

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**THE SUPERIOR FEDERATION OF TEACHERS,  
LOCAL 202, AFT-WISCONSIN. AFT, AFL-CIO**

and

**THE SCHOOL DISTRICT OF SUPERIOR**

Case 134  
No. 60637  
MA-14686

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**Appearances:**

**Timothy E. Hawks** and **B. Michelle Sumara**, Hawks Quindel, S.C., Attorneys at Law, 700 West Michigan Avenue, Suite 500, P. O. Box 442, Milwaukee, Wisconsin 53201-0442, for the labor organization.

**Kenneth A. Knudson** and **Johanna R. Kirk**, Knudson, Torvinen, Jones & Kirk, S.C., Attorneys at Law, 823 Belknap Street, Suite 222, Superior, Wisconsin 54880, for the municipal employer.

**ARBITRATION AWARD**

The Superior Federation of Teachers, Local 202, AFT-Wisconsin. AFT, AFL-CIO and the School District of Superior are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising there-under. The Federation made a request, in which the District concurred, for the Wisconsin Employment Relations Commission to provide a panel of five staff members and commissioners from which they could select an arbitrator to hear and decide a grievance over the interpretation and application of the terms of the agreement relating to early retirement benefits. The Commission did, and the parties selected Stuart D. Levitan to serve as the impartial arbitrator. Hearing in the matter was held in Superior, Wisconsin on August 18, 2010, with a stenographic transcript being provided to the parties by September 3. The parties submitted pre-hearing and post-hearing briefs, the last of which was received on October 12, 2010.

**ISSUE**

The Federation states the issue as: “Did the District violate Article IX, Section A, and Article I, Section A.2 of the parties’ collective bargaining agreement when it denied Kathy Mertzig’s request for early retirement with benefits? If so, what should be the remedy?”

The District states the issues as: “Does a long-term substitute (LTS) as defined by Art. I, Sec. A.2. of the contract acquire ‘years of teaching experience’ to satisfy the requirements of Art. IX? Are the District-provided retirement benefits outlined in Art. IX of the contract reserved only for ‘teachers’ (as defined by Art. I Sec. A.) who are under contract and acquiring seniority? Is the grievant entitled to the District’s \$100,000 retirement benefit when she has not completed fifteen years of consecutive contracted employment with the District, continues to be an employee of the District and fails to meet the condition of having filed for Wisconsin retirement benefits? Does substitute service for which an employee does not receive a contract, or meet the definition of ‘teacher’ under the contract, count towards district retirement requirements?”

While I believe the District’s formulation does raise several questions I must address in considering this grievance, I accept the Federation’s statement as a more standard expression of the issue.

## **RELEVANT CONTRACTUAL LANGUAGE**

### **2009-2010 COLLECTIVE BARGAINING AGREEMENT**

#### **ARTICLE I – RECOGNITION AND SCOPE**

##### **Section A – Recognition**

1. The Board of Education recognizes the Federation as the exclusive bargaining representative of all the teachers in the school district known and designated as School District of Superior. Teachers in this Agreement are defined as all regular full time and regular part-time certified classroom teachers, as well as all regular full time and regular part-time professional employees, whether certified, or not certified, by the Department of Public Instruction, who are employed as professionals working with students, including, but not limited to, full time Guidance Counselors, Special Teachers, Homebound Teachers, Speech Therapists, and School Psychologists, in the employ of the School District of Superior, excluding substitute teachers, administrative and supervisory personnel.
2. Any substitute teacher employed by the District in the same teaching position for forty-five (45) working days or longer will be covered by all provisions of the collective bargaining agreement with the exception of seniority for job security purposes; i.e. nonrenewal, discharge, layoff, transfer or promotion. Such teachers shall be called “long term substitutes” (LTS).

3. The above-described forty-five day “qualification” period of “long term substitutes” may be modified or waived entirely by the Board of Education depending on one or more of the following factors:
  - a. The certainty of the need for a LTS in the assignment.
  - b. Previous in-district experience of the substitute teacher.
  - c. Application materials and interview committee recommendation.
  - d. Written recommendations from previous supervisors.
  - e. Certification for the position.

In no case will a substitute teacher hired as a LTS be required to serve more than forty-five (45) working days at the regular substitute pay rate in a given school year. If the teacher is subsequently issued a teaching contract, the seniority date will be established through the offer of employment process.

### **ARTICLE III – DUES DEDUCTION AND SENIORITY**

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#### **Section B – Seniority**

1. Seniority shall be the length of continuous service of a teacher in the Superior School system. Continuous service shall be determined in reference to unbroken service to the district and with reference to the sections of this Agreement pertaining to Leaves of Absence.
2. A list shall be maintained by the administration showing the seniority of each member of the bargaining unit by school system. Such list shall be made available to the Federation on or about October 15<sup>th</sup> of each year. The administration shall provide this roster to the Federation.

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### **ARTICLE VIII – SALARY AND TEACHER WELFARE**

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#### **Section H – Physical Therapists and Occupational Therapists**

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2. All benefits granted to the teaching staff shall apply to P.T.s and O.T.s

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## **ARTICLE IX – RETIREMENT**

### **Section A – Retirement**

Teachers retiring before the start of the 2007-2008 school year will have the option of retiring at the benefit level that existed for those retiring during the 2005-2006 school year or the benefit level listed below.

**For teachers contracted under WI State Statute 118.22 prior to January 1, 2007, commencing with the start of the 2007-2008 school year, the retirement benefit is amended as follows: (emphasis in original)**

A teacher who has a minimum of fifteen (15) consecutive years (including approved leave) of teaching experience in the Superior system immediately preceding retirement may elect to retire upon eligibility under Wisconsin Retirement System Rules. Upon such retirement, the teacher will be eligible to receive the retirement benefit.

