

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 WASHBURN SCHOOL DISTRICT : Case 25  
 : No. 43836  
 : MA-6083  
 and :  
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 WASHBURN EDUCATION ASSOCIATION :  
 :  
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Appearances:

Weld, Riley, Prenn and Ricci, S.C., by Ms. Kathryn J. Prenn, 715 South  
Mr. Barry Delaney, Executive Director, Chequamegon United Teachers,  
 Road, P.O. Box 8003, Madison, Wisconsin, having prepared the post-  
 hearing arguments on behalf of the Washburn Education Association.

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ARBITRATION AWARD

Washburn Education Association, hereafter referred to as the Association, and Washburn School District, hereafter referred to as the District, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration, the undersigned was appointed by the Wisconsin Employment Relations Commission to arbitrate a dispute over the posting rights of an employe. Hearing on the matter was held in Washburn, Wisconsin on June 20, 1990 and September 19, 1990.

Submission of post-hearing arguments was held in abeyance pending the issuance of a unit clarification decision by the Wisconsin Employment Relations Commission. 1/ Post-hearing arguments were received and exchanged by the undersigned on April 2, 1991. Full consideration has been given to the evidence, arguments and testimony presented in rendering this Award.

ISSUES:

During the course of the hearing, the parties agreed to leave framing of the issues to the undersigned. The undersigned frames the issues as follows:

1. Is the grievance arbitrable?  
 If yes,
2. Did the Washburn School District violate the collective bargaining agreement when it failed to allow the grievant transfer rights to a full-time teacher position for the 1990-1991 school year?  
 If yes,
3. What is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

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ARTICLE I - PREAMBLE

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1/ Washburn Public Schools, Decision No. 26780, 2/8/1991.

B. BARGAINING UNIT

The Board of Education recognizes the Washburn Education Association as the exclusive bargaining representative, as provided in 111.70 of the Statutes, on wages, hours and conditions of employment for all certified employees of the District engaged in teaching and/or on leave under Board approval, including classroom teachers, librarians, and guidance counselors, but excluding the following:

1. Administrators and coordinators.
2. Principals, supervisors and those department heads having evaluation responsibility over other staff members.
3. Office, clerical, maintenance and operating employees, or aides.
4. Certified personnel contracted through a secondary agency, such as CESA #1.

ARTICLE IV - GRIEVANCE PROCEDURE

B. DEFINITION

1. For the purpose of this Agreement, a grievance is defined as any complaint regarding the interpretation of a specific provision of this Agreement.

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ARTICLE XV - VACANCIES, TRANSFERS AND PROMOTIONS

- A. When a teaching position, administrative position, or activity on supplemental pay schedule is open, this position will be announced to the present staff.
- B. Any teacher wishing another teaching assignment or transfer shall make their wishes known by May 1 in order to be given consideration for the following school year. Application must be renewed annually to remain valid.
- C. In making teaching assignments, transfers and promotions, the convenience and wishes of the individual teacher will be honored to the extent that they do not conflict with the instructional requirements and best interests of the school system and the students.
- D. The District will notify each member of the bargaining unit of a vacancy at least 10 days prior to the filling of the vacancy.

BACKGROUND

The District operates a K-12 educational system in Washburn, Wisconsin. For a number of years, the District contracted with Cooperative Educational Service Agency No. 12 (CESA #12) for a Jobs Target Program Tutor. This tutor had the following job description:

GENERAL: The position of tutor within the CESA #12 Agency is generally a part-time position during the school year. The tutor's job function is structured based upon the needs of under-achieving youth within the schools served by the Jobs Target Program. The general job duties and objectives of a tutor shall focus on assisting students within the school districts to develop sufficient academic skills necessary to complete their assigned course work, as assigned to the student by the school's instructional staff.

SPECIFIC: To implement a successful tutoring program, tutors must cooperate closely with the student's instructors throughout the school year. Tutoring may be conducted either one-on-one or group basis, but shall provide the following instructional services for the student:

- Provision of study skills instruction including explanations of how to study for a course, how to study a text, how to study notes, etc.
- Review of course outlines and objectives, class assignments, etc.
- Checking student's work for errors and suggesting to the student ways to improve work.
- Assisting the student to identify major topics, concepts and kinds of information

- in the course which are important to understand the subject.
- Explain difficult concepts, methods, or information in the course.
  - Assisting students to prepare for examinations and tests by utilizing techniques such as question and answer, drilling, practice sheets, and review.
  - Giving students make-up exams and tests, basic skills assessments, and other test instruments or interest surveys as assigned by the instructor.
  - Actively listening to student problems and referral of students to appropriate staff within the school system when problems are identified.
  - Provide feedback and program reports to the classroom teacher and monitoring student progress in the regular classroom.
  - Assuring that students assigned to the tutor are in regular attendance in the tutoring room and abide by the tutoring schedule.

