AMERICAN ARBITRATION ASSOCIATION
LABOR ARBITRATION FORUM

In the Matter of:

___ ASSOCIATION,	)	
	)	**Grievance: Post Vacancy Position**
Association,	)	
	)	**AAA Case No ___**
and	)	
	)	**Gr No ___**
___ DISTRICT,	)	
	)	**Arbitrator Lee Hornberger**
Employer.	)	

DECISION AND AWARD

1. APPEARANCES

For the District:

___

For the Association:

___

2. INTRODUCTION

This arbitration arises pursuant to a Collective Bargaining Agreement (CBA) between the ___ Association (Association) and the ___ District (District). The CBA had a term of August 28, 2004, to August 27, 2007.

On January 13, 2011, the Association filed a grievance alleging that the District violated the CBA regarding the posting for positions of teachers who went on a leave of absence. The Association contends that the grievance is arbitrable and should be granted. The District contends that grievance is not arbitrable and should be denied.

Pursuant to the procedures of the American Arbitration Association, I was selected by the

parties to hear the matter and render a final and binding arbitration award. A pre-hearing case management conference was held on May 3, 2011. At the pre-hearing case management conference, the parties agreed that the arbitrability issue would be submitted to and ruled upon by me prior to a hearing on the substantive merits of the post vacancy position grievance. The dispute was deemed submitted on May 31, 2011, the date the parties' submissions concerning the arbitrability issue were received by me from the American Arbitration Association.

The parties stipulated that the arbitrability issue was properly before me.

3. FACTS

The District is a public school system. The District employs over 300 professional teaching personnel. The teaching personnel are represented by the Association.

There was a CBA in effect between the District and the Association with a term of August 28, 2004, to August 27, 2007. The parties have not as of yet successfully negotiated a new CBA.

After the start of the 2010-2011 school year, certain members of the bargaining unit applied for and were granted leaves of absence that extended beyond the end of the school year. The District filled these positions with long-term substitutes.

The Association grieved this filling of the positions with long-term substitutes and ultimately filed a demand for arbitration. The Association alleges that the District's procedure for filling the positions violated Article 9 of the CBA.

4. RELEVANT CONTRACTUAL LANGUAGE

Article 1 - Recognition

The ___ Board of Education hereby recognizes the ___ Association, ___, as the exclusive bargaining representative, as defined in Section II of Act 379, Public Acts, for all full-time and regularly part-time certified professional personnel whether under contract, on leave, employed or

to be employed by the Board of Education, including social workers, guidance counselors, school psychologists, certified librarians, occupational therapists, physical therapists, and nurses, but excluding all supervisory or administrative personnel, including superintendent, assistant superintendent, administrative assistants to the superintendent, directors of programs, including Title VI director, athletic directors, principals, assistant principals, curriculum coordinator, coordinator of special education, business manager, individuals performing any extracurricular assignments who are not otherwise part of the bargaining unit, per diem substitute teachers, aides, paraprofessionals, any personnel engaged 50% or more of the time in administration, and all other employees of the Board of Education or any other employer.

Article 3 - Rights of the Board

The Board ... hereby retains and reserves unto itself, without limitation, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by laws and the constitution of the State of Michigan and/or the United States, including but not limited to the following:

The management and control of school properties, facilities, grades and courses of instruction, athletic and recreation programs, method of instruction, materials used for instruction and the selection, direction, transfer, promotion or demotion, discipline or dismissal of all personnel. The exercise of these powers, rights, authority, duties, and responsibilities by the Board and the adoption of such rules, regulations and policies as it may deem necessary shall be limited only by the specific and express terms of this agreement.

Article 9 – Promotions, Vacancies, Transfers and Assignments

Section D — Posting

Whenever a vacancy, or a professional position in the district shall occur during the school year, the Board shall publicize the same by posting such vacancy ... for at least fourteen (14) calendar days. ... No such vacancy shall be filled, except on a temporary basis, until such vacancy shall be posted for fourteen (14) calendar days. For vacancies occurring from the last day of school to the opening of the new term, the Board shall notify the Association of all openings ... for the purpose of notification to all members.

