BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
NEOSHO JOINT SCHOOL DISTRICT #3	
and	Case 15 No. 47090 MA-7173
NEOSHO TEACHERS EDUCATION ASSOCIATION	

Appearances:
Mr. Robert W. Butler, Esq., Wisconsin Association of School Boards, on behalf
Mr. John Weigelt, Executive Director, Cedar Lake Educators, on behalf of the As

ARBITRATION AWARD

According to the terms of the 1989-91 collective bargaining agreement between Neosho Joint School District #3 (hereafter District) and the Neosho Teachers Education Association (hereafter Association), the parties waived the procedure described in Article XXVI D. Para. 3. a, and they requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as impartial arbitrator of a dispute between them regarding the employment of Mrs. Susan Kizaric as a non-bargaining unit (long-term substitute) teacher for the 1991-92 school year. The undersigned was designated arbitrator and made full written disclosures to which no objections were raised. Hearing was scheduled for May 7, 1992 at Neosho, Wisconsin, but on that day, rather than go on the record, the parties agreed to attempt to negotiate a settlement of this case. On May 7th, the parties reached a tentative settlement, subject to ultimate client approval. The parties later advised that the settlement had not been approved and hearing was rescheduled for July 20, 1992 at Neosho, Wisconsin. No stenographic transcript was taken of the proceedings. The parties filed their written briefs by September 21, 1992 which were exchanged thereafter by the undersigned. The Union reserved its right to file a reply brief. Therefore, the parties agreed to postmark their reply briefs to the undersigned by 10 days after their receipt of initial briefs. Having received no reply briefs from either party by October 5, 1992, the record was closed as of that date.

ISSUES:

The parties stipulated that the following issues are to be determined in this case:

1) Is the grievance arbitrable?

2) If the grievance is arbitrable, was it timely filed?

3) If the grievance is arbitrable and if it was timely filed, did the District violate the recognition clause of the collective bargaining agreement by employing Ms. Kizaric as a non-bargaining unit teacher?

4) If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS:

ARTICLE III: RECOGNITION

A. The Board of Education acting for said District recognizes the Association as the official representative for the following unit of employees, contracted by the Board.

Unit Description: All non-supervisory teaching personnel (full-time and part-time) employed by Neosho State Graded School District No. 3. This does not include substitute teachers. . . .

ARTICLE X: CHILD CARE LEAVE

A. The district shall grant a child care leave without pay to any teacher, regardless of marital status, who requests such a leave for the purpose of providing parental care to his or her natural born or adopted child. Teachers shall notify the district in writing that they desire a child care leave at least four (4) weeks prior to commencing the leave.

Child care leaves may be granted for the remainder of the semester in which the leave commences or for that period plus an additional semester. The following conditions shall apply to child rearing leaves.

1. No fringe benefits would be available for the extent of the leave unless the employee wishes to pay for these benefits.

2. Shorter leaves and/or early return from leave shall be only upon mutual agreement of the employee and the Board.

3. One child care leave shall be given for each individual child. Additional child care leave(s) may be granted, upon request, at the discretion of the Board.

4. No experience credit for the year would be granted when the employee is on leave for more than half of the normal school term.

5. The application for child care leave shall certify that the primary purpose for the leave is to be child care. The Board may deny or discontinue a leave based on evidence that the leave is being continued primarily for purposes other than child care.

B. Maternity: Any pregnant teacher shall be required to discontinue her services on the date that her doctor certifies that she is no longer capable of working. The teacher shall be allowed to use sick leave for those days of disability occasioned by the pregnancy. The teacher shall be eligible to return to duty when she is physically able provided:

1. The teacher has previously indicated her intent to return to duty following the medical disability.

2. The teacher provides her physician's certification that she is able to return to work.

A pregnant teacher may commence unpaid child care leave prior to the onset of disability occasioned by child birth, or the teacher may continue teaching until the onset of disability.

Teachers who work until the onset of disability may then take child care leave pursuant to the provisions of this Article.

C. Child care leave may be extended by mutual agreement between the teacher and the District.

D. Upon return from child care leave a teacher shall be assigned to the same type of teaching position with the same percentage of work as when the teacher began the leave. The continuing contract shall remain in effect, and the teacher shall retain all seniority, salary benefit status, and other advantages which have accrued prior to taking the leave.