Teachers planning retirement prior to the start of the next school year shall notify the District on or before February 15. In other circumstances, teachers shall notify the District ninety (90) days prior to their contemplated retirement, contingent on Board approval, except when extenuating circumstances (i.e., health reasons) occur.

Teachers employed by the District prior to January 1, 2007 will upon retirement receive the District's contribution in lieu of health insurance premiums for retirees meeting the District's eligibility criteria, \$20,000 per year for 5 years. The District will deposit the funds in a HRA (Health Reimbursement Account). The first annual payment will be made no later than the last week in July following the school year the employee retires and no later than the last week in July of the subsequent four years. The intent of the deposit is that the money will be available upon retirement for eligible medical expenses and premiums, not limited to participation in the District's health insurance plan.

All teachers retiring under this Retirement Benefits Plan will receive for each unused sick day, accumulated up to 150 days, \$50 per day to be placed in the Health reimbursement Account in which they are fully vested.

If a retirement eligible employee dies prior to receiving the maximum District contribution, the surviving spouse is entitled to the benefit in which the teacher is vested.

**For teachers contracted under WI State Statute 118.22 on or after January 1, 2007, the retirement benefit is amended as follows: (emphasis in original)**

Teachers will have deposited on their behalf \$1300 annually into a HRA (Health Reimbursement Account). The intent of the deposit is that the money will be available upon retirement for eligible medical expenses and premiums, not limited to participation in the District's health insurance plan. The deposit will be made the last week in July following the successful completion of the preceding school year. Deposits will earn interest and carry over from year to year. The teacher will be vested and owner of funds when they become eligible for retirement under Wisconsin Retirement System Rules, and have a minimum of 15 consecutive years of service (including approved leave) immediately preceding retirement in the Superior School District.

All teachers retiring under this Retirement Benefits Plan will receive for each unused sick day, accumulated up to 150 days, \$50 per day to be placed in the Health Reimbursement Account in which they are fully vested.

*This provision will not be treated as a fringe benefit for purposes of QEO calculation.*

**Early Retirement agreement language (emphasis in original)**

Tentative agreement incorporated into the 2005-2007 Agreement commencing with the 2006-2007 school year.

## **2003-2005 COLLECTIVE BARGAINING AGREEMENT**

### **ARTICLE I – RECOGNITION AND SCOPE**

#### **Section A – Recognition**

1. The Board of Education recognizes the Federation as the exclusive bargaining representative of all the teachers in the school district known and designated as School District of Superior. Teachers in this Agreement are defined as all regular full time and regular part-time certified classroom teachers, as well as all regular full time and regular

part-time professional employees, whether certified, or not certified, by the Department of Public Instruction, who are employed as professionals working with students, including, but not limited to, full time Guidance Counselors, Special Teachers, Homebound Teachers, Speech Therapists, and School Psychologists, in the employ of the School District of Superior, excluding substitute teachers, administrative and supervisory personnel.

2. Any substitute teacher employed by the District in the same teaching position for forty-five (45) working days or longer will be covered by all provisions of the collective bargaining agreement with the exception of seniority for job security purposes; i.e. nonrenewal, discharge, layoff, transfer or promotion. Such teachers shall be called “long term substitutes” (LTS).
3. The above-described forty-five day “qualification” period of “long term substitutes” may be modified or waived entirely by the Board of Education depending on one or more of the following factors:
  - a. The certainty of the need for a LTS in the assignment.
  - b. Previous in-district experience of the substitute teacher.
  - c. Application materials and interview committee recommendation.
  - d. Written recommendations from previous supervisors.
  - e. Certification for the position.

In no case will a substitute teacher hired as a LTS be required to serve more than forty-five (45) working days at the regular substitute pay rate in a given school year. If the teacher is subsequently issued a teaching contract, the seniority date will be established through the offer of employment process.

## **ARTICLE IX – RETIREMENT AND EARLY RETIREMENT**

### **Section A – Early Retirement**

A teacher who has a minimum of fifteen (15) years of teaching experience in the Superior System may elect to retire upon eligibility under Wisconsin Retirement System Rules. Upon such an early retirement, the teacher will be eligible to receive the following benefits:

1. Upon early retirement, age fifty-five (55) until Medicare eligible, the teacher will be eligible for Board paid medical insurance, family or

single plan, based on the teacher's unused sick leave. One and one-fourth (1.25) sick leave days will be considered the equivalent of one month's family health insurance premium. Medical insurance premiums for family coverage will be paid by the Board at the exit rate as of June 1 of the school year following the teacher's retirement. Exit rate is defined as the family premium amount being paid by the Board as of June 1. (Clarification of exit date: When teachers retire from the District at the end of the school year or at times other than the end of the school year, this clause is interpreted to provide the retiring teacher with twelve (12) months, not including the month in which the teacher retires, of health insurance without co-pay of the premium by the retiree.) If the retiree's unused sick leave benefits have expired or expire prior to Medicare eligibility, the single health insurance premium for the retiree shall be paid by the Board until the retiree becomes eligible for Medicare. During a teacher's last year of employment with the district, the employee may draw upon an additional twelve (12) sick leave days without reducing his/her accumulated sick leave days. The additional days may not be exchanged for health insurance premiums.

2. Teachers planning early retirement prior to the start of the next school year shall notify the district on or before March 15. In other circumstances, teachers shall notify the district ninety (90) days prior to their contemplated retirement, contingent on Board approval, except when extenuating circumstances (i.e. health reasons) occur.
3. If the retiree dies prior to normal Medicare eligibility, the retiree's spouse will be entitled to district paid single health insurance coverage until Medicare coverage or until the retiree would have been eligible for Medicare coverage, whichever would occur first.
4. The stipend for 2003-2005 for all retiring teachers will be \$5,000 placed in a medical trust fund. The \$5,000 stipend will be contained in a side letter to sunset June 30, 2005. The early retirement benefit and stipend will require a Release and Retirement Agreement.

