and/or enumerated powers, rights, authority and responsibilities are specifically exempt from being covered by or subject to the grievance procedure.

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## **ARTICLE VI GRIEVANCE PROCEDURE**

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### Step Five

**Arbitration** If the grievance is not resolved satisfactorily in Step Four, the grievant(s) and his/her representative(s) may request, in writing, a solution through arbitration. The parties agree to the following procedure in selecting an arbitrator to resolve the dispute. First, within ten (10) days after a notice of intention to proceed to binding arbitration is received by the Board, the Board and the IGEAPSSP shall attempt to agree upon a mutually acceptable arbitrator and obtain a commitment from said arbitrator to serve. Second, if the parties are unable to mutually agree to an arbitrator, the parties will request the Wisconsin Employment Relations Commission (WERC) to provide a panel of five (5) potential arbitrators from the WERC staff to serve as the arbitrator to resolve the grievance. The Board and the employee representative shall determine by coin toss who has the choice of striking first or second and thereafter shall, in that order, alternately strike a name from the list, and the fifth and remaining name shall act as the arbitrator. If the parties are unable to mutually agree to an arbitrator and the WERC will not provide a panel of five (5) potential arbitrators from the WERC staff, then the Wisconsin Employment Relations Commission shall be asked to appoint a member of its staff to serve as an arbitrator. No grievance may proceed to arbitration without the consent of the Association.

. . .

The arbitrator shall interpret the terms of the bargaining agreement and shall not have authority to change, alter or modify any of the terms or provisions of this agreement. Findings of the arbitrator shall be final and binding upon both parties.

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**ARTICLE VIII**  
**SENIORITY**

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D. Vacancies

1. When vacancies occur the Board will cause a notice of such to be distributed to each IGEAPSSP employee at least five (5) working days before the closing of applications for said vacancy. A copy of such posting shall also be sent to the IGEAPSSP President, when the vacancy or position is posted during the time when that particular class of employees is not working. Qualified employees will be used to fill the vacancies if application is made. The qualified employee with the most seniority will be selected to fill each vacancy.
2. Posting notice of vacancies will require the District to post only for a vacancy in a job classification. The District reserves the right to make transfers. All transfers will be accomplished before recall from layoff.

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5. If a limited term employee position which meets the definition of bargaining unit work exists for forty-six (46) consecutive regular work days or more, the Board shall choose to proceed in one of the following ways:
  - a. The Board may hire the incumbent limited term employee, thereby converting the employee to a bargaining unit member. Said date of hire shall be considered the date of initial employment for all purposes under the collective bargaining agreement.
  - b. The Board may post the position pursuant to Article VIII (Seniority) D. (Vacancies) and proceed in accordance with that section, including the hiring for the position from outside the bargaining unit.
6. Nothing herein shall be construed as obligating the Board to hire the incumbent limited term employee or to alter any of the existing obligations/rights of the Board if it chooses to proceed under Article VIII-D.

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## **BACKGROUND AND FACTS**

The District owned and operated its school bus system before going into what it terms a hybrid system with a subcontractor during the 2007-2008 school year. Before this the bus routes had been driven primarily by bargaining unit members. When members were on leaves or reassigned to other duties on a non-permanent basis, substitute bus drivers have been used. Substitutes came from two sources: bargaining unit members who otherwise worked in custodial positions, and non-bargaining unit drivers who were not otherwise employed by the District. Bus drivers also have a limited privilege under Article X of the collective bargaining agreement, to arrange for their own substitutes from an approved list. When substitute drivers were used there were no new positions created by the District. One bargaining unit driver, Halverson, had his duties changed on or about May 12, 2006 and he did not drive a route again until his resignation of May 7, 2007. The route he had previously driven was filled by other bargaining unit members or other substitutes in some combination.