BACKGROUND:

The District employs approximately twenty-two teachers (18 FTE's). According to District records, the District has hired several long-term substitutes for bargaining unit teachers who have been on various leaves of absence. District records indicated the following:

Name of Teacher	Date Started	Date Employment Ended	Benefits
S. Kizaric	8-22-91	6-4-92	None
J. Bertz	1-23-91	5-31-91	None
L. Witt	1-31-90	2-12-90	None
B. Pflum	8-25-80	6-3-82	?
L. Hageman	12-7-83	2-5-84	None
L. Hageman	2-6-84	6-6-84	Full

Regarding the employment of J. Bertz, District Administrator Janice Duff stated that according to District records, Bertz was hired to substitute for a teacher who became too ill to teach; and that Bertz taught more than one semester because the teacher Bertz was substituting for died during the school year. Witt was hired to substitute for a teacher on disability who later returned to work. Pflum was hired as a substitute Art Teacher on August 25, 1980. Duff stated that no District records could be found to show that Pflum received benefits in 1980-81. However, Pflum was given a full-time bargaining unit position with a stated annual salary and subject to the labor agreement and all benefits for the 1981-82 school year, according to District records. Hageman was originally hired and employed as a "Long-term substitute" Math teacher on December 7, 1983. Hageman's contract stated that she would be paid "$34.21 per half-days (11:30 a.m. - 3:30 p.m.)" and listed no benefits for her. Hageman had been hired to substitute for a current District teacher, Mr. Richter, who had been promoted to acting District administrator. When, in February, 1984, the Board of Education promoted Richter permanently to the District Administrator position, Richter's teaching position then opened up. The Board then offered Hageman that opening (Richter's former teaching position) and Hageman signed a contract for the position on February 6, 1984, for the period from February 6 through June 6, 1984. This contract listed an annual salary for Hageman and indicated that Hageman was entitled to full benefits and coverage under the Association's labor agreement. District records also showed that Hageman's benefits (health and dental insurance) were effective on February 6, 1984.

FACTS:

First grade Teacher Jill Blaedow sent a letter dated May 31, 1991 to District Administrator Janice Duff, requesting child care/maternity leave for the entire 1991-92 school year. By letter dated June 12, 1991, Ms. Duff notified Blaedow that her child care/maternity leave request had been granted by the Board of Education for the 1991-92 school year. The Board had never before granted such a leave for an entire school year. The letter referred to provisions of Article X A Para. 1 regarding fringe benefits. It also stated: "If you plan to return, you must indicate your intent to return to duty." In May, 1991, Duff posted a notice of this opening, for a long-term substitute for First Grade in the Association's lounge on the Union bulletin board. 1/

By letter dated July 3, 1991, Administrator Duff also advised Association President Lois Milliken that certain teaching vacancies existed. Among these was the following:

> First Grade self-contained one year long-term substitute. Requires appropriate certification with

1/ Part-time District teacher Diane R. Miller, wrote a letter to the Board, dated June 10, 1991 in which she indicated an interest "in the resent (sic) opening . . ." for the full-time First Grade position.

"IBM Writing to Read" skill preferred.

Duff sent this letter to Milliken's home address.

Thereafter, having heard no objections from the Association, the District sought to hire a substitute for Ms. Blaedow to teach first grade for the 1991-92 school year. Among other actions, the District placed an ad in the "Watertown Daily Times" for an unknown period of time in July, 1991 which stated, inter alia:

> TEACHERS: . . . First grade, 1 year long-term substitute, IBM writing to read skill preferred. Send letter of application, resume, credentials with references. . . . 2/

Ms. Duff accepted and reviewed the applicants' submissions, pursuant to this ad, and she then interviewed all candidates. During the interview process, Duff made it clear to all applicants that the opening in First Grade was for up to one year only, as a long-term substitute for a District teacher who might return before the end of the 1991-92 school year. Duff made it clear that the position was per diem, without benefits and not subject to the collective bargaining agreement. Duff stated she never told any candidate anything that would lead them to believe that the successful applicant in the position would be employed for longer than one year.