All non-bargaining unit professional positions will be subject to this posting procedure; however, the appointments to these positions will not be subject to the grievance procedure.

Section E —- Vacancy

Any teacher may apply for such vacancy. In filling such vacancy, the Board agrees to give due consideration to the professional background, training, and seniority. The policy of the district is to fill vacancies from within its staff whenever candidates from within the system meet the criteria established by the Board for the position. If said teacher is denied the position, the teacher

shall be notified of the specific reasons, in writing, of said denial.

Article 24 – Professional Grievance Procedure [*in pertinent part*]

A claim is made by a teacher or the Union that there has been a violation, misinterpretation or misapplication of any provision of the agreement, or any rule, order, or regulation of the Board and processed as a grievance as hereinafter provided. ...

Level V.

If the Union is not satisfied with the disposition of the grievance by the Board, or if no disposition has been made within the period above provided, the grievance may be submitted to arbitration before an impartial arbitrator ... . The arbitrator shall have no power to alter, to add, or to subtract from the terms of the agreement. ... .

Article 31 – Duration of Agreement.

This agreement shall be effective as of August 28, 2004 and will extend to August 27, 2007.

5. CONTENTIONS OF THE PARTIES

1. For the Association

The Association contends that the District has not only continued honoring portions of the CBA that must remain post-expiration under the Public Employment Relations Act, MCL 473.201 *et seq*, (PERA) but has also honored mandatory subjects that traditionally expire with the CBA. These include automatic payroll deduction of Association dues.

According to the Association, the issue being grieved is based on a right that had arguably accrued or become vested under the CBA prior to its termination. Elkouri & Elkouri, How Arbitration Works (6th ed), p 133; and *Nolde Bros, Inc v Bakery Workers,* 430 US 243 (1977). The recognition clause defines the unit and by inference who does bargaining unit work, thereby making this a vested right under the 2004-2007 CBA and therefore arbitrable.

According to the Association, the past several CBAs have been settled post expiration.

The respective CBAs have been retroactive upon signing, thus allowing the Association to assume that it would retain its right to arbitrate.

The grievance should proceed to arbitration on the substantive posting issue.

2. <u>For the District</u>

The District contends that the grievance is not arbitrable because the parties' CBA expired on August 27, 2007, the parties have not agreed to extend the CBA, and the grievance at issue does not involve an accrued or vested right under the expired CBA. The subject matter of the grievance is not one that is an accrued or vested right under the expired CBA, and thus the matter is not arbitrable. The facts giving rise to the grievance occurred more than three years after CBA expiration. The CBA contains no language indicating an agreement by the parties to arbitrate post-expiration disputes. The District contends that the grievance is not arbitrable and should be denied in its entirety.

6. STATEMENT OF THE ISSUE

Is the grievance arbitrable?

7. DISCUSSION AND DECISION

This case involves a situation where the grievance was filed after the CBA's expiration date. This case requires me to determine whether a grievance concerning job postings which occurred at least three years after expiration of the CBA arises under the CBA and is hence arbitrable. There is a background of Federal and Michigan law as well as three prior arbitration decisions between the parties that has developed in analyzing whether the grievance is arbitrable in such a situation. In light of that background and the provisions of the CBA between the parties in this case, I decide that the grievance is not arbitrable.

Arbitration is a matter of contract. A party cannot be required to submit to arbitration any dispute which it has not agreed to so submit. *United Steelworkers v Warrior & Gulf Nav Co*, 363 US 574 (1960); and *Ottawa Co v Jaklinski*, 423 Mich 1, 22; 377 NW2d 668 (1985).

The United States Supreme Court case of *Litton Financial Printing Div v NLRB*, 501 US 190 (1991), determined whether a dispute over layoffs which occurred well after expiration of a CBA must be said to arise under the CBA despite its expiration. *Litton* held that

> A post-expiration grievance can be said to arise under the contract only [1] where it involves facts and occurrences that arose before expiration, [2] where an action taken after expiration infringes a right that accrued or vested under the agreement, or [3] where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement. [*Id* at 206.]