LINE AND STAFF RESPONSIBILITIES: The tutor is directly responsible to the Jobs Target coordinator and building principal. However, all tutors must be in close contact with and cooperate with, the teaching staff of the school district concerning classroom assignments, homework, and testing.

CERTIFICATION REQUIREMENTS: Teacher certification is desired, but not necessary depending upon the specific assignment, number of students to be served, length of service, and content of curriculum. At a minimum, it is recommended that applicants for tutorial positions should possess a teacher's aide or substitute teacher's license or other license which would allow the applicant to work with students in a school building.

SALARY: Wages or salary are negotiated with the applicant, based upon each school's recommendations as it pertains to the school's contractual arrangement with its employees and the applicant's certification status.

Prior to the commencement of the 1989-1990 school year, the District's Acting Administrator, Kenneth Kasinski, determined that the need for tutorial hours was greater than what CESA 12 was willing to contract. Kasinski therefore recommended to and received approval from the School Board to directly hire a tutor. The position was posted on or about October 2, 1989. Rodney Dymesich applied for the position. In his application letter, Dymesich informed Kasinski he held a similar position for CESA 12 and was working 80% of a full-time position. Kasinski hired Dymesich, hereinafter the grievant, for the position. When Kasinski interviewed the grievant for the position, he was aware that the grievant was the CESA 12 Tutor at two (2) other school districts. The grievant was hired to work Fridays during the school year for a total of thirty-six (36) days. The grievant was also informed he was to perform the same duties as he performed of a CESA 12 Tutor at the other two (2) school districts.

The grievant requested on several occasions that he sign a contract with the District. Kasinski directed his secretary to prepare a contract and a contract was given to the grievant for his signature. The document signed by the grievant is the same as the individual teaching contract signed by employees the Union represents. Thereafter, the grievant also directed the school secretary to commence deducting union dues from his paycheck and the grievant joined the Union. When Kasinski learned of the dues deductions he ordered that such deductions cease and informed the grievant he was not a member of the teacher bargaining unit. 2/

The individual teaching contract signed by the grievant identified him as a teacher four times, referred to his work as "professional services", and specified it was subject to the provisions of the "Master Agreement".

The grievant holds a five (5) year license from the Wisconsin Department of Public Instruction as an Elementary Teacher, first through eighth grade. As the District's tutor, the grievant worked with students in the seventh through twelfth grade. These students were referred to the grievant by teachers and/or the Acting Administrator, or were students who volunteered for tutoring. The grievant evaluated the student's needs, determined what materials and methods to use. Methods used by the grievant included mock tests, drilling, and review of educational material. The grievant did not develop any lesson plans nor did he assign any grades to students. Contrary to his job description as a CESA 12 tutor, the grievant did not work closely with teachers nor did he consult with them about student needs or appropriate tutorial services.

The instant matter arose when the grievant informed Kasinski of his intention to exercise transfer rights under Article XV of the collective bargaining agreement. The grievant was informed on February 26, 1990 that he was not in the teacher bargaining unit, that the District had made a mistake in issuing him an individual teacher contract and that he did not have any transfer rights. Thereafter a grievance was filed and processed to arbitration in accordance with the parties' grievance procedure.

Hearing on the matter commenced on June 20, 1990 in Washburn, Wisconsin. At the onset of the hearing, the District raised a threshold question concerning the undersigned's jurisdiction to determine the grievant's bargaining unit status. The hearing was continued to September 19, 1990. During the interim, a unit clarification petition was filed with the Wisconsin Employment Relations Commission. The hearing on the unit clarification issue was held on August 2, 1990. The undersigned acted as the Commission's Examiner in that matter and a decision was rendered by the Commission on February 8, 1991. Therein the Commission held the matter was moot because the tutor position was no longer in existence. Per the parties agreement, the record of that matter is incorporated herein.

On February 24, 1991 the District moved to have the grievance dismissed based upon the Commission's decision. This motion was denied by the undersigned on March 4, 1991 because the issues before the undersigned concern what rights, if any, the grievant had when the grievance was filed and such

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2/ At the unit clarification hearing the District took the position that if the Commission determined that the tutor position belonged in a bargaining unit, it should be the bargaining unit which includes Teacher Aides.

issues were not moot.