Ultimately, the District hired Mrs. Susan Kizaric (the person on whose behalf the Association filed the grievance) to fill the "long-term substitute" opening in First Grade. Kizaric signed a contract for the position of "1st Grade Long Term Substitute" on or about August 14, 1991. This contract was for the period "August 22, 1991 and ending June 5, 1992." It listed Kizaric's rate of pay as "$118.07 per day." The contract listed no benefits of any kind for Kizaric.

It is undisputed that as a long-term substitute, Kizaric performed all of the duties that bargaining unit teachers performed and she was subject to the same rules and policies as regular full and part-time teachers.

Apparently, the Association became aware of the fact that Kizaric was not receiving labor contract benefits sometime during the first semester of the 1991-92 school year. 3/ On December 4, 1991, the Association requested

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2/ At the same time, the District advertised for a regular full-time Physical Education Teacher K-8, as follows:

Physical Education (Health/Human Growth and Development) K-8.

On August 14, 1991, Sharon Stuckey signed a contract with the District to fill this position. That contract was unlike Kizaric's contract because it listed an annual salary for Stuckey and stated that Stuckey would be covered by the Association's labor agreement and that she would receive full benefits under the labor agreement.

3/ In a letter to Ms. Duff dated December 19, 1991, Kizaric disavowed any interest in the grievance and stated:

> At the beginning of the school year, I was approached several times by union representatives in regard to this matter. I informed them that I had signed my long-term substitute contract with the full understanding that I

information regarding Kizaric's benefit package. Duff responded by a letter dated December 6, 1991 that the District did not regard Kizaric as a regular bargaining unit member.

On December 17, 1991, at the end of the first semester of the 1991-92 school year, the Association filed a grievance alleging that the District had violated the labor agreement.

> ". . . through the employment of Ms. Sue Kizaric as a regular classroom teacher without providing to her all benefits, rights, privileges, and responsibilities of the collective bargaining agreement. . . ."

Throughout the processing of the grievance, the District took the position that Kizaric was hired as a long-term substitute teacher, not a part of the bargaining unit or covered by the labor agreement.

On March 30, 1992, Jill Blaedow indicated that she would not accept the Board's Notice of Contract Renewal (issued on March 11th) and that she would not return to work at the District for the 1992-93 school year. As a result, the District posted on the Association bulletin board and ran the following ad in the newspaper beginning on or about May 17, 1992:

> would not be receiving benefits and that I did not want to become involved in any way in this matter.

1992 - 1993 TEACHING VACANCIES
Neosho Jt. 3 School District
201 Center Street, P.O. Box 17
Neosho, WI 53059

Positions: First Grade self-contained (Gr. 1 License required) (IBM Writing To Read and Whole Language training and experience preferred)

. . .

POSITIONS OF THE PARTIES:

Association:

The Association urged that the District does not have a consistent policy, practice or definition of the term "substitute teacher". In addition, the Association noted that as a substitute teacher, Kizaric worked the same calendar days and hours of work and that she functioned under the same policies and job description as all regular bargaining unit teachers.

The Association asserted that the evidence proffered by the District to show a practice regarding the use of substitute teachers, actually supported the Association's case. In this regard, the Association pointed out, both Pflum and Hageman were clearly employed by the District as salaried, regular teachers entitled to benefits and the protection of the labor agreement. Regarding Pflum, the Association claimed that she had been hired to replace regular teacher Jeannette Cassidy who had been granted a one year maternity leave of absence. With regard to Hageman, the Association asserted that due to the Association's objection to Hageman's being hired as a substitute, the District issued Hageman a new regular teaching contract for the school year in question. The Association urged that the Bertz and Witt cases were factually distinct from the instant case because both Bertz and Witt were hired after the second semester of the school year had begun.

The Association contended that despite the language of the Recognition clause which excludes "substitute teachers" from coverage, the District has treated substitutes the same as unit teachers. In addition, the Association cited two cases 4/ for the proposition that Ms. Kizaric should be treated as a member of the bargaining unit. The Association asserted that Kizaric's performance of unit work for a substantial (one year) period as well as facts demonstrating that she shared a community of interest with unit teachers, required a conclusion that the District should have employed Kizaric as a "replacement teacher, provided full salary and fringe benefits, and terminated her employment pursuant to the individual contract with the consent of the Association."

