In the Matter of Arbitration Between	:	
	:	
Wyalusing Area Education Association	:	
(Hereinafter "Association")	:	Appointment
	:	
AND	:	
	:	
Wyalusing Area School District	:	
(Hereinafter "District")	:	

OPINION AND AWARD

Hearing: December 8, 2015

Appearances:

For the Association:
William Hebe, Esquire

For the District:
David Conn, Esquire

Before:
Thomas M. Krapsho
Impartial Arbitrator

The parties selected the undersigned Arbitrator to hear and decide the instant dispute. At issue in this case is the appointment of Ms. as a short term substitute teacher.

A hearing was held on December 8, 2015, at the District Administrative Office. Both parties were afforded the opportunity to present testimony, examine and cross-examine witnesses, and introduce documentary evidence in support of their respective positions. Briefs were submitted. The matter is now ready for disposition.

BACKGROUND

The Association and the District were parties to a collective bargaining agreement which expired on June 30, 2013. (Joint Exhibit #1). The parties have not reached a successor collective bargaining agreement and have been in a "status quo" situation. As such, the agreement which expired on June 30, 2013, is the basis for review of the grievance at issue herein.

On June 14, 2010, the District adopted Policy Number 405 entitled "Employment of Substitute Professional Employees." (Joint Exhibit #6). This policy was then revised on January 9, 2012. Policy Number 405 provides that short term substitutes are those who are employed to work "...20-89 consecutive days of employment for the same teacher" and are paid at a rate periodically set by the School Board. Long term substitutes are those who are employed to work "...90 or more consecutive days of employment for the same teacher" and would "receive a prorated portion of first step of the collective bargaining agreement." (Joint Exhibit #6, p. 2).

At its meeting on April 8, 2013, the School Board approved the request of Mr. for a sabbatical leave of absence for the second semester of the 2013-14 school year. (Joint Exhibit #3). Thereafter, the District advertised the position as a short term substitute teacher:

> ...who will teach 6th grade reading, writing, and science. Tentative Dates; January 21, 2014 until June 2, 2014 (may be extended if school days are missed due to inclement weather)...The pay for this position is $86/day for Days 1-19 and $99/day thereafter. The position will not exceed 89 consecutive days. (Joint Exhibit #9).

On October 15, 2013, the Superintendent's Secretary sent an email to all professional staff entitled "Notice of Vacancy-Elementary 6th Grade." (Joint Exhibit #9).

At the November 11, 2013 School Board meeting, the School Board approved a motion:

> ...to employ as a Short-term substitute for Mr. during the second semester of the 2013-2014 school year. Ms. will be paid according to district Policy 405...(Joint Exhibit #5).

Ms. worked a total of 86 days beginning January 31, 2014, and June 12, 2014. During this period, Ms. was responsible for all tasks which would have been required of Mr.

On December 16, 2013, the Association President filed a grievance asserting that the District failed to consider the grievant as a long term substitute teacher and pay her according to the collective bargaining agreement. The grievance listed Ms. name as the grievant but Ms. did not sign the grievance (Joint Exhibit #2) nor was she present at the arbitration hearing.

ISSUES

1. Is the grievance arbitrable?

2. Was the District contractually required to appoint Ms. as a long term substitute teacher to fill a sabbatical leave of absence and to provide salary and fringe benefits in accordance with the collective bargaining agreement for the period of her employment from January 31, 2014, through June 12, 2014?

CONTRACT PROVISIONS:

Witnesseth, Paragraph 1, Recognition:

The Wyalusing Area Board of School Directors (Employer) recognizes the Wyalusing Area Education Association/PSEA (Association) as the exclusive representative for all full-time and regular part-time employees in the bargaining unit certified by the Pennsylvania Labor Relations Board, PERA-R-141-C and dated January 6, 1971, for the purpose of collective bargaining on all matters with respect to wages, hours and other terms and conditions of employment.

Witnesseth, Paragraph 4, Wages and Salary Provisions:

The parties agree that wages and salaries to be affected by this Agreement are accurately reflected in Appendix A, made part of this Agreement, and that the schedule of wages as set forth in Appendix A shall be the schedule which will remain in force for the period of this Agreement.

Witnesseth, Paragraph 5, Other Employee Benefits:

The parties agree that other employee benefits to be provided under this Agreement are accurately reflected in Appendix B attached to and made part of this Agreement.