The record also demonstrates that there were a total of seventeen (17) different positions the grievant expressed an interest in transferring to. Further, if the grievant had been placed on the collective bargaining agreement's BA + 8 lane at Step 1, he would have earned \$4,005.00 rather than \$1620. Finally, the record also demonstrates the District employes teacher aide Peggy Hagstrom, who is a teacher's college graduate, has taught for two years and has some graduate credits, and teacher aide Dorothy Scholl, who has a Master's degree in school psychology.

### Union's Position

The Union argues that the primary issue herein is whether the grievant belonged to the professional unit represented by the Union or to the Aide's unit. The Union asserts the issue is arbitrable and that the undersigned has the authority to decide the ripeness of the dispute. The Union also argues that nothing in the unit clarification decision indicates otherwise.

The Union contends the grievant was a member of the professional unit by virtue of the clear and unambiguous language in his individual teaching contract. The Union also argues that the grievant belonged in the professional unit by nature of the work he actually performed. Further, that his duties were professional in nature under Sec. 111.70(1)(L) Wis. Stats. 3/ The Union

3/ Section 111.70(1)(L), Wis. Stats., defines the term "professional employe" as follows:

(1)Any employe engaged in work:

- a.Predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work;
- b.Involving the consistent exercise of discretion and judgment in its performance.
- c.Of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time;
- d.Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher education or a hospital, as distinguished from a general academic education or from an apprenticeship or form training in the performance of routine mental, manual or physical process; or

(2)Any employe who:

- a.Has completed the courses of specialized intellectual instruction and study described in subd. 1.d;
- b.Is performing related work under the supervision of a professional person to qualify himself to become a professional employe as defined in subd. 1.

also asserts that a comparison of his daily responsibilities with those of teacher aides, demonstrates the grievant's strong community of interest with the professional unit.

The Union also argues that the grievant's actual duties should take precedence over the job description said to apply to him. The Union argues the CESA 12 job description is inappropriate because the grievant was a District employe during the material period. The Union asserts, however, that even if it were assumed arguendo that the CESA 12 job description applied to the grievant, that description indicates that he functioned as a teacher rather than an Aide.

The Union also argues the District should not be permitted to profit from any missteps in the instant matter. The Union argues the grievant should be made whole and immediately placed in a full-time teacher position. As a lesser alternative, the Union seeks an order directing the District to reconsider the grievant for any and all positions he was wrongfully denied. At an absolute minimum, the Union argues the grievant should be considered for any future job openings.

#### District's Position

The District argues the grievance must be dismissed for lack of jurisdiction. The District relies on the Wisconsin Employment Relations Commission decision in the unit clarification that the matter is moot. The District also contends that it did not violate the collective bargaining agreement by not including the grievant in the teacher's bargaining unit. The District points out the bargaining unit excludes teacher aides and asserts that in the instant matter the grievant's function was as a teacher aide. The District also points to Sec. 111.70(1)(L), Wis. Stats., and asserts the duties of the tutor are such that they do not meet all the criteria of this statute. In support of its position, the District points to the CESA 12 job description for the tutor position and argues all CESA 12 tutors receive a copy of this job description. The District also argues no changes were made in this job description when it directly employed a tutor for the 1989-90 school year.

The District argues the tutor is to support and not supplant, the classroom teacher. The District points out the tutor does grade, assign work or prepare tests for students. Further, any tests of students are administered by the classroom teacher, not the tutor. The District also points out the tutor does not even provide input in determining the final grade of tutored students.

The District also argues that the tutor's work does not involve the consistent exercise of judgment or discretion. The District asserts the tutor does not develop lesson plans, cannot modify curriculum, does not attend inservice training and does not participate in parent-teacher conferences. The District also points out the tutor does not determine which student is to receive tutoring nor can the tutor authorize a student to attend tutoring services. The District also argues that lack of direct supervision does not alter the level or scope of the duties of the tutor. The District also asserts that no knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized instruction and study in an institution of higher education is required for the position.

The District also asserts that if the grievant's position were eligible to be included in the bargaining unit and a retroactive remedy is appropriate, the District argues the grievance still fails as the grievant would still not be entitled to a full-time training position as the grievant did not meet the two (2) year experience requirements which were posted with the thirteen

positions.

For the above reasons, the District would have the undersigned deny the grievance.

DISCUSSION:

The fundamental issue herein is whether the grievance is arbitrable. In order for the grievance to be arbitrable, the undersigned must determine whether the grievant is included in the bargaining unit represented by the Union. The undersigned finds such a question is not moot as argued by the District. The unit clarification decision rendered by the Wisconsin Employment Relations Commission concluded there was not a tutor position in existence; therefore there was no position for the Commission to clarify. However, the instant grievance was filed while the position was in existence and while the grievant was employed by the District.

