

BEFORE THE ARBITRATOR

-----

In the Matter of the Arbitration	:	
of a Dispute Between	:	
	:	
FORT ATKINSON EDUCATIONAL SUPPORT	:	Case 33
STAFF UNION	:	No. 49264
	:	MA-7880
and	:	
	:	
FORT ATKINSON SCHOOL DISTRICT	:	
	:	

-----

Appearances:

Ms. Alice A. O'Mahar, Director, Capital Area UniServ-North, appearing on behalf of the Union.  
 Godfrey & Kahn, S.C., Attorneys at Law, by Mr. Jon E. Anderson, appearing on behalf of the District.

ARBITRATION AWARD

The Fort Atkinson Educational Support Staff Union, hereafter the Union, and Fort Atkinson School District, hereafter the District or Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Union, with the concurrence of the District, requested the Wisconsin Employment Relations Commission to appoint a staff member as a single, impartial arbitrator to resolve the instant grievance. On August 25, 1993, the Commission designated Coleen A. Burns, a member of its staff, as impartial arbitrator. Hearing was held on October 27, 1993, in Fort Atkinson, Wisconsin. The hearing was transcribed, and the record was closed on January 13, 1994, upon receipt of written arguments.

ISSUE:

The parties were unable to stipulate to a statement of the issue. The Employer frames the issue as follows:

1. Was the grievance appealed to arbitration in a timely manner?
2. If so, did the District violate the labor contract by classifying the position of Ms. Brokl as Clerk/Typist?

3. If so, what is the appropriate remedy?

The Union frames the issue as follows:

1. Did the District violate the collective bargaining agreement by classifying Sandy Brokl as a Clerk/Typist rather than a Secretary/Technician/ Aide II?
2. If so, what is the appropriate remedy?

The Arbitrator frames the issues as follows:

1. Was the grievance appealed to arbitration in a timely manner?
2. Did the District violate the collective bargaining agreement by classifying Sandy Brokl's position of AV Secretary/Media Aide as a Clerk/Typist, rather than as a Secretary/Technician/Aide II?
3. If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

4.0 MANAGEMENT RIGHTS

The District possesses the right to operate the District and all management rights repose in it. These rights include, but are not limited to, the following:

- A. To direct all operations of the District;
- B. To establish reasonable work rules and schedules of work;
- C. To create, combine, modify and eliminate positions within the District;
- D. To hire, promote, transfer, schedule and assign employees in positions within the District;

- E. To suspend, demote, discharge and take other disciplinary action against employees consistent with the terms of this Agreement;
- F. To relieve employees from their duties;
- G. To maintain efficiency of District operations;
- H. To take whatever action is necessary to comply with State or Federal law;
- I. To introduce new or improved methods or facilities;
- J. To change existing methods or facilities;
- K. To determine the kinds and amounts of services to be performed as pertains to District operations;
- L. To contract out for goods or services consistent with the terms of this Agreement;
- M. To determine the methods, means and personnel by which District operations are to be conducted;
- N. To take whatever action is necessary to carry out the functions of the District in situations of emergency.

The foregoing enumeration of the functions of the Board shall not be deemed to exclude other functions of the Board not specifically set forth, the Board retaining all functions not otherwise specifically nullified by the express terms of this Agreement.

. . .

## 11.0 CLASSIFICATIONS AND SALARY SCHEDULE

### 11.1 Classifications

Classifications Include:

Secretary III: Payroll Secretary

Secretary II: Business Manager's  
Secretary

Accounts Payable/Receivable  
Secretary  
Director of Instruction's  
Secretary  
Elementary School Secretary  
Elementary Administrative Aide  
Special Education Secretary

Secretary/Technician,  
Aide II:

Senior High Attendance Secretary  
Middle School Attendance  
Secretary  
Audio-Visual Directors'  
Secretary  
Senior High Guidance Secretary  
Middle School Guidance Secretary  
District Reading/Chapter I  
Secretary  
Assistant Senior High Secretary  
Assistant Principal's  
Secretary  
Special Education Receptionist/  
Typist  
Graphics Arts Technician  
Teacher Aide (where District  
requires certification or  
licensure)

Clerk/Typist  
Aide I:

Library Aide  
School Health Aide  
Senior High Audio Visual Clerk  
Teacher Aide (where District  
does not require certification  
or licensure)

Para-Professional:  
All District para-professionals.

11.2 Wage Schedules

- A. Rates: Wage schedules for 1990-91  
and 1991-92 are those found in

Appendix A.

- B. Placement on wage schedules for the 1990-91 and 1991-92 terms shall be in accordance with Appendix B. following initial placement. Advancement on the wage schedules shall be on the anniversary date of the employee's date of hire.
  
- C. Based upon relevant work experience, new employees may be placed on the wage schedule by the District Administrator up to and including Step 3.