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### **RELEVANT STATUTORY LANGUAGE**

#### **118.22 Renewal of teacher contracts.**

(1) In this section:

(a) "Board" means a school board, technical college district board, board of control of a cooperative educational service agency or county children with disabilities education board, but does not include any board of school directors in a city of the 1<sup>st</sup> class.

(b) “Teacher” means any person who holds a teacher’s certificate or license issued by the state superintendent or a classification status under the technical college system board and whose legal employment requires such certificate, license or classification status, but does not include part-time teachers or teachers employed by any board of school directors in a city of the 1<sup>st</sup> class.

(2) On or before March 15 of the school year during which a teacher holds a contract, the board by which the teacher is employed or an employee at the discretion of the board shall give the teacher written notice of renewal or refusal to renew the teacher’s contract for the ensuing school year. If no such notice is given on or before March 15, the contract then in force shall continue for the ensuing school year. A teacher who receives a notice of renewal of contract for the ensuing school year, or a teacher who does not receive a notice of renewal or refusal to renew the teacher’s contract for the ensuing school year on or before March 15, shall accept or reject in writing such contract not later than the following April 15. No teacher may be employed or dismissed except by a majority vote of the full membership of the board. Nothing in this section prevents the modification or termination of a contract by mutual agreement of the teacher and the board. No such board may enter into a contract of employment with a teacher for any period of time as to which the teacher is then under a contract of employment with another board.

(3) At least 15 days prior to giving written notice of refusal to renew a teacher’s contract for the ensuing school year, the employing board shall inform the teacher by preliminary notice in writing that the board is considering nonrenewal of the teacher’s contract and that, if the teacher files a request therefor with the board within 5 days after receiving the preliminary notice, the teacher has the right to a private conference with the board prior to being given written notice of refusal to renew the teacher’s contract.

(4) A collective bargaining agreement may modify, waive or replace any of the provisions of this section as they apply to teachers in the collective bargaining unit, but neither the employer nor the bargaining agent for the employees is required to bargain such modification, waiver or replacement.

### **BACKGROUND**

Kathy Mertzig is a special education teacher with the Superior School District, in the kindergarten through fifth grade levels. This grievance concerns her request for early retirement at the end of the 2009-2010 school year, which the District denied on the grounds she would not meet the requirement for 15 consecutive years teaching experience.

Mertzig began her employment with the District in the early 1970s as a substitute teacher. In 1990, and again in 1994, she worked for the District as a driver’s education teacher. She worked the entire 1993-94, 1994-95 and 1995-96 school years under emergency



licenses as a long-term substitute teacher for children with severe cognitive disabilities. The District hired Mertzig as a full-time permanent teacher for the 1996-97 school year, and each school year thereafter.

The District does not keep complete records summarizing all long term substitutes over the years and the length of their appointments. Prior to Mertzig, no employee ever sought retirement benefits under the collective bargaining agreement based on service as a long term substitute.

Long term substitutes receive sick leave at a pro-rated level, based on the number of days they work that school year; because their employment with the District is considered to end upon conclusion of their assignment, long term substitutes do not accumulate and carry over sick leave, as permanent teachers do, although some District superintendents prior to 2010 allowed some long term substitutes to carry over sick leave.

As part of the hiring process at the time, district officials told long term substitute applicants that the position was limited term, with no benefits beyond the termination of their appointment, and no seniority date.

On June 7, 1994, then-Assistant Superintendent Gerald Peck wrote Mertzig as follows:

Dear Kathy:

The 1993-1994 school year is quickly coming to a close as is your employment with the school district as a long term substitute CD/S teacher at Cooper Elementary. I want to thank you for your service to the students and the district. The work that you have done is greatly appreciated.

I hope that your experience with the School District of Superior has been personally rewarding.

On August 24, 1994, Peck wrote Mertzig as follows:<sup>1</sup>

Dear Kathy:

Congratulations on your being recommended for a long term substitute special education teacher position and your subsequent acceptance pending Board of

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<sup>1</sup> The letter was incorrectly dated August 24, 1995, and was offered at hearing as the letter of appointment for the 1995-96 school year. Subsequent to the hearing, I asked the parties to provide the actual appointment letter for the 1995-96 school year, or stipulate that it was identical to the letter dated August 24, 1995, but for the dates, assignment and salary. The Federation agreed to so stipulate. The District replied that it was “unable to locate any letter discussing other terms or conditions of her employment and, therefore, cannot stipulate that such a letter ever existed, much less, stipulate to the contents of such a letter.” I reject the District’s surprising claim that no such letter of appointment ever existed, because I do not believe that the District would employ a long term substitute without the requisite letter of appointment reflecting formal action taken by the administration and School Board. I hold the District’s failure to properly maintain public records of employment against it, and accept the Federation’s stipulation that the letter of appointment for the 1995-96 school year was identical to the letter incorrectly dated August 24, 1995, but for the dates, salary and assignment.

Education approval. A recommendation for employment will be made to the Board of Education at their September 14 meeting.

As I said to you, the position you are being recommended for is a C.D.-S. position at Cooper. Based upon your successful experience as a long term substitute teacher last spring the forty five days at substitute teacher pay will be waived and Bachelor salary schedule, Step 1, will be recommended. Please contact Monica Tikkanen regarding enrollment in insurance and other benefits available to you. You may contact Monica at XXX-XXXX.

Physical examinations and other medical requirements are currently on file. It is important that you meet with me the week of August 29 to complete an application for the emergency teaching license.