Prior to *Litton* the Michigan Supreme Court held in *Ottawa Cty v Jaklinski*, 423 Mich 1 (1985), that the right to arbitration of a post-expiration unjust discharge claim does not survive the expiration of the CBA by which it is created. The right to arbitration is necessarily a creation of the parties' intent as expressed in their CBA. *Jaklinski* indicated that the right to grievance arbitration survives the expiration of a CBA when the dispute concerns rights which can accrue or vest during the CBA's term.

After *Litton*, the Michigan Supreme Court considered in *Gibraltar School Dist v Gibraltar MESPA-Transportation*, 443 Mich 326; 505 NW2d 214 (1993), whether an arbitration clause of a CBA survives the expiration date of the CBA which created it. The Court was persuaded by the strong precedent favoring arbitration as being consensual that an agreement to arbitrate does not survive expiration of a CBA statutorily as a term or condition of employment under the PERA. The obligation to arbitrate grievances post-contract encompasses grievances

involving employee rights that accrue or vest under the contract, or situations in which the parties expressly provided for arbitration beyond the term of the CBA.

The Court stated:

> Public employers and employees have to bargain in good faith about grievances that arise while there is no collective bargaining agreement and employees have a potential unfair labor practice charge against the employer for unilateral change in working conditions. The PERA does not, however, impose arbitration, which is merely a method of determining a dispute involving some other substantive right, on the bargaining process as a term of the statutory contract. [*Id* at 347.]

The grievances filed on behalf of the custodial-maintenance unit in *Gibraltar* involved out-contracting, failure to have a unit member in attendance at a school sponsored event, and assignment of one position. *Gibraltar* stated that: "[t]hese involve the traditional areas of wages, hours and working conditions, in other words, the mandatory subjects of bargaining. This is identical to one of the approaches we rejected in *Jaklinski* and the approach for the statutory obligation [to arbitrate post-expiration issue grievances] that we reject above." *Id* at 349.

There have been three prior arbitration cases between the Association and the District concerning the arbitrability of grievances that were filed after the expiration of the 2004-2007 CBA.

In the arbitration decision of ___ *Dist*, AAA ___, Arbitrator Nora Lynch (May 11, 2009), Arbitrator Lynch held that the Association's grievance concerning the District's implementation of a response to intervention program was not arbitrable. Arbitrator Lynch concluded that "the grievance does not involve rights which have vested during the terms of the expired agreement and therefore is not arbitrable."

In ___, AAA ___, Arbitrator Nora Lynch (November 15, 2010), Arbitrator Lynch held that the Association's grievance concerning the District's refusing to post a vacant position was

not arbitrable. According to Arbitrator Lynch:

> The issue involved here, the posting of vacancies ... concerns a matter which is subject to change through collective bargaining, rather than a right earned by employees under the previous contract which would be fixed and enforceable after contract expiration.

Arbitrator Lynch concluded that "the grievance does not involve rights which have vested during the term of the expired agreement and therefore is not arbitrable."

___, AAA ___, Arbitrator Kenneth P Frankland (April 14, 2011), held that the Association's post-expiration denial of insurance coverage to a unit member was not arbitrable. Arbitrator Frankland concluded, in part, that the:

> case law is compelling. ... While prior arbitration decisions are not binding upon successive arbitrations, a decision and award involving the same parties and the same contract provision should be given respect and some deference.

The Association makes several serious arguments concerning the situation. I have seriously considered each of them.