. . .

12.0 SENIORITY

. . .

- 12.3 Job Postings - In the event the District deems it necessary to fill a vacant position or create a new position within the bargaining unit, notice of such vacancy shall be posted in each of the schools and sent to the President of the Union. Should any employee be interested in the posted position, he/she shall notify the Superintendent in writing of his/her interest by the date specified on the posting, which shall be no earlier than ten (10) calendar days from the date the posting is sent to the President of the Union. When qualifications are relatively equal, the employee with the greatest seniority will be given preference. At the time the selection is made for the vacancy, the Board shall send to the President of the Union a list of those employees who have expressed an interest in the position and the name of the successful candidate.

. . .

19.0 GRIEVANCE PROCEDURE

- 19.1 Purpose - The purpose of this procedure

is to provide an orderly method for resolving differences arising during the term of this Agreement. A determined effort shall be made to settle any such differences through the use of the grievance procedure.

19.2 Definition - For the purpose of this Agreement, a "grievance" is defined as an alleged violation of a specific provision of this Agreement.

19.3 Time Limits Application - Time limits set forth shall be exclusive of Saturdays, Sundays, and holidays and the time limits for processing grievances from one step in the limits for processing grievances from one step in the procedure to another may be extended upon mutual agreement.

19.4 Steps of the Grievance Procedure

Step 1 An employee shall, within ten (10) days after the event giving rise to the grievance occurred, or the employee could reasonably have been expected to have knowledge of it, submit such grievance directly to the immediate supervisor. The grievant(s) may either present the grievance alone or accompanied by a Union Representative.

Step 2 If a satisfactory settlement is not reached with the above described person in Step 1 within five (5) days, the Union Representative and/or the Union Grievance Committee may present the grievance in writing to the Superintendent or the Superintendent's designated representative. The Superintendent or the Superintendent's designated representative shall respond to the grievance(s) in writing.

Step 3 If a satisfactory settlement is not reached with the Superintendent or the Superintendent's representative in Step 2 within ten (10) days, the Union Representative and/or the Union Grievance Committee may present the written

grievance to the Superintendent. Thereafter the Union Representative and/or Grievance Committee may present the grievance to the Board of Education at its next regularly scheduled meeting.

The Board of Education shall respond in writing within ten (10) days following its next regularly scheduled meeting.

Step 4 If a satisfactory settlement is not reached in Step 3 or if no answer is given within the time noted, the Union may, within twenty (20) days, submit such grievance to arbitration by filing a written request with the WERC to appoint an arbitrator from the Commission or its staff.

The arbitrator will confer with the Board and the Union and shall hold hearings promptly and shall issue his/her decision on a timely basis. The arbitrator's decision shall be in writing and will set forth his/her findings of fact, reasoning and conclusions of the issues submitted.

The arbitrator shall not have any power or authority to add to, disregard, subtract from, or modify any terms of this Agreement or any amendments hereto nor to change the structure of a classification. The decision of the arbitrator shall be final and binding on the parties except as forbidden by law. In the event there is a charge for the services of the arbitrator, including per diem expenses, the parties shall share such expenses equally.

19.5 Group Grievance - A general or group grievance maybe (sic) filed by the Union and initiated at Step 2.

19.6 Miscellaneous - The parties agree to follow each of the foregoing steps of the grievance procedure. If the Employer fails to give a written answer within the time limits set out for any step, the Union may immediately appeal to the next step. Grievances not processed to the next step within the prescribed time

limits shall be considered dropped.

. . .

20.0 AMENDMENTS AND DURATION OF AGREEMENT

. . .

20.5 Waiver/Zipper Clause

The parties acknowledge that, during the negotiations which resulted in this agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the areas of collective bargaining and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. As a result each party voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter specifically referred to or covered by this Agreement.

. . .

BACKGROUND:

Sandy Brokl, hereafter the Grievant, has been employed by the Fort Atkinson School District since August, 1988. On or about November 24, 1992, the District posted a vacancy with the Job Title of "AV Secretary/Media Aide." The posting did not indicate the classification of the position or a rate of pay. The Grievant, a Clerk/Typist in the District's Athletic Department applied for the vacancy. At the time that the Grievant applied for the position, she understood that Mary Lou Donkle, who had retired from the position in June of 1992, had been classified as a Secretary/Technician/Aide II. 1/

---

1/ Donkle had been replaced by Ann Lueder. Lueder's position was entitled "AV Secretary/Media Aide." When Lueder left her employment with the District, the position of AV Secretary/Media Aide was posted and awarded to the Grievant. The record is silent with respect to the classification of



The Grievant was interviewed for the "AV Secretary/Media Aide" vacancy on or about December 13, 1992 by Librarian Mark Lee, AV Director John Erickson, and High School Principal Paul Pelnar.