Enclosed is a packet of information sent to all instructional staff with information about the opening of the 1994-1995 school year. If you have any questions, please contact my office.

On June 6, 1995, Peck wrote Mertzig as follows:

Dear Kathy:

The 1994-1995 school year is quickly coming to a close as is your employment with the school district as a long term substitute CD/S teacher at Cooper Elementary. I want to thank you for your service to the students and the district. The work that you have done is greatly appreciated.

I hope that your experience with the School District of Superior has been personally rewarding.

On September 11, 1995, the District Board of Education unanimously approved Mertzig's appointment as a long term substitute in Special Education/CDA, assigned to Bryant School, effective August 28, 1995. On the basis of her prior experience, the district placed Mertzig at the BA 2 step of the salary schedule, without requiring her to first work 45 days at the base substitute teacher rate.

On May 21, 1996, Peck sent Mertzig the following letter:

As a follow up to our conference, a teaching position for 1996-1997 was offered and accepted pending Board of Education approval on June 10, 1996. You will be assigned as a special education teacher/E.D. at Bryant Elementary School. A formal contract will be mailed to you after Board action in June. I will provide you additional information (i.e. calendar, new teacher inservice, etc.) when your contract is sent.

Congratulations to you as a new member of an excellent professional staff in the School District of Superior.

The standard contract which the Board approved and which Mertzig signed on June 20 provided in part:

IT IS FURTHER AGREED that this contract is made and shall remain subject to the provisions of State Statutes 118.21, 118.22, 118.235 and 118.25 and other applicable provisions of Title XIV of the Wisconsin Statutes, as revised and to the provisions of the Agreement, Board Policy and the Administrative Policy manual of the School Board now existing.

The contract placed Mertzig at MA/03 on the schedule, with a starting salary of \$32,445. Although the contract stated that it was "Effective August 22, 1996," the District established May 16, 1996 as Mertzig's seniority date.<sup>2</sup>

In 2006, the District gave Mertzig a certificate thanking her for ten years of teaching experience. Pursuant to the collective bargaining agreement, the District has each year provided the Federation with a list of seniority dates; neither Mertzig nor the Federation formally challenged the District's documentation that Mertzig had a seniority date of 1996. The Federation was aware by 2007 that the District did not consider long term substitutes operating under a letter of appointment to have formal contracts or seniority dates as permanent, full-time teachers did, and that the District had refused the Federation's request that it issue formal contracts.

At some point in the early winter of 2008, Mertzig's husband contacted the District's Director of Human Resources, Monica Tikkanen, to ask if Mertzig could count her time as a long term substitute towards the service she needed to qualify for retirement benefits. Tikkanen told him she could not, because service credit began with a seniority date, which she did not acquire as a long term substitute.

On October 21, 2009, Mertzig wrote Superintendent Janna Stevens as follows:

Dear Janna

Please consider this letter my notification to the District of my intent to retire from my teaching position at the end of this school year, as provided in Article IX, Section A of the working agreement between the Board of Education and the Superior Federation of Teachers.

If you should have any questions, please contact me.

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<sup>2</sup> Mertzig testified she received her Master's degree on May 16, 1996. It is unknown whether that is why the District designated that as her seniority date.

On October 27, 2009, Stevens wrote Mertzig as follows:

Dear Kathy:

I have received your retirement request dated October 21, 2009. According to the seniority records, your seniority date is May 16, 1996. A resignation request would be recommended to the Board of Education by Administration but your retirement request can not be approved until June of 2011.

If you would like to discuss this matter feel free to contact me at XXX-XXXX.

On December 18, 2009, Federation staff representative Patricia Gunsucker wrote Acting Superintendent Monica Tikkanen to inform her that the Federation was filing a grievance at the Step 2 and Step 3 levels. On January 28, 2010, Superintendent Stevens wrote Mertzig as follows:

Dear Ms. Mertzig:

On January 20, 2010, we met as Step 3 in the grievance procedure in the teaching contract outlines. The purpose of our meeting was to share the administration's interpretation of the provision in the agreement regarding retirement.

Your grievance received on December 29, 2009 stated the following:

'Ms. Mertzig has 15 years of teaching experience in the Superior School System. The retirement benefits require "... a minimum of 15 years of teaching experience in the Superior System ...."

At the meeting on January 20, 2010, I stated to you and your representation (sic) the following:

- The actual contract language states: 'a teacher who has a minimum of 15 **consecutive** years (including approval leave) of teaching experience in the Superior system immediately preceding retirement may elect to retire ...'
- Ms. Mertzig **will not** have 15 consecutive years at the end of the 2009-2010 school year; she will have 15 consecutive years at the end of the 2010-2011 school year.

- Ms. Mertzig was hired in August of 1995 as a long term substitute for the 1995-1996 school year as noted in the Board minutes from September 1995.
- Ms. Mertzig worked as a long term substitute for the 1995-1996 school year; at the end of this school year her employment was terminated.
- Ms. Mertzig applied for a teaching position for the 1996-1997 school year. She was offered and accepted the position. The Board approved the position with the start date of August 1996.
- Ms. Mertzig has a break in service to the district from June 1995-August 1995; she was not an employee of the Superior District during that time frame.
- The language in the contract states ‘consecutive years of service’; Ms. Mertzig has a clear break from the district as outlined in Board Minutes.
- Long Term substitutes have no rights to seniority for job security purposes.

I provided documents during our meeting on January 20, 2010 to substantiate all the information outlined in the bulleted statements above. The statements above outline the reasoning for administration’s denial of Ms. Mertzig’s request to retire at the conclusion of the 2009-2010 school year.

Sincerely,

Janna Stevens

As of January 1, 2010, Mertzig had accumulated 15.89 years of creditable service for the Wisconsin Retirement System. As of June, 2010, she had accumulated 16.25 years of creditable WRS service.