In the 1994-1995 Master Contract the parties added Article VIII-D subsections 5 and 6, as set out above. Article IV subsection 13, as set out above, had already been in the collective bargaining agreement and remained in the Master Contract. There have been situations in the District where employees in various positions in the bargaining unit have been out for extended periods of time – beyond 46 consecutive days - but have not resigned or separated their employment so as to create a permanent vacancy. The District did not fill those positions by hiring replacement employees. The District did use substitute employees in at least some of those situations.

Along with declining enrollment, the District had changed the number of bus routes in the past few years. In 2005-2006 there were 14 routes with 14 bargaining unit member drivers at the start of the year. During and after that time there had been some drivers separate their employment with the District and new drivers hired into the bargaining unit. In 2006-2007 three of the routes were combined into two and another special education route was added for a total of 14 routes. In 2007-2008 two routes were eliminated by twice combining three into two, for a remaining total of 12.

During the 2006-2007 school year the District explored subcontracting the bus service, eventually concluding that it could save money by subcontracting. The District did not want to negatively or adversely diminish the benefits for current employees. The District felt it would be receiving some retirements or resignations of some transportation related employees in the future. The Board held meetings in August, September and October of 2007 on potentially subcontracting the bus service, and on October 17, 2007 awarded a subcontract for the service. The District and the successful bidder later entered into a signed Transportation Agreement which stated it commences October 25, 2007 but, was not signed until December 21, 2007. The busses were transferred from the District to the subcontractor on or about January 1, 2008. The transportation agreement between the District and the subcontractor contained the following clause

Contractor shall provide and the District shall pay for bus transportation as required by the District and in accordance with the terms and conditions

contained in this Agreement. This Agreement is intended to govern the relationship of the parties hereto with respect to the provision of bus services by the Contactor where such services include the provision of Contractor's employees as bus drivers. In addition, for as long as the District employs bus drivers pursuant to the applicable Collective Bargaining Agreement existing at the time of the execution of this Agreement, or any successor agreement to such Collective Bargaining Agreement, the District shall provide and the Contractor shall utilize such bus drivers in connection with the provision of transportation services under this Agreement. The parties agree that the District, not the Contractor, shall retain responsibilities as the employer of such drivers, and that the District shall provide such services on a subcontracting basis. Accordingly, drivers provided by the District shall not be considered employees under Section 1.4 (intro) hereinbelow. However, contractor shall carry out the screening, training and other duties specified under Subsections 1.4.1 and 1.4.2 hereinbelow.

At the time of the October 17<sup>th</sup> award, there were 10 bargaining unit employees driving busses and all 10 continued driving bus routes as District employees. After October 24<sup>th</sup> the District did not hire, use or employ any non-bargaining unit substitute drivers. The subcontractor would fill any unfilled or vacant driver positions with its own drivers – effectively from outside the bargaining unit with non-bargaining unit drivers. There were two such positions at the time of the subcontracting, with the routes being driven by non-bargaining unit substitutes including Eric Tranberg and Kambly Roth. The record does not show who the subcontractor had drive the two routes.

Tranberg had applied with the District to be a substitute bus driver in November 2005 and began substituting in November 2005. According to District payroll records, he worked, among other times, consecutive regular work days from October 12, 2006 through January 6, 2007 - 59 days, and consecutively on work days from January 18, 2007 through March 30, 2007 - 50 days. He does not appear on the District payroll records as having worked for the District after October 24, 2007. He did not drive for 46 consecutive regular work days on any other occasions.<sup>[1]</sup> At no time was he offered employment by the District as a regular full-time or regular part-time transportation employee in the bargaining unit. The same records show that Roth drove frequently during the 2006-2007 school year, but never for 46 or more consecutive regular work days. She drove 18 consecutive regular days from October 1, 2007 through October 24, 2007, and did not work for the District after that. She did not drive for the District for any period of at least 46 consecutive regular days. At no time was she offered employment by the District as a regular full-time or regular part-time transportation employee in the bargaining unit.

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[1] He did not drive a makeup day in June of 2006 that other bargaining unit drivers drove, thus breaking a different string of days.