On the District's timeliness issue, the Association noted that the grievance was timely filed after the Association's December 6 receipt of relevant information on Kizaric's status. In addition, the District failed to raise any timeliness objections prior to the instant hearing. Finally, the Association asserted that the grievance involves a continuing violation -- that the District violated the contract on every day Kizaric worked and/or received

4/ The Association cited, without any volume, reporter or page references, Lebanon School District (which is found at 83 LA 817 (Raffaele, 1984) and "Holley (N.Y. Central School District, (Thomas N. Rinaldo, 1985)." I could find no evidence that the latter case has been published.

a paycheck for an amount less than she was entitled under the contract.

Thus, the Union urged that the grievance is timely and that it is otherwise arbitrable. As a remedy for the violation it believes it proved, the Association sought all salary and benefits that Kizaric would have received as a regular teacher including "placing her within all the protections of the collective bargaining agreement including the layoff clause," this remedy to date back to the initial filing of the grievance.

District:

The District urged that because the collective bargaining agreement specifically excludes substitutes, the grievance is not arbitrable on the merits, and the undersigned lacks jurisdiction to find that any violation of the labor agreement has occurred herein. The District observed that the contract is silent regarding whether a substitute teacher may be deemed accreted into the bargaining unit. Thus, evidence of past practice is relevant on this point. The District contended that its consistent practice has been to treat substitutes as non-bargaining unit employes. It also cited the School District of Monona Grove case 5/ for the proposition that a grievance like the instant one must be denied and dismissed for lack of jurisdiction where substitute teachers were not covered by the labor contract.

In addition, the District asserted that the ordinary meaning of a "substitute" is one who takes the place of another. The District urged that Kizaric took Blaedow's place for the period of the latter's maternity/child care leave so that Blaedow could return to her former position, had she chosen to do so, at the end of her leave.

The District asserted that its clear and consistent past practice has been to treat substitutes as non-unit employes: no substitute has received contract benefits while substituting. The District also noted that the labor agreement excludes from coverage, all substitutes without distinction. The District observed that the Union submitted no bargaining proposals or grievances to demonstrate that a different interpretation of the contract would be appropriate. Similarly, the Union failed to prove that it lacked knowledge of this long-standing practice to which it should now be bound, in the District's view. The District urged that the facts demonstrated that the Association has sat on its rights and has therefore waived its right to object regarding the District's treatment of substitutes.

The District further argued that the grievance was untimely filed, having been filed 117 days after Mrs. Kizaric's first day of employment at the District. Furthermore, the District contended that a ruling on the merits in favor of the Association would give the Association benefits it has been unable to gain at the bargaining table. Even if the undersigned were to rule in favor of the Union, the District asserted that no remedy should be granted on equitable grounds. Therefore, the District sought the denial and dismissal of the grievance in its entirety.

DISCUSSION:

The initial question before me is whether this case is substantively arbitrable. On this point, the District has asserted that the labor agreement as well as long-established past practice (which is consistent with the labor agreement), force a conclusion that Ms. Kizaric, as a long-term substitute

5/ Case 31, No. 32444, MA-3092 (Honeyman, 1/85).

teacher, is not covered by or extended the benefits of the labor agreement. I agree.

The record evidence demonstrated that the District hired Ms. Kizaric as a substitute and consistently treated her as such. The fact that Ms. Kizaric worked the same number of hours and under the same general day-to-day conditions as regular unit teachers does not require a finding that Ms. Kizaric should be treated as a regular unit teacher. 6/ In this regard, I note that the postings and newspaper ads as well as Ms. Duff's statements during the interview process and Kizaric's written, executed contract clearly show that the 1st grade opening was a substitute teacher opening, not a regular unit opening.