On February 9, 2010, the Board of Education agreed to waive Step 4 and move directly to Step 6 of the grievance process. The Federation thereafter made a timely appeal to the Wisconsin Employment Relations Commission for arbitration, in which the District concurred.

On March 12, 2010, and March 15, respectively, Mertzig and the District executed a standard 2010-2011 Teacher Employment Contract, under which Mertzig was placed at MA + 00/13, and paid \$61,787.<sup>3</sup> But for format and salary placement, that contract was identical in relevant detail to the one the parties executed in 1996.

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<sup>3</sup> The salary schedule ended at 13 years tenure.

### POSITIONS OF THE PARTIES

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

The unambiguous language of the recognition clause entitles Mertzig and other long-term substitutes to all benefits provided by the labor agreement, except for seniority for job security purposes. This language is unequivocal, and entitles Mertzig to post-retirement benefits under Article IX. The only benefits denied to long term subs by the Recognition Clause are expressed and relate to seniority and job security.

Having satisfied the two contractual criteria, namely a minimum of 15 consecutive years of teaching and eligibility for WRS benefits, Mertzig is entitled to Article IX post-retirement benefits. These two criteria are the only ones the parties agreed to; they did not negotiate any other conditions on the entitlement and the evidence is unrebutted that they certainly never negotiated an exclusion which would deny long term substitutes entitlement to the post-retirement health benefits. Again, the contract language is unequivocal.

The District's claim that years worked as a long term substitute don't count towards the requisite 15 years of teaching experience because long term substitutes don't have a contract, or that "consecutive years of service" must be measured from a teacher's seniority date, thereby discounting Mertzig's first three years of teaching in which she did not accrue seniority, are specious. If the District's idiosyncratic position is upheld, the language of the recognition clause will be rendered meaningless, which would be an incongruous result which would not reflect the parties' intent or the Federation's understanding of the plain language of the agreement.

The changes to Article IX after 2007 merely clarify a newly negotiated two-tier retirement benefit structure and the parties did not intend that it would add an additional condition related to seniority on the post-retirement health benefit. The District's assertion that the new language was crafted to distinguish long term substitutes from other teachers and thereby exclude their service years from the calculation for the post-retirement health benefit is based on an unreasonable interpretation of the contract language and the parties' negotiations history. As former Federation negotiator William Kalin testified unequivocally, the parties' only intention in negotiating the new language was to give teachers a choice which benefit structure to apply, not to change the criteria for qualifying for the benefit.

Mertzig's seniority is not determinative of her entitlement to the post-retirement benefit. There is no factual support for the District's idiosyncratic interpretation that her seniority date is the starting date for her consecutive years of service. There is no basis for the District's assertion that long term substitutes do not receive contracts and are thereby excluded by the boldface language in Article IX. Long term substitute appointments are approved by the school board and the District issues a letter of appointment, by which both parties are bound. Despite the fact that Mertzig did not accrue seniority during her years of service as a long term substitutes, Article IX makes no reference to seniority. The operative reference is to "years (including approved leave) of teaching experience," which is a significant and meaningful difference from a reference to a contractually defined seniority date. Long term substitutes are clearly covered by the Recognition Clause, so the District's contention that Mertzig's service as a long term substitute is not "teaching experience" is belied.

Mertzig's employment history is unique; there has never been another long term substitute who had similar years of experience and claimed entitlement to Article IX benefits. And for teachers retiring prior to 2007, service as a long term substitute would have been irrelevant because retirement health benefits required an accumulation of sick leave days, which was not available for long term substitutes. Also, most long term substitutes do not go on to become full-time teachers.

Mertzig is entitled to Article IX post-retirement health benefits despite the District's specious assertions that her three years as a long term substitute don't count because of summer breaks, that she must have first applied for Wisconsin Retirement System benefits, and that she should be bound by a contract to teach for the 2010-2011 school year. The parties' intent was that a "year" is the 187-day school year. The District's incredulous (sic) assertion that a teacher is a teacher for 365 days a year is a specious claim that has no application to the parties' labor agreement. There is also no support for the District's incongruous claim that Mertzig is ineligible because she must have first applied for WRS benefits; there is no support for such a claim, and there is no dispute that Mertzig was eligible for WRS benefits, thus satisfying this criterion. It is also incongruous for the District to deny post-retirement health benefits to long term substitutes, while they are extended to physical and occupational therapists under language similar to that of the Recognition Clause. And the District can't have it both ways – it cannot deny Mertzig the benefits on the grounds that, under its erroneous interpretation of the contract, she did not satisfy the length of service requirement, yet disallow her grievance on the grounds that she continued to teach.

The language of the Recognition Clause unambiguously directs that long term substitutes are entitled to the post-retirement health benefits. Having met the two stated criteria, Mertzig should be found eligible for the Article IX benefits. The arbitrator should so find and order that the District stop violating the contract and grant Mertzig's request to retire with early retirement benefits at the close of the 2009-2010 school year and allow her to retire immediately.

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

Long term substitutes do not receive contracts from the District, and are not considered "teachers" as defined by the collective bargaining agreement. Only teachers with a minimum of 15 years consecutive service are eligible for the District's retirement benefit. These benefits have always been awarded based on seniority dates, and long term substitutes do not have seniority dates. Mertzig signed her first contract in 1996, giving her 14 years service and making her ineligible for the retirement benefit until the end of the 2010-2011 school year. Mertzig is also ineligible because she has neither applied for nor retired with the WRS, and has entered into a contract for the 2010-2011 year.