Appendix A, Salary Provisions, Appendix B, Fringe Benefits:

These provisions contain references to only "Professional Employees and Temporary Employees."

Appendix E, Definitions:

PROFESSIONAL EMPLOYEE shall include all those who are certified as teachers, dental hygienists, visiting teachers, home and school visitors, school counselors and school nurses who are under regular contracts of employment with the Wyalusing Area School District.

TEMPORARY PROFESSIONAL EMPLOYEE shall include all those who are certified as teachers, dental hygienists, visiting teachers, home and school visitors, school counselors and school nurses who are under regular contracts of employment with the Wyalusing Area School District.

ASSOCIATION POSITION:

It is the position of the Association that Ms. [redacted] was, during the term of her employment, a member of the bargaining unit entitled to the wage and salary provisions as well as the employee benefits as set forth in the collective bargaining agreement. (Association Brief, pp. 1 and 2). During her eighty six (86) days of employment, Ms. [redacted] was responsible for all of the duties performed by Mr. [redacted] including grading, reporting time, ending time, lesson planning, etc. As such, Ms. [redacted] was a professional employee covered by the certification order issued by the Pennsylvania Labor Relations Board.

The Association relies primarily on the February 3, 1982, decision of the Commonwealth Court of Pennsylvania in *School District of the Township of Millcreek v. Millcreek Education Association,* 440 A.2d 673 (Cmwlth. Ct. 1982) in which the Court affirmed a decision by the Pennsylvania Labor Relations Board to include long term substitutes in a bargaining unit with full time permanent employees.

The Association notes that in *Millcreek,* the Pennsylvania Labor Relations Board was dealing with teachers who were employed as long-term substitute teachers to fill positions of teachers who were on leave of absence extending beyond eighty nine (89) days. As such, the emphasis is not on the number of days worked by the substitute teacher but, rather, on the length of the leave of absence being taken by the regular classroom teacher. If that leave, as granted, is to extend beyond eighty nine (89) days, then the person hired to fill that position must be considered a member of the bargaining unit. In addition, the Court noted that the determination as to whether or not a particular teacher is to be included within the bargaining unit must be based on the actual functions of the job rather than the School Code. In the case at issue herein, Ms. [redacted] did Mr. [redacted] 's job in all material respects and was entitled to receive wages and benefits in accordance with the collective bargaining agreement. (Association Brief, pp. 3, 4, and 5).

The Association also stated that the sole reason why Ms. was employed for eighty six (86) days rather than the full semester was to save money.

DISTRICT POSITION:

The District argues initially that the issue is not grievable. The Association's assertion that Ms. should have been hired as a long term substitute teacher does not automatically make her a member of the bargaining unit.

With respect to the Association's reliance on the Commonwealth Court's decision in *Millcreek, the* District argues that the test to determine whether a long term substitute teacher shared a sufficient community of interest with the bargaining unit to warrant inclusion within that unit requires the long term substitute to demonstrate an expectation of continued employment. In the case at issue herein, the Association failed to introduce any evidence of long term employment by Ms. prior to the spring of 2014 and the record is undisputed that Ms. had no expectation of continued employment after the spring of 2014. In fact, Ms. was not employed by the District after the spring of 2014.

> Thus, even accepting the Association's argument that Ms. should have been hired as a long term substitute, she still would fail the *Millcreek* test for establishing any right to claim membership in the bargaining unit. As such, she has no right to partake in the grievance process. (District Brief, p. 2).

The District further argues that the collective bargaining agreement defines a grievance as "...an alleged claim by any Professional Employee or Temporary Professional Employee ..." Joint Exhibit #1, Appendix D). Since Ms. was neither a Professional Employee or a Temporary Professional Employee, she has no right to grieve. (District Brief, pp. 2 and 3). Also of significance is the December 13, 2013, email from Ms. to the Superintendent in which Ms. stated, "I am emailing you to confirm that I have no part in any grievance about the pay rate for the short term position I will be starting in January for ." (Joint Exhibit #10).

With respect to the merits of the grievance, the District asserts that there is no language either in the collective bargaining agreement or School Board policy which imposes any restrictions on the District's authority to fill a vacancy created by a sabbatical leave of absence. Board Policy 405 sets out the entirety of the limits regarding hiring part time employees. In support of its position, the District cites the decision of Arbitrator Skonier that in the absence of any contractual language, a School Board Policy will control. *Benton Area Education Association v. Benton Area School District* (Skonier, Sept. 21, 2012). (District Brief, p. 3).