In addition, several provisions of the labor agreement support the conclusion above. At Article III, the contract specifically excludes all "substitute teachers" from its coverage. Article X further provides "leave without pay" to any teacher for "the purpose of providing paternal care" or for maternity leave, using accrued sick leave, until such time as the teacher "shall be eligible to return to duty." Article X, D. specifies:

> Upon return from child care leave a teacher shall be assigned to the same type of teaching position with the same percentage of work as when the teacher began the leave. . . . (emphasis supplied)

The above-quoted language makes clear that the District must place the teacher returning from child care leave in the same type of position they had before their leave. It is reasonable that the District would hire a substitute teacher to fill in for the regular unit teacher on child care leave, given this requirement. In addition, there may be some uncertainty as to exactly when the teacher on child care leave will return, or whether they will return at all, due to provisions allowing for extensions and for early returns by mutual agreement and for the teacher to notify the District of their intent to return, subject to physician's approval. However, it is clear that Article X requires the District to either reserve the job of the teacher on child care leave in a vacant state while the teacher is on such a leave or temporarily fill the job with a substitute to allow for the return of the regular teacher, or permanently fill the job and offer the returning teacher a different job upon his/her return. I note that the labor agreement is silent on which approach

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6/ The Lebanon School District case, cited by the Union is factually distinguishable from the instant case. The Pennsylvania State Labor Board's practices and procedures specifically provided for regular substitutes to be included in units covering regular full-time and part-time teachers. The facts of the case showed that the employer had previously hired the grievant as a "substitute" for substantial periods of time (at times 89 days or more) each year of a four year period immediately preceding the time period involved in the grievance. The contract there covered "all eligible professional employees" and it did not specifically exclude substitutes from coverage in any relevant area, as does the instant contract. In this context, the Arbitrator analyzed the evidence and found that the grievant had an expectation of continued employment; that she shared a community of interest with regular bargaining unit teachers based on the virtually identical work performed in the same surroundings and under the same conditions as regular unit teachers; and that the grievant had been hired for one semester, a substantial part of the school year. Thus, the peculiar facts of the Lebanon case demonstrate that it is inapposite here.

the District should use in finding a proper job for the teacher who returns from Child Care Leave. Thus, the District was free to determine which of the above courses of action to take.

Notably, the District submitted evidence of its past practice of hiring long-term substitutes in child care and other teacher leave situations which also tended to buttress the District's case. In this regard, the evidence showed that there were six long-term substitutes used by the District between 1984 and 1992; that two of the long-term substitutes (both Pflum and Hageman) were offered regular contracts and that they were offered regular full-time teaching positions for the school year after they had been employed as long-term substitutes. The evidence also showed that the period of time that these substitutes were employed as such was from two weeks (Witt) up to one year (Plum and Kizaric). While substitutes, none of these employes received benefits, none was subject to the labor agreement and all of them were paid on a per diem basis.

The fact that Pflum and Hageman were offered regular full-time bargaining unit teacher contracts after they had worked under separate contract as long-term substitutes does not support the Union's claims. Rather, these facts demonstrate the District's distinctly different treatment of long-term substitutes and the District's commitment (by the use of substitutes) to holding jobs open for teachers who may return from leaves of absence. Both the Board of Education minutes and the District's employment records for Hageman tended to support a conclusion that until Richter took his administrative position on February 6, 1984 Hageman was treated as a long-term substitute (as her contract clearly stated). Only after Richter was promoted out of the bargaining unit was Hageman offered a regular teaching contract for Richter's former (unit) position.

In all the circumstances of this case, I conclude that Ms. Kizaric was hired and retained as a substitute teacher (albeit for one school year); that Kizaric was expected to substitute for Ms. Blaedow while she was on a one year approved child care leave; 7/ that Kizaric is not covered by the labor agreement; and that the Union therefore lacked authority to file a grievance regarding Kizaric's pay and benefits. 8/ As there is no need to determine or

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7/ The fact that Ms. Blaedow ultimately notified the District that she would not be returning to her position following her year-long child care leave, does not require a conclusion that Kizaric must therefore be retained in the 1st grade position as a regular unit teacher.

8/ In regard to the Monona Grove School District case cited by the District, I note that there Arbitrator Honeyman observed that the recognition clause, (and its amendment) and the WERC certification (along with the

decide issues 2), 3) and 4), I therefore issue the following

AWARD

The grievance is not substantively arbitrable. It is therefore denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 10th day of December, 1992.

By _____
Sharon A. Gallagher, Arbitrator

Commission's routine exclusion of substitute teachers from unit determination) and the past practice of the parties, clearly demonstrated that substitute teachers were not covered by the labor agreement. In the circumstances, therefore, the Arbitrator dismissed the case, holding that he lacked jurisdiction of the subject matter of the grievance, which the Union grievant lacked the authority to file.