The union's argument that because the retirement benefit is not specifically listed in the excluded rights, that benefit is available, was defeated by the facts established at hearing. Eligibility for this benefit has always been based on seniority, which long term substitutes do not receive. Even the union negotiator agreed the language limits eligibility to "contracted" teachers who acquire seniority. Long term substitutes are not contracted, and do not acquire seniority. Prior to the 2007-2009 agreement, retirement health benefits were based upon accrued sick days, which were only acquired by contracted teachers with a seniority date. The new contract language was intended to change the substance of the benefit, not the eligibility criteria. The District never agreed to provide the benefit based on time as a long term substitute. When Mertzig and other union members asked about this, the District stated its position very clearly, and the Union did not grieve. Now the Union is attempting to gain by arbitration what it failed to gain during negotiations.

Finding for the Union would require the arbitrator to violate many established principles, including adding a new benefit, defining eligibility, and nullifying provisions of the agreement. It would also require the arbitrator to impose an unreasonable and unfair interpretation of the agreement to the detriment of the District.



The collective bargaining agreement expressly excludes “substitute teachers” from being defined as a “teacher.” A substitute only becomes a “long term substitute” after 45 days of teaching. Mertzig was a long term substitute for only a portion of the 1995-1996 school year. Giving her credit for a full year would give her a benefit for time she was still a regular, not long term, substitute.

Mertzig also failed to meet the other eligibility requirements, including applying for retirement under the WRS. Also, her contract obligates her to teach through the end of this school year. The issue of her long term substitute service has no practical significance, so this grievance is moot.

The parties have a past practice of only counting years as a contracted employee towards District-provided retirement benefits. Mertzig is not eligible for those benefits because she has not met the 15-year requirement and has not retired with the WRS. The grievance requests the arbitrator to violate well-settled rules of contract interpretation. The entire matter is moot because Mertzig has contracted to complete another year with the District. The grievance must be denied.

In reply, the Federation posits further as follows:

The District’s crabbed interpretation of the Recognition Clause, assuming that every long term substitute year begins with 45 days of substitute service, belies the terms of Article I, Section 4(4). Further, the documentary evidence clearly supports a conclusion that Mertzig’s service as a long term substitute was for three consecutive full school years, translating to three consecutive years of teaching experience as required by Article IX. The District’s assertion that it has an established past practice, which the Federation has acceded to, excluding consecutive years of service as a long term substitute is a red herring unsupported by the evidence.

The District also errs in contending this grievance should have been filed when Mertzig first inquired about her eligibility for benefits. The grievance was properly filed after her claim ripened on the District’s refusal to grant the post-retirement benefit. The District never raised this specious claim during the grievance process and it should not be given any credence at this late date.

In reply, the District posits further as follows:

Although there have been similarly situated employees, neither the union nor any employee has asked the District to count service as a long term substitute towards eligibility for retirement. Mertzig’s grievance is moot because she

signed a binding contract for 2010-2011, making her ineligible for retirement after the 2090-2010 year. A finding for the union would result in an absurdity, leaving unanswered exactly what days the District should count towards the eligibility standard. The collective bargaining agreement definition of “teacher” excludes substitutes, and the retirement benefit is only available to employees with “teaching” experience. The grievance must be denied.

### DISCUSSION

This grievance determines whether any or all of the three full school years that Kathy Mertzig worked as a long term substitute, 1993-1996, counted towards the fifteen years of teaching experience she needed to receive the early retirement benefit from the Superior school system.

To receive that benefit under the collective bargaining agreement, a teacher must have a minimum of fifteen consecutive years of qualifying teaching experience in the Superior school system and be eligible under Wisconsin Retirement System rules. Thus, for Mertzig to have been eligible for the retirement benefits she sought at the end of the 2009-2010 school year, she would have needed to start her streak of qualifying teaching experience no later than the start of the 1995-1996 school year.

The Federation asserts that in denying Mertziz the benefit the District violated two provisions of the collective bargaining agreement, Article I, Section A(2), and Article IX, Section A. I consider the clauses in that order.

Article I, Section A-2 provides that long term substitutes “will be covered by all provisions of the collective bargaining agreement with the exception of seniority for job security purposes; i.e. nonrenewal, discharge, layoff, transfer or promotion.” Article IX, Section A details the early retirement benefit. Other than these retirement benefits, the Federation does not allege any other refusal by the District to extend the provisions of the agreement.<sup>4</sup>

I agree with the Federation there is nothing in the enumerated list of exceptions in I-A(2) that applies to retirement. The listed exclusions all relate to employment status; early retirement is a benefit. Article I, Section A(2) requires that long term substitutes “be covered” by all provisions of the collective bargaining agreement relating to retirement benefits. That is, if there are provisions of the collective bargaining agreement relating to retirement benefits, they must cover long term substitutes as well. There are such provisions in this collective bargaining agreement, so “all” of the ones relating to retirement benefits must cover long term substitutes.

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<sup>4</sup> The record establishes the District provided greater pay than that required for long term substitutes under Article I, Section A-2. and 3., by waving the 45-day delay and moving Mertzig on the salary schedule immediately.

But being “covered” by the same provisions as permanent teachers doesn’t necessarily mean long term substitutes are given the same *coverage*; if detailed in the collective bargaining agreement, those provisions can give different coverage to different classifications of teachers.<sup>5</sup> The early retirement terms in the 2009-2010 agreement, IX-A, are several years more recent, and far more specific, than the terms of I-A(2). Thus, they are given double weight, and any limitation or exclusion expressed in IX-A takes precedence over the equal provisions clause of I-A(2).

The question is therefore whether IX-A limits Mertzig’s application of her service as a long term substitute towards the tenure required for the early retirement benefit.

The District is wrong about several aspects of this case. It is wrong in contending that a teacher must *apply* for retirement under the Wisconsin Retirement System in order to receive the contractual benefit; the collective bargaining agreement clearly only requires that the teacher *be eligible* under WRS rules. Mertzig satisfied this criterion for qualification.