Both parties acknowledge in their arguments that the bargaining unit represented by the Union is professional. Both parties point to Sec. 111.70(1)(L), Wis. Stats., to support their positions. Whether a position is professional, the Commission has held, depends upon whether all the criteria found in this section are present. However, the definition of "professional" employee is not limited to employee personally possessing a college degree nor is possession of a degree essential. What is essential is that knowledge of the employee's job duties be of a type customarily required by a prolonged course of specialized intellectual instruction and study in an institution of higher education or a hospital. 4/ Given the above reasoning, the undersigned finds that the individual teaching contract signed by the grievant nor the fact that the grievant joined and/or paid union dues via dues deduction from his wages are indicia of professional status. The type of duties performed by the grievant and the knowledge and skills required to perform those duties determine professional status.

The Union has argued that the CESA 12 job description for the tutor position is relevant because the grievant was employed by the District, not CESA 12. The undersigned finds no merit in this argument. The grievant's job application letter of September 10, 1989 clearly informed the District of the grievant's work for CESA 12. It is also evident from Kasinski's testimony that the District did not desire to change the type of work performed by the tutor but only to increase the number of days the tutor was employed. Given the grievant's application letter and Kasinski's testimony, the undersigned concludes the grievant was not only aware at the time of his hire what his job duties were to be, but because he was already performing the function at two other school districts as a CESA 12 employee, the grievant was aware what a Job Target Program Tutor's duties were before he even applied for the District's position. Therefore the undersigned finds the CESA 12 job description is irrelevant and that it describes the duties of the tutor.

The undersigned would note here that the record herein demonstrates that the grievant is a self-motivator, that he undertook duties that were above and beyond what were expected of him, and that he undertook duties and responsibilities that were not assigned to him. While such actions may be laudable, they were not actions which were assigned to him by the District. As they were not assigned duties, they cannot be used as indicia of professional status. Thus, when the grievant exercised independent judgment to recruit students, he did so of his volition; it was not an action he was directed to

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4/ Chippewa Valley Technical College, Decision No. 22230-A (WERC, 5/27/88).



do. When the grievant determined on his own what deficiency a student had and how to correct the deficiency without consulting the student's teacher, he again did so of his own volition. The grievant, in the words of the union, "crafted his own job". He did so without permission and without supervision. While the undersigned may agree with the Union that the grievant did an admirable job working on his own with limited resources, it is also evident the grievant requested no approval nor received any approval for his independent actions. While the grievant may have built a tutorial program from the ground floor, he did so of his own volition and he was not directed to do so. Therefore the undersigned concludes these actions of the grievant cannot be construed as indicia of professional status.

The undersigned does find that the record fails to demonstrate the grievant is a professional employe. In order to do so, as noted above, the knowledge and duties of the tutor position meet all the criteria of Sec. 111.70(1)(L), Wis. Stats. The Union has been able to demonstrate the position is intellectual and varied in nature. However, the position's incumbent assigns no grades, does not determine which students have deficiencies and therefore are to be assigned to tutoring, nor is there any evidence that the grievant determines when tutoring has been successful. Therefore the undersigned cannot conclude the position requires the consistent exercise of discretion and judgment. The record also demonstrates the output of the tutor position is basically only measured by the number and times students are tutored. 5/ Thus, the undersigned finds the output of the position, i.e., the number of students tutored per day, can be standardized over a given period of time. The record is silent concerning what knowledge of an advanced type customarily acquired by a prolonged course of study is necessary to perform the duties of a tutor. Only a teacher's aide license is required as a minimum for the position. The record demonstrates teacher's aides are included in the non-professional bargaining unit. That unit was certified by the Commission as a unit excluding professional employes.

Based upon the above, the undersigned concludes that the tutor position does not meet the criteria of Sec. 111.70(1)(L). Having so concluded, the undersigned finds the grievant is not a member of the bargaining unit represented by the Union. Therefore, the grievance is not arbitrable and is denied. Because the grievance is not arbitrable, the undersigned has not reviewed the merits of this matter.

AWARD

The grievance is not arbitrable.

Dated at Madison, Wisconsin this 26th day of July, 1991.

By Edmond J. Bielarczyk, Jr. /s/  
Edmond J. Bielarczyk, Jr., Arbitrator

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5/ Testimony at unit clarification hearing of CESA 12 Job Target District Director James Lee, transcript, p. 203-204.