Furthermore, the Pennsylvania School Code does not impose any restrictions on the District's authority to address the filling of a vacancy created by a sabbatical leave.

The District also noted that while the first two steps of the grievance included an assertion that the District violated past practice, the Association never presented any evidence regarding any past practice.

DISCUSSION:

Is the grievance arbitrable?

The question of Ms. / , status as a member of the bargaining unit is not the key issue in determining if the grievance is arbitrable.

In this case, the grievance was filed by the Association on behalf of Ms. alleging that the "...District failed to properly consider the grievant a long-term substitute, place her on the proper step of the salary matrix, and provide her the other benefits outlined in the collective bargaining agreement." (Joint Exhibit #2). In essence, the Association is arguing that under the terms of the collective bargaining agreement, Ms. should have been hired as a member of the bargaining unit. When the District rejected the Association's claim, it filed the grievance at issue in order to enforce what it believed to be a contractual right.

While the District is correct in its assertion that the Association is not mentioned in the "Definition" section of the Grievance Procedure, the District fails to take into account the negotiated role of the Association in the Grievance Procedure as described in Levels One, Two and Three. In addition, Level Four provides that if the aggrieved person and/or the Association representative is not satisfied with the decision at the Level Three and the Association representative determines that the grievance is meritorious and that appealing it is in the best interests of the school system, the Association may appeal the grievance to arbitration. Only the Association may appeal a grievance to arbitration and such appeal does not require the signature or concurrence of an aggrieved employee. (Emphasis Added).

As such, the language of the collective bargaining agreement recognizes the right of the Association to enforce its agreement with the District.

In some cases, the interests of the aggrieved person and the Association may not coincide but that does not detract from the Association's right to enforce what it believes to be contractual requirements. Therefore, the Association had the contractual right to file the grievance at issue herein even if Ms. was content with her hiring as a short term substitute.

Based on the above, the grievance is arbitrable.

Merits

The Association's argument that Ms. was, during the term of her employment, a member of the bargaining unit and entitled to the wage and benefit provisions of the collective bargaining agreement is based primarily on the Commonwealth Court's decision in *Millcreek*.

In February 1971, the Pennsylvania Labor Relations Board certified the Millcreek Education Association as the exclusive representative for a bargaining unit consisting of teachers, traveling teachers, guidance counselors, librarians, traveling librarian, guidance counselors, dental hygienist, speech therapists, and nurses. Thereafter, the Millcreek Education Association and the Millcreek School District negotiated several collective bargaining agreements without changing the description of the bargaining unit. At the time of certification, the Millcreek School District employed long term substitute teachers to fill positions of teachers who were on leaves of absence extending beyond eighty nine (89) days. When a dispute arose in 1976 concerning the inclusion of the long term substitute teachers in the bargaining unit, the Millcreek Education Association filed a unit clarification petition arguing that long term substitutes shared a community of interest with the other full-time permanent employees sufficient to justify their inclusion in the same bargaining unit.

In the case at issue herein, the Association never filed a unit clarification petition regarding substitute teachers even though the unit was certified in January of 1971 and the Commonwealth Court's decision in *Millcreek* was issued on February 3, 1982. It is clear that the Association was aware of the District's use and compensation of short term and long term substitute teachers as well as their exclusion from the bargaining unit from at least the date of the adoption of Policy 405 (June 14, 2010). There is no evidence of record that prior to June 14, 2010, to suggest that the District treated short term and long term substitutes in a manner which differed from Policy 405.

The facts in *Millcreek* differ from those at issue in this case. As noted by the Association, in *Millcreek,* the Pennsylvania Labor Relations Board was dealing with teachers who were employed as long term substitute teachers to fill positions created when regular teachers who were on leaves of absence extending beyond ninety (90) days. Both parties agreed that the substitute teachers were, in fact, hired as long term substitute teachers. The issue was whether or not the long term substitute teachers who worked more than ninety (90) days should be members of the bargaining unit entitled to all the rights and privileges thereof. However, in the case at issue herein, Ms. was hired as a short term substitute teacher and worked only eighty six (86) days during the fall 2014 term. In addition, the Court did not address the issue that the District was required to hire Ms. as a long term substitute teacher for the entire term.