The District is wrong in contending that this matter is moot, either as a practical or legal matter; the fact that Mertzig signed a contract to teach during the 2010-2011 school year would in no way prevent me from finding that the District violated the collective bargaining agreement by denying her request for retirement benefits prior to her signing that contract, and ordering appropriate remedy.

The District is also wrong in making the blanket assertion that long term substitutes are not “teachers” as defined by the collective bargaining agreement. While “substitute teachers” are explicitly excluded by the recognition clause, that same article also declares that substitute teachers employed by the District in the same teaching position for forty-five working days or longer “will be covered by all provisions of the collective bargaining agreement with the exception of seniority for job security purposes,” namely “nonrenewal, discharge, layoff, transfer or promotion.” The District contends that long term substitutes are not “teachers” under the agreement; yet Article I, Section A(2) concludes, “(s)uch teachers shall be called ‘long term substitutes.’” Because the contract is right, the District is wrong.

But the District is correct that the full three years Mertzig worked as a long term substitute did not give her sufficient consecutive year’s experience to make her eligible for early retirement benefits at the close of the 2009-2010 school year.

Article IX, Section A provides:

**For teachers contracted under WI State Statute 118.22 prior to January 1, 2007, commencing with the start of the 2007-2008 school year, the retirement benefit is amended as follows: (emphasis in original).**

. . .

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<sup>5</sup> Subject, of course, to statutes and case law barring invidious discrimination.

After describing the benefit for these teachers, the agreement then provides as follows:

**For teachers contracted under WI State Statute 118.22 on or after January 1, 2007, the retirement benefit is amended as follows:** (emphasis in original)

...

The agreement then notes the benefit for those employees.

This language thus establishes the early retirement benefits for just two classes of teachers: those contracted under sec. 118.22, Stats., prior to January 1, 2007, and those so contracted after that date. No other teacher is eligible for early retirement benefits. Thus, the definition for “teacher” in the context of Article IX, is explicitly expressed in terms of sec. 118.22, Stats.; to be eligible for the early retirement benefits, a teacher must be contracted under sec. 118.22. Teachers who are not contracted under sec. 118.22 are not within the terms of IX-A.

The Federation maintains that the letters of appointment the District extended to Mertzig from 1993-1994 through 1995-96 were tantamount to a contract because they bound both parties. But whether or not the letters (both in the record and presumed) satisfied the *legal* standard for a binding contract (i.e, a meeting of the minds between competent parties to make/accept an offer to implement a legal purpose) is not the issue; the issue is whether the letters made Mertzig a teacher “contracted under WI State Statute 118.22 ....” The Federation contends that the letters of appointment constituted such a contract. I find that they did not.

The first indication the Federation is wrong comes with comparison of the 1993 and 1994 letters of appointment and the 1996 contract. The first two documents do not reference sec. 118.22; the latter document explicitly incorporates the statute. On its face, the 1996 contract is a contract under sec. 118.22; on its face, the standard letter of appointment is not.

I also take arbitral notice of the text of sec. 118.22, Wis. Stats., particularly subsection (2), which provides for the automatic renewal of a teacher’s contract for the ensuing school year if a District fails to give written notice of nonrenewal by March 1, and subsection (3), which requires a District considering nonrenewal of a teacher’s contract to provide a preliminary notice and offer the teacher a private conference with the school board prior to the written notice of refusal to renew. Clearly, these two critical aspects of 118.22 are not included in the District’s letter of appointment as a long term substitute, meaning that a long term substitute is not a teacher “contracted under WI State Statute 118.22 ...”

This conclusion corresponds to the explicit exclusion of the long-term substitutes from the contractual provisions for non-renewal and layoff. Thus, while the District errs by being overly expansive in its assertion that long term substitutes “are not considered ‘teachers’ as

defined by the collective bargaining agreement,” it correctly asserts that long term substitutes are not considered “teachers” *under Article IX*, because they are not “contracted under WI State Statute 118.22....” The two references in Article IX, Section A to Sec. 118.22 is firm evidence that the parties intended to exclude long-term substitutes from the retirement benefit, and firm evidence that years worked only under a letter of appointment are not qualifying years for that benefit.

I also find the bargaining history of the parties to be extremely strong, even dispositive, evidence against the Federation’s position.

Under the collective bargaining agreement of 2003-2005, early retirement health benefits were based on the teacher’s accumulated unused sick leave, with one month’s health insurance being provided for each 1.25 days of unused sick leave.<sup>6</sup> It is undisputed that long term substitutes did not have a right to accumulate and carry over unused sick leave days (although some superintendents had allowed some long term substitutes to do so on an ad hoc basis). The parties thus designed an early retirement program which they knew to exclude long term substitutes, effectively making them not eligible for the benefit.

With only non-long term substitutes – that is, teachers under sec. 118.22 -- effectively eligible for the benefit, there was thus no need to refer to sec. 118.22 in that section of the 2003-2005 agreement.<sup>7</sup>

Due to concerns and litigation over possible age discrimination in the way the early retirement benefit was structured, and concerns over unknown liabilities, the parties amended the agreement to set teacher eligibility for a defined benefit based explicitly on an absolute and unique qualification – a set length of service as a teacher contracted under sec. 118.22, plus a supplemental benefit calculated on unused sick leave.<sup>8</sup> Those contracted under sec. 118.22 before January 2007 now get \$20,000 annually for five years; teachers contracted after that date now get \$1,300 annually deposited into their HRA. Both groups get \$50 for each day of unused sick leave, up to 150 days, also to be deposited into their HRA.