There were several resignations of bus drivers in 2007. Driver Baker resigned effective the end of the 2006-2007 school year. Driver Halverson resigned on May 7<sup>th</sup>. Driver Durni resigned June 27<sup>th</sup>. At that point the District was still reviewing potential routes for the coming school year and was working to develop 12 routes out of the previous 14 routes. Thus, at that point there would be one vacancy. On July 9, 2007 the District posted the vacancy internally to the bargaining unit. No one from the bargaining unit applied for the position. Tranberg was not sent a copy of the posting or otherwise notified by the District of the vacancy. The District did not post externally or otherwise advertise for the vacant position in the local media or any other way. For at least several years there have been other vacancies for other positions in the bargaining unit which had been posted internally to the bargaining unit but, not outside of the bargaining unit. Tranberg was not hired by the District to fill the bus driver vacancy. The District reduced the number of routes to 12 on August 13, 2007. When the school year started, Tranberg drove routes, after the first week, consistently but not continuously until October 24, 2007.

In early September 2007 the Association filed a grievance over the posting procedure used after the Durni resignation, contending the position had not been properly posted. The grievance was denied by the District. Several steps of the grievance procedure were then taken with the District Board of Education denying the grievance both on the merits and procedurally, communicating the same to the Association by letter of November 8, 2007. The Association eventually did not pursue the denied grievance to arbitration.

Another driver, Schambow, resigned with a last day of driving September 28, 2007. Thereafter his route was driven by substitutes. There was no posting of a vacancy for that position, and no one driving as an out of bargaining unit substitute, Tranberg, Roth and other substitutes, nor anyone else, was hired into that position. As noted above, Roth drove as a substitute from October 1st through October 24<sup>th</sup>.

The Association filed a second grievance at step 2 on or about November 30, 2007. In its written formal grievance contending an ongoing violation of Article VIII, Seniority, Section D and any other applicable articles, it stated the grievance as

The District misinterpreted, inequitably applied and/or violated the contract when it failed to post notice(s) of vacancy for bus driver position(s) or offered the position to the substitute driver; in effect adding the person to the bargaining unit.

The grievance requested that the District follow the guidelines outlined in Article VIII, Section D and to make the grievant whole. The grievance was denied by the District and this arbitration followed. Further facts appear as are in the discussion.

## POSITIONS OF THE PARTIES

### Association

In summary, the Association argues that The District violated the collective bargaining agreement's provision regarding vacancies when it failed to follow Article VII (Seniority), Section D (Vacancies), Number 5, when it failed to either hire an incumbent limited term employee or post a vacant position, including the hiring for the position from outside the bargaining unit, in an instance where a vacancy occurred for more than forty-six (46) consecutive regular work days. The District's management right to contract for goods and services not currently provided by present staff members on a regular basis is limited by the specific and express terms of the agreement, which includes Article VIII, Section D, subsection 5, added in the 1994-1995 Master Agreement:

5. If a limited term employee position which meets the definition of bargaining unit work exists for forty-six (46) consecutive regular work days or more, the Board shall choose to proceed in one of the following ways:

...

- a. The Board may hire the incumbent limited term employee, thereby converting the employee to a bargaining unit member. Said date of hire shall be considered the date of initial employment for all purposes under the collective bargaining agreement.
- b. The Board may post the position pursuant to Article VIII (Seniority) D. (Vacancies) and proceed in accordance with that section, including the hiring for the position from outside the bargaining unit.