The Association argues that the District has not only continued honoring portions of the CBA that must remain post-expiration under the PERA, but has also honored mandatory subjects that traditionally expire with the CBA, including automatic payroll deduction of Association dues. This argument does not control because (1) whether there is a requirement to continue payroll deduction can depend on factors other than the wording of the CBA, (2) the expired CBA provision concerning posting of vacancies is not a vested or accrued right within the meaning of *Litton* and *Gibralter*, and (3):

> the fact that the Employer has honored certain provisions of the previous contract does not indicate an intent to be bound by the expired agreement, particularly where the Employer has consistently stated its position that it has not agreed to extend the agreement and that, while submitting to the jurisdiction of AAA in this matter, it has reserved all of its objections to the arbitration proceeding. [___,

AAA ___, Arbitrator Nora Lynch (November 15, 2010).]

The Association argues that the issue being grieved is based on a right that had arguably accrued or become vested under the CBA prior to its termination, Elkouri & Elkouri, p 133; and *Nolde*, 430 US 243; and the recognition clause defines the unit and by inference who does bargaining unit work, thereby making this a vested right under the 2004-2007 CBA and therefore arbitrable. This argument does not control because, in part, the grievances filed on behalf of the unit in *Gibraltar* involved "outside employees performing bargaining unit work," 443 Mich at 332, failure to have a unit member in attendance at an event, and the assignment of a position. These *Gibralter* contractual issues are similar to the posting of vacancies issue because, in part, they concern who does bargaining unit work. Furthermore, Elkouri & Elkouri indicates that the "holding in *Nolde* was imprecise. The opinion ... embraced two disparate, inconsistent propositions ... ." Elkouri & Elkouri, p 134. *Nolde* "caused confusion in the lower courts and led to the taking of conflicting positions over the scope of the obligation to arbitrate post-contract grievances." *Id*. According to Elkouri & Elkouri, the United States Supreme Court resolved some of these post-expiration arbitration issues in *Litton*. *Litton* applied the narrow interpretation of *Nolde*. Elkouri & Elkouri, p 139. Under the *Litton* rationale, the posting of vacancies issue (1) did not occur before CBA expiration, (2) did not infringe a right that accrued or vested under the CBA, or (3) involve rights that survived the CBA's expiration. 501 US at 206; Elkouri & Elkouri, p 139.

Furthermore, Article 9 (E), concerning posting for a vacancy states:

> Any teacher may apply for such vacancy. In filling such vacancy, the Board agrees to give due consideration to the professional background, training, and seniority. The policy of the district is to fill vacancies from within its staff whenever candidates from within the system meet the criteria established by the Board for

> the position. If said teacher is denied the position, the teacher shall be notified of the specific reasons, in writing, of said denial.

The successful application for a posted vacancy is not an accrued or vested right unless expressly so provided in the CBA. It is not the same as severance or vacation pay. The specific clause at issue in the instant grievance involves consideration of "professional background, training, and seniority." *Litton* stated that:

> The important point is that factors such as aptitude and ability do not remain constant, but change over time. They cannot be said to vest or accrue or be understood as a form of deferred compensation. Specific aptitudes and abilities can either improve or atrophy. And the importance of any particular skill in this equation varies with the requirements of the employer's business at any given time." [*Litton*, 501 US at 210. See generally *Cincinnati Typographical Union v Gannett Satellite Info Network*, 17 F3d 906 (CA 6 1994).]

The Association argues that the past several CBAs have been settled post expiration with the respective replacement CBAs having been retroactive upon signing, thus allowing the Association to assume that it would retain its right to arbitrate. This argument does not control because, in part, *Gibraltar* stated that the possibility that there would be a "retroactivity clause in the new agreement" was a reason for **not** having mandatory arbitration of the post-expiration dispute in that case. 443 Mich at 343.

The crucial points in this case include (1) the facts and occurrences being grieved arose after the expiration of the CBA, (2) the District's conduct being grieved does not infringe a right that accrued or vested under the CBA, (3) under normal principles of contract interpretation, the disputed contractual right does not survive CBA expiration, (4) the three prior arbitration awards between the Association and the District, (5) the *Litton* and *Gibraltor* decisions, and (6) the language of the CBA.

8. AWARD

The grievance is not arbitrable and is therefore denied.

/S/Lee Hornberger
Dated: June 6, 2011 Lee Hornberger
Arbitrator