In this case, the Association offers a creative interpretation of *Millcreek* and argues that the emphasis is not on the number of days worked by the substitute teacher but rather on the length of the leave of absence being taken by the regular classroom teacher. If that leave extends beyond eighty nine (89) days, then the person hired to fill that position must be

considered a member of the bargaining unit. (Association Brief, p. 4). However, the Association offered no case law in support of its position. In addition, there is no language in the Commonwealth Court's decision which addresses the position asserted by the Association.

The Association's argument does not take into account one other aspect of the Commonwealth Court's decision in *Millcreek.* In addition to being hired for a substantial period of time, the substitute teacher must demonstrate an expectancy of continued employment. Specifically, the Court stated:

> The PLRB first examines whether the employee has been hired for a substantial period of time during the semester in issue; it then considers whether the employee has either a history of employment for a substantial period in the previous semester or the possibility of employment for a substantial period in the next semester. (440 A.2d at 675).

Applying the test noted above to the facts at issue herein, Ms. had no expectancy of continued employment sufficient to warrant her inclusion in the bargaining unit. Ms. was not employed by the District in the semester prior to January 2014 nor was she hired by the District to work in the following semester. In fact, the only time Ms. was an employee of the District was between January 31, 2014, through June 12, 2014; a period of eighty six (86) days. Assuming for the sake of argument that the Association's position regarding the emphasis being placed on the length of the approved leave of absence is correct, Ms. did not meet the "expectancy of continued employment" test utilized by the Pennsylvania Labor Relations Board and confirmed by the Commonwealth Court.

The next issue is whether the collective bargaining agreement places any restrictions on the District's ability as to how best to fill positions vacated by regular teachers who may be on a leave of absence.

The collective bargaining agreement at issue contains no language imposing any requirements on the District regarding the filling of positions created when regular teachers are on short term or extended leaves of absences. Neither party introduced any evidence of prior negotiations requiring the District to employ only long term substitutes to replace regular teachers on a leave of absence in excess of ninety (90) days.

District Policy 405 (Joint Exhibit #6) defines short term and long term substitute teachers. While Policy 405 was adopted on June 14, 2010, and amended on January 9, 2012, there is no evidence of record regarding any attempt by the Association to challenge Policy 405 or to assert that the District is contractually required to employ, as a member of the bargaining unit, only a long term substitute to replace a regular teacher on leave of absence in excess of ninety days. The record in this case confirms the following:

1. There is no contract language which limits the District's ability to determine how best to fill a vacancy created when a regular teacher is on an approved leave of absence.

2. Prior to the filing of the grievance at issue herein, the Association made no attempt to challenge, either by grievance or unit clarification, the District's position that short term and long term substitute teachers were not members of the bargaining unit.

3. Although District Policy 405 was first adopted on June 14, 2010, the Association made no attempt to challenge this policy.

As such, the Arbitrator concludes that District Policy 405 is controlling with respect to determining how a vacancy created when a regular teacher is on a leave of absence will be filled.

The Association introduced two court decisions to support its argument that:

> To deny her [Ms. ,] compensation and benefits in accordance with the collective bargaining agreement would be to breach the covenant of good faith and fair dealing which is implied in every contractual obligation entered into in the Commonwealth of Pennsylvania. (Association Brief, p. 5).

While the Association believes that Ms. was not treated fairly when she was hired as a short term substitute teacher, the fact remains that the collective bargaining agreement limits the Arbitrator's authority to determining if there was a "...violation or misinterpretation of this Agreement." (Joint Exhibit 1, Appendix D, Grievance Procedure, Definition). The Arbitrator must be guided by this contractual provision. To do otherwise would require the Arbitrator to impose his own definition of fairness and to add a contractual requirement which does not now exist.

The Association also asserted that the "...District's violations include, but are not limited to, every article of the collective bargaining agreement, PERA, and the Pennsylvania School Code of 1949 (as amended). More specifically, the existing past practice and policy..." (Joint Exhibit #2). The Association did not present any evidence regarding an alleged violation of the Public Employee Relations Act. In addition, the Association did not present any evidence to support its claim that a past practice existed or the nature and the application of such past practice. With respect to the alleged violation of the Pennsylvania School Code, there is no reference to any case law or statutory language which imposes any restrictions on the District's ability to determine how a vacancy created when a regular teacher is on a leave of absence will be filled. As such, these arguments must fail.

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	:	
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	:	Appointment
AND	:	
	:	
Wyalusing Area School District	:	
	:	

AWARD

Based on the record as a whole and for the reasons discussed, the grievance is denied.

Thomas M. Krapsho

Thomas M. Krapsho, Arbitrator
February 11, 2016