The arbitration addresses two factual situations. First, the Association objects to the District having not permitted Eric Tranberg to be hired after serving in a limited term employee position for forty-six (46) or more days during a vacancy in his job classification or to post the position externally, as a non-bargaining unit person could be hired for the vacant bargaining unit position. Secondly, The Association objects to the District having not permitted Kambly Roth to be hired after serving in a limited term employee position for forty-six (46) or more days during a vacancy in her job classification or to post the position externally, so a non-bargaining unit person could be hired for the vacant bargaining unit position. The Association would have wholeheartedly agreed with [the District's] interpretation of the contract prior to 1994-1995. However, the current language means what it says. Prior to 1994-1995 the management right to contract out for goods and services which are not currently provided by present staff members on a regular basis had the effect that the protection for limited term employees was non-existent. Adding Article VIII-D subsection 5 changed the focus from protection of workers to the protection of limited term employees or the work they performed, so long as the Iowa-Grant School District was the employer.

The Association argues that Tranberg drove bus during the 2005-2006 school year, the 2006-2007 school year, and during the 2007-2008 school year until the District sold its bus fleet. Roth was available any time to drive during the 2006-2007 school year. During these respective times both Tranberg and Roth were used as substitutes as there were no vacancies. The Association asserts that when a vacancy occurred on May 7, 2007, with the resignation of Halverson, the two drivers became limited term employees. When Baker later resigned another vacancy opened up. The District acknowledges at least one vacancy was posted on July 9, 2007. After the Durni resignation and reduction of bus routes to 12, this still left at least one vacancy. Schamow's resignation created another vacancy. The language in Article VIII-D subsection 5 is clear and unambiguous. At least one vacant position existed in the bus driver classification as early as May 7, 2007. The time for counting forty-six (46) consecutive work days would start with May 7, 2007 being day one. October 2, 2007 would be the forty-sixth (46<sup>th</sup>) consecutive work day a limited term employee position existed. Tranberg was the limited term employee that should have been offered the job on October 2, 2007 or the District should have posted for the position, including externally so the position would be filled by a bargaining unit member. This was not done.

When Schamow resigned on September 30, 2007, Roth was the limited term employee position that began with the vacant position starting on October 1, 2007. December 10, 2007 would then be day forty-six (46) which would kick in subsection 5 of Section D in Article VIII. At this point Roth should have been offered the vacant position or the District should have posted for the position, including externally, so the position would be filled by a bargaining unit member. The District did neither. The Association notes that the Transportation Agreement was signed on December 21, 2007, eleven days after Roth should have been hired to fill the vacant position, and the bus fleet was sold January 1, 2008, also after the date Roth should have been hired by the District. The Association has a problem with the District's anticipated argument that the effective date of the subcontracting was earlier, since the subcontractor president was the District Transportation supervisor – but that is another issue.

The Association argues that the Management Rights clause for subcontracting shall be limited only by the specific and express terms of this agreement. Clearly, Article VIII-D subsection 5 falls under specific and express terms of this agreement.

The Association requests as a remedy that Tranberg and Roth be made whole by being hired as bargaining unit employees as of October 2, 2007 and December 10, 2007, respectively, and by otherwise making them whole, including reimbursement for loss of collective bargaining agreement benefits.

The Association also argues that the District's discussion of subcontracting in its initial brief is not relevant. It is uncontroversial that the limited term employees here were performing bargaining unit work for a period in excess of forty-six (46) consecutive regular work days. By the plain language of Article VIII-D subsection 5, the provision mandates the District take one or the other action. The District has done neither. The posting was internal only, and did not include the possibility of "hiring for the position from outside the bargaining

unit.” As to paragraph 6 of Article VIII-D, there are at least two problems with the District’s interpretation. First, it implies intent in paragraph VIII-D subsection 5 that there was a third, unstated option to contract out the work. This flies in the face of standard contract interpretation of *expressio unius est exclusio alterius*. Had the parties intended a third option, they would have provided for one. The second problem is VIII-D subsection 6 ignores the condition under which the provision applies “. . . if it chooses to proceed under Article VIII-D.” Since VIII-D is the provision about posting vacancies (and not subcontracting), it is obvious that paragraph 6 does not undermine the Association’s arguments in this case. It is the District, not the Association, which is seeking to change, alter or modify the Agreement through arbitration.