The Federation would have had a stronger case had the parties *not* added the reference to sec. 118.22. That is because, with the primary benefit no longer based on accumulated sick leave, it could have been seen to now apply to those teachers who did not accumulate sick

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<sup>6</sup> There were also several references to Medicare eligibility, not relevant to the instant dispute.

<sup>7</sup> That agreement also provided that “(a) teacher who has a minimum of fifteen (15) years of teaching experience in the Superior System may elect to retire upon eligibility under Wisconsin Retirement System Rules.” I do not find the differences in this text from that of the amended IX-A to be material in this dispute.

<sup>8</sup> The new language was incorporated in the 2005-2007 agreement, effective with the 2006-2007 school year, and continued in the 2007-2009 and 2009-2010 agreements

leave, namely long term substitutes. But the parties *did* add that reference, strong evidence they were knowingly continuing the existing exclusion of long term substitutes. As the Federation itself stated, the parties did not intend by this new language to change the eligibility criteria, but only to change the benefit. The logic is therefore unassailable -- since long term substitutes were effectively not eligible for the benefit under the prior terms, and the new terms changed only the benefit but did not change the eligibility criteria, long term substitutes who were previously not eligible for the benefit remain so. I do not see how the Federation can argue otherwise.

The Federation's reliance on the agreement's treatment of physical therapists and occupational therapists is also misplaced. Those employees receive the retirement benefit because the parties, at VII-H-2 of the collective bargaining agreement, separately mandated that "(a)ll benefits granted to the teaching staff apply to the P.T.s and O.T.s." The fact that the physical and occupational therapists do not receive contracts under 118.22 does not disqualify them from this benefit; the sec. 118.22 requirement only applies to teachers, as the language itself establishes. There is nothing in the record about the tenure and other employment provisions applicable to physical and occupational therapists; however, there is nothing inherently incongruous about the parties mutually agreeing to provide a benefit to these employees, while not agreeing to extend the same benefit to long term substitutes.

The limited and finite nature of the long term substitutes' employment is further substantiated by the letters the District sent Mertzig following the 1993-94 and 1994-95 school years -- service the Federation counts in asserting Mertzig had 17 years teaching experience. Peck's letters on June 7, 1994 and June 6, 1995 explicitly linked the school year and Mertzig's employment as two things "quickly coming to a close." The District is correct there was an absolute break in Mertzig's employment as a teacher. The Federation is thus wrong to include these two years in Mertzig's claimed total of 17.

A like letter from June 1996 would dispose of this dispute; however, the district did not offer such corresponding correspondence. Its failure to do so might have been a further reflection of lax record-keeping, litigation strategy, or a meaningful change in policy or practice. Or perhaps the District *knowingly* did not issue such a letter in June, 1996 because Mertzig's employment was not "quickly coming to a close," but was now under the sec. 118.22 contract which the District offered in May, 1996.

There is no evidence for any of these explanations. There is evidence, however that by June 1996, there was an employment relationship between Mertzig and the District which had not existed the prior two years.

There were several signposts marking this meaningful and permanent change in Mertzig's employment status, including Peck's confirmation letter of May 21, Board approval on June 10, Mertzig's signing the contract on June 20, and the start of school around Labor Day. For reasons not apparent in the record, the District set Mertzig's seniority date as May 16.

The District has maintained throughout that the seniority date is the critical element in establishing eligibility for the early retirement benefit, because it establishes a teacher is under a sec. 118.22 contract. In setting Martzig's seniority during the time she was still a long term substitute, the District may have thus created some analytical confusion.

Article IX, Section A limits the early retirement benefit to "teachers contracted under WI State Statute 118.22." As a long term substitute, Mertzig was a teacher covered by all the terms of IX-A. Her seniority date of May 16 means that is the day she is deemed to have become "contracted under" sec. 118.22, even though her *teaching activities* on that date were still pursuant to her letter of appointment, not a sec. 118.22 contract.

Thus, by the District's own argument, May 16, 1996 must be the date Mertzig began accruing years of qualifying teaching experience under IX-A, even though she would not begin performing her contracted teaching duties until the end of August.<sup>9</sup>

There is nothing in the collective bargaining agreement which prevents the early retirement clock from starting mid-year. Article IX, Section A refers to "fifteen (15) consecutive years," not "fifteen (15) consecutive *school* years." Mertzig will therefore attain her fifteen consecutive years of qualifying teaching experience and become eligible for early retirement benefits under IX-A at the end of the school day on May 16, 2011.

But although Mertzig becomes eligible for early retirement on May 16, 2011, that will not be her last day of work. Because she was not eligible for early retirement at the end of the 2009-2010 year, Mertzig had to sign a new sec. 118.22 contract to retain employment with the District for 2010-2011. This individual contract, which she and the District executed in March 2010, is both more recent and more specific than the collective bargaining agreement's retirement benefit, and thus takes precedence. It is also her individual contract's incorporation of sec. 118.22 that allows Mertzig to continue accruing qualifying teaching experience at all. That individual contract obligates Mertzig to teach the full school year, and so she shall.<sup>10</sup>

Because Mertzig does not become eligible for the early retirement benefit under Article IX, Section A until the end of the school day on May 16, 2011, the District did not violate the collective bargaining agreement when it denied her request to retire with benefits at

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<sup>9</sup> Of course, this seniority date cannot cause retroactive credit for the 1995-1996 school year; accrual was purely prospective.

<sup>10</sup> I am confident that Mertzig and her representatives understand her professional responsibility, and that she would not leave her last class of students with just a few weeks to go even if allowed to. The above paragraph is to explain why she is not allowed to do so.

the close of the 2009-2010 school year. Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

**AWARD**

That the grievance is denied.

Dated at Madison, Wisconsin, this 29<sup>th</sup> day of December, 2010.

Stuart D. Levitan /s/

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Stuart D. Levitan, Arbitrator