The Association further argues that the District’s review of trends with subcontracting and other school Districts is not relevant in this case. The issue is whether the District violated the collective bargaining agreement in this case. The Association further argues that the District’s frequent reference to the Mineral Pont subcontracting case is misleading. The Master Agreement there had no clause requiring the District to either hire an incumbent limited term employee or post for the position, including externally, after a specified period of time. And, Mr. Slack’s interpretation of the subsection 6 of Article VIII-D on page 21 of the District’s brief is not the final word. Slack is not an expert on arbitral law. Further, the past practice reasoning the District uses to argue its case on page 24 is flawed. In each instance cited by the District there were no vacancies until a resignation, retirement or termination occurred. Finally, the District implies that Mr. Tranberg had the opportunity to apply for the vacant position that was posted internally on June 7, 2007. He never applied because he did not receive the internal notice, as he was not part of the bargaining unit.

### **District**

In summary, the District argues that the Association has not met its burden to show that the District violated the Master Contract when it subcontracted its bus service. It is clear from Article IV subsection 13 that the parties agreed the District has the right to contract for goods and services, emphasizing: “3. To contract for goods and those services, which are not currently provided by present staff members on a regular basis.” This is clear and unambiguous language subject to only one plausible meaning. That is, the District has the right to contract for services when those services are not being currently performed by present staff members on a regular basis, i.e. services are not being currently performed by bargaining unit members. When the District contracted for bus driver services it had two vacant positions, which became vacant after the District eliminated two routes and four employees resigned or retired. Throughout the 2007-2008 school year the District had substitute drivers serving in the two vacant positions. It did not have bargaining unit members serving on a regular basis in those two vacant positions. Because these services were not being currently provided by present staff members on a regular basis the District could contract out for these services in compliance with the Master Contract. This was consistent with other cited arbitral authority.

The District argues that Article VIII, Section D, does not limit any District right to subcontract. The Association argument that Article VIII-D somehow limits the District's right to subcontract has not met the burden of proof. The District emphasizes Article VIII-D subsection 6:

Nothing herein shall be construed as obligating the Board to hire the incumbent limited term employee or to alter any of the existing obligations/rights of the Board if it chooses to proceed under Article VIII-D.

The Association argument as to subsection 5 prohibits the District's right to subcontract the position. However, this completely ignores subsection 6, above. This was incorporated into the Master Contract at the same time as subsection 5, and clearly states that subsection 5 was not intended to alter any of the existing rights of the Board, including the right to contract for services. Certainly, the right to subcontract was an "existing" right because it appeared in the Master Contract before subsections 5 and 6 were added. Accordingly, the right to contract pursuant to Article IV, subsection 13 was not diminished by Article VIII, Section D, Subsection 5. And because the District complied with Article IV, subsection 13, it did not violate the Master Contract. Mr. Slack shared this understanding. After a limited term employee position exists for forty-six consecutive regular workdays, the Board may choose to hire the incumbent limited term employee or it may post the position. However, according to Slack, there is no obligation to do either because of subsection 6, which reverts back to the management rights clause permitting subcontracting. Interestingly, the Association never asked its witness, a bargaining team member, about subsection 6. Arbitrators must read all of the language in the contract. And, no weight should be given to bargaining history because the language is not ambiguous, and the Association witness had no personal knowledge of the bargain at all.

The District also argues that the Association has failed to show that the District was required to follow Article VIII-D. The Association has failed to show that the District was even required to follow Article VIII-D 5, which require a limited term employee position that has existed for forty-six consecutive regular work days. The section looks at a position, rather than whether an employee served in a position for forty-six consecutive regular work days. The definition of limited term employee is "an employee who worked less than forty-six (46) consecutive regular work days in a particular position". The definition looks at whether a particular employee served in a position. Based on the definition, in order to constitute bargaining unit work, it appears to require an employee to work in a position for forty-six consecutive work days. In this case there is no evidence that a limited term employee position was created or even existed in the District. There were a number of substitute drivers, but no evidence to show these positions constituted limited term employee positions. There is a distinction. The recognition clause lists both substitutes and limited term employees as outside of the bargaining unit. Even if such a position existed, at least for the 2007-2008 school year there was no substitute position existing for forty-six consecutive days or that an employee worked for forty-six consecutive work days. In numerous instances the District has never converted substitutes, presumed to have worked more than forty-six consecutive work days, to

regular employees. Association has not grieved that, citing various examples of employees on leaves, including bus drivers and other situations where the District knew that injured employees would not be coming back to work. As Slack stated, there is nothing in the subsection that indicates that the forty-six consecutive work days is only applicable when the District determines that there is a vacancy. The arbitrator does not have authority to add this language to the contract. The argument that subsection 5 applies only when there is a vacancy is without merit.

The District argues that the Association has failed to show that the District failed to follow Article VIII, Section D. Even if the District was required to follow Article VIII, section D 5 before contracting for the services, the District followed this provision in all respects. The District has two options under the provision: it may hire the incumbent serving in the limited term position or post the position pursuant to Article VIII-D. The language does not require the District to hire the limited term employee. The Association never sought in bargaining to change the language to require the District hire such employees. In this case the District had a vacancy as a result of three resignations or retirements with two routes also being eliminated. The District posted the vacancy internally. The route had not yet been determined. After posting, the District did not receive any applications. Tranberg did not apply. The District then received Schambow's retirement notice, resulting in two vacancies. After not receiving any applications, the District took steps to subcontract these positions. Nothing in Article VIII-D requires external posting, allowing Tranberg or other substitutes to apply for the position. The District practice is not to always post externally and the vacancies identified in Joint Exhibit 6 had not been posted outside of the bargaining unit. The District had no obligation to post the position externally. Under Article IV the District can contract for goods and services not currently provided by present staff members on a regular basis. The District complied with this provision. The members of the bargaining unit were not affected by the Board's subcontracting decision. The vacancy provision does not limit the Board's rights and specifically states that it was not intended to alter any rights of the Board.

The District further argues that the Association's interpretation of the Master Contract ignores the reserved rights doctrine. The collective bargaining agreement reserves to the District the right to operate its business and control the work force limited only by specific and express terms of the agreement. In this case the Master Contract reserves such right to the Board, including the right to contract out for services specifically contained in Article IV subsection 13. The other bus drivers who were members of the bargaining unit were not affected by the Board's decision and they remained employed by the District subject to the Master Contract. The vacancy provision in Article VII-D does not in any way limit the Board's right to subcontract, and specifically states it was not intended to alter any right of the Board. In the case of a limited term employee position which exists for forty-six consecutive regular work days, the District is required to either hire the employee or post the position pursuant to Article VIII-D. In this case the District opted to post the position. The posting is only required by the Master Contract to be internal, notifying the Association of any vacancy. The District did exactly that on July 7, 2007. The District is not required to post externally and hire from outside the bargaining unit. The language in VIII-D subsection 5.b which states "including the hiring for the position from outside the bargaining unit" merely permits the Board to hire from

outside, but does not require the Board to do so. The Association is asking the arbitrator to place additional obligations and limitations on the District's right to subcontract that are not in the Master Contract. The District is not required to post externally unless the agreement requires as much, which it does not in this case.

The District argues that the Association's interpretation of the Master Contract refuses to read and apply all the language governing the employment of limited term employees. The Association never informs the arbitrator of subsection 6 of Article VIII-D. That language was adopted at the same time as subsection 5 and uses some of the same language. Thus, the parties must have intended for subsection 5 and subsection 6 to be harmonized. It is clear the parties intended not to alter any of its existing obligations under Article VIII-D if the District chose to post any position pursuant to subsection 5.b. They did not intend to require the District to post the position externally.

The District further argues that the Association has not met its burden to show that a limited term employee position existed. Article VIII-D subsection 5 is only triggered if there is a limited term employee position that meets the definition of bargaining unit work and this position exists for forty-six working days or more. The Association appears to argue that such positions existed because there were vacancies. However, nothing in the Master Contract suggests that a limited term employee position is created or exists simply because there is a vacancy. The Association cannot meet its burden simply by relying on its allegation that a vacancy existed for that amount of time. Nothing in the Master Contract suggests that resignations and retirements, standing alone, trigger a vacancy. This determination, as with those relating to the size of the workforce, is reserved to the District in Article IV, subsections 1, 3, 4, 6, and 9. The Association cannot show that a vacancy was created by an individual retirement or resignation. The District determines when a vacancy exists.

The District argues that the Association included a number of factual misstatements. Tranberg applied for a substitute position, not a regular position in November 2005. There are no facts in the record to support the Association conclusion that the District would have hired either Tranberg or Roth in any regular bus driver positions if there had been a vacancy, other than as substitutes. And there is nothing in the record to base the Association conclusion that any change in focus occurred with the addition of Article VIII-D subsection 5 to protection of limited term employees or the work they perform. Even as to obligations if a limited term position existed for a certain period of time, the District fulfilled all of its obligations.

### **DISCUSSION**

The Association contends that the District should be made to hire Eric Tanberg and Kambly Roth and make them whole because the District contracted out for goods and services while ignoring important provisions of the Master Contract regarding vacancies and limited term employee positions. As limited term employees, they should have been hired into the bargaining unit as drivers, or at least given the opportunity to apply from an out of bargaining unit posting, before the positions were subcontracted. The Association bases its position on Article VIII-D subsection 5, which states:

5. If a limited term employee position which meets the definition of bargaining unit work exists for forty-six (46) consecutive regular work days or more, the Board shall choose to proceed in one of the following ways:
  - a. The Board may hire the incumbent limited term employee, thereby converting the employee to a bargaining unit member. Said date of hire shall be considered the date of initial employment for all purposes under the collective bargaining agreement.
  - b. The Board may post the position pursuant to Article VIII (Seniority) D. (Vacancies) and proceed in accordance with that section, including the hiring for the position from outside the bargaining unit.

The Association asserts that when a vacancy occurred on May 7, 2007 with the resignation of Halverson, the two substitute drivers (Tranberg and Roth) became limited term employees. Thereafter, there were two vacancies when Schamow later resigned. In the Association's view, both these vacancies existed for more than forty-six consecutive regular work days and the District was then bound to follow one of the two options available in subsection 5. That would have provided them the opportunity to be hired directly or to apply and be hired from outside of the bargaining unit. The District took neither of these actions, in breach of subsection 5 when it subcontracted for the two positions.

The District denies that it had any vacancies that turned into limited term employee positions; that it did post a vacancy internally on July 9, 2007 in compliance with the agreement; that it did not have to post the position externally before subcontracting; that subsection 6 of Article VIII-D reflects its right not to have to hire an incumbent limited term employee if there were any and maintained its right to subcontract; and, that it subcontracted properly when it kept the then bargaining unit members and employees and only subcontracted for the two positions under its Article IV subsection 13 management right to "contract for goods and those services, which are not currently provided by present staff members on a regular basis." Subsection 6 states

6. Nothing herein shall be construed as obligating the Board to hire the incumbent limited term employee or to alter any of the existing obligations/rights of the Board if it chooses to proceed under Article VIII-D.

Among those rights is the Article IV 13 management right to subcontract.

Article VIII-D subsection 5 is a type of work preservation clause. As written it provides an opportunity for certain work to be preserved for bargaining unit members. It, along with subsection 6 which was added to the contract at the same time, does not guarantee that the

work will remain or become bargaining unit work. Under subsection 5 a, the incumbent limited term employee may be hired and converted into a bargaining unit member. The District is not obligated to take that option. Under subsection 5 b, the District may post the position as a vacancy, hire from the outside, or, as subsection 6 states, use its other rights if it proceeds under VIII-D (posting). Those other rights include subcontracting if the subcontracting provisions in Article IV subsection 13 are met. However, the District is not obligated to proceed under either Subsection 5 a or b unless there is a limited term employee position existing for the requisite period of time.

In order to maintain its Article VIII-D subsection 5 argument the Association must show that there was a limited term employee position, which meets the definition of bargaining unit work, that existed for forty-six consecutive work days or more.<sup>[2]</sup> The parties' agreement speaks in terms of several different types of employees. There are the regular full-time and regular part-time employees who are recognized as being in the bargaining unit. There are also, as stated in the recognition clause, both substitutes and limited term employees, neither of which are in the bargaining unit. The parties' agreement contains a definition of limited term employee in Article I Definitions

8. "Limited Term Employee" shall be defined as an employee who works less than forty-six (46) consecutive regular work days in a particular position.

Both Tranberg and Roth had driven bus as substitutes before the May 7<sup>th</sup> and September 28<sup>th</sup> vacancies occurred.<sup>[3]</sup> At neither of these two points, nor before or after, did the District create any new or different positions. These vacancies occurred in existing positions. The District, which maintains the right to organize and set the size of the workforce, did not make any new positions or take any action to convert these existing, though vacant, positions to a limited term position. There were no specific terms, goals, set of duties or responsibilities, or other circumstances identified to make a new, limited term position. The substitute drivers were not hired for any specific period of time. The substitute drivers were clearly working in positions that already existed. The Association's arguments admit as much in that the Association argues that it was only after the vacancies occurred that Article VIII-D subsection 5 applies. And, Tranberg had driven for more than forty-six consecutive regular work days on at least two occasions prior to the May 7<sup>th</sup> vacancy. Merely working that requisite period of time is not what triggers Article VIII-D subsection 5, according to the Association. It is the existence of a vacancy for that period of time during which the substitutes did or could have worked which is at the root of the Associations' point. Vacancies have their own provision in Article VIII-D subsection 1. Granted, subsection 1 is one of two options to be followed by the Board in proceeding under Article VIII-D subsection 5 b, in the case of a limited term employee working in at least forty-six consecutive regular work days. But, as pointed out by the District,

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[2] Here, the work being performed was bargaining unit type work because it was work performed by substitute drivers for bargaining unit members.

[3] The District initial brief at p. 14 acknowledges there were two vacancies .

there is nothing in the agreement which automatically converts a vacant position into a limited term position.<sup>[4]</sup> No language in the agreement supports the Association argument on this point. Had the District made a limited term position which then existed for forty-six regular work days or more, then it would be obligated to proceed under Article VIII-D subsection 5. No such position existed. Nor is there any cited rule of law or contract interpretation which supports the Association's position.

The parties have made several other arguments and counter arguments as to how Article VIII-D subsection 5 is to be applied, if at all. Because the undersigned has determined that there was no limited term employee position, there is nothing for the remainder of Subsection 5 to apply to and the Association cannot prevail. Because the positions were vacant, no current bargaining unit members were then currently providing the services in the vacant positions. The District then had a management right to subcontract the positions under Article IV subsection 13. Therefore, it is not necessary to resolve those other arguments.

There were not two limited term employee positions existing when the District subcontracted the vacant bus driver positions. The District was not bound to either hire an incumbent driver into the bargaining unit or post for the vacancies either inside or outside of the bargaining unit pursuant to Article VIII-D subsection 5. Accordingly, based upon the evidence and arguments in this case, I issue the following

**AWARD**

The grievance is denied and dismissed.

Dated at Madison, Wisconsin this 21<sup>st</sup> day of August, 2008,

Paul Gordon /s/

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Paul Gordon, Arbitrator

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[4] See, e.g. SHEBOYGAN COUNTY, CASE 336, NO. 60125, MA-11258 (JONES, AUGUST 2003).