During the interview, the Grievant asked about the position's pay scale. Pelnar responded that he would get back to the Grievant. Subsequently, the Grievant was awarded the position of AV Secretary/Media Aide and was advised by the District's Payroll Secretary that the Grievant was to be paid as a Clerk/Typist. Thereafter, the Grievant met with the District Administrator to discuss the rate of pay for her new position. When the Grievant advised the District Administrator that the position was that of "AV Secretary/Media Aide" and that Donkle had been paid as a Secretary/Technician, the District Administrator responded "That's what the Union did for you."

On or about January 17, 1993, a written grievance was filed with District Superintendent Gerald McGowan alleging that:

Mrs. Sandy Brokl is classified as a Clerk/Typist. Her employment responsibilities reflect that she should be classified as a Secretary/Technician.

The grievance was denied at all steps of the contractual grievance procedure.

#### POSITIONS OF THE PARTIES:

##### Union

The letter requesting the appointment of the arbitrator is dated March 24, 1993. As the Receipt for Certified Mail establishes, the letter was mailed in Fort Atkinson, Wisconsin, on March 24, 1993. While the return receipt card indicates that the letter was received by Dave Kelm, a State of Wisconsin employe, on March 25, 1992, it is evident that the letter was actually received on March 25, 1993. The Union did file a written arbitration request with the Commission within the 20 day time limit.

In arguing untimeliness, the District maintains that the arbitrator may not go outside the contract, but ignores its own advice, and turns to administrative codes to support its

---

the position held by Lueder.

definition of the contractual language "filing a written request with the WERC." The Union agrees that mailing is not synonymous with filing. The return receipt card indicates that the request for arbitration was delivered to Dave Kelm, who by signing it in his agency capacity, acknowledged receipt. It is not reasonable to hold the Union responsible for any delay between Kelm's receipt of the document and the date stamp by the Commission.

The Union has no obligation under the collective bargaining agreement to notify the District that it is filing for arbitration. However, Mr. David Ward, the Clerk of the Fort Atkinson School Board, was sent a courtesy copy of the Union's letter to the WERC.

The Grievant is occupying the position which had been held by Lueder and Donkle. The duties of the position have not decreased.

"Reclassification" assumes there is some change in a former classification. At all times the position in question was and remains classified as Secretary/Technician/Aide II.

The documents used by both parties in the interest arbitration proceeding consistently and repeatedly reflect that the position held by Donkle was classified as Secretary/Technician/Aide II. The cost of the wages paid to Donkle as a Secretary/Technician/Aide II were assessed to the package costs.

During bargaining, the Union made many proposals regarding job classifications and job reclassification studies, but the Board refused to accept any such proposals. The position held by Donkle could not have been reclassified from Secretary/Technician/Aide II to Clerk/Typist classification because no reclassifications took place during the bargain.

The District Administrator implies that Donkle was placed in the Secretary/Technician/Aide II classification because of her seniority with the District. Had the parties intended to "grandfather" Donkle in that position, it would have been incumbent upon the parties to make it clear that, in the future, the position would be down graded.

The position entitled High School Audio Visual Clerk is listed in the contract. However, there are job titles which are not filled. The job title of High School Audio Visual Clerk can exist without there being anyone in the position.

The position vacated by Donkle was posted by the District as "Audio Visual Secretary/Media Aide." This job title more closely mirrors the position classification of Secretary/Technician/Aide II; nowhere in the posting was the position identified as anything other than a Secretary/Aide classification; and the words "Clerk/Typist" are noticeably absent

from the posting. During the job interview, the District did not distinguish the position from that held by Lueder and Brokl.

Throughout the negotiations, all parties knew that Donkle was classified as a Secretary/Technician/Aide II. The District offered no evidence that the newly created Senior High Audio Visual position was identical to or replaced the position filled by Donkle. To accept the District's position in this matter, would be to permit the District to randomly and unilaterally down grade any position.

The collective bargaining agreement mandates that wages be paid in accordance with Appendix B. Appendix B in its final form, as well as in all earlier drafts, shows the Donkle position to be classified as Secretary/ Technician/Aide II. The position once held by Donkle and now held by the Grievant remains the same. The grievance should be sustained and Sandy Brokl should be awarded all back wages within ten days of the issuance of the Award.

District

The Union did not appeal the grievance to arbitration within the contractual time period of 20 days. There is no credible evidence that the letter requesting arbitration, prepared on March 24, 1993, was actually mailed on that date. The School District Clerk, listed as receiving a courtesy copy, did not receive the letter.

The return receipt that was tied to the letter was dated as received by the State on March 23, 1992, a year before the Union claims that the letter was sent. Moreover, the correcting letter allegedly sent the very next day by the Union President was also not received by the School District and was not stamped by the WERC until May 20, 1993. What is the likelihood that two pieces of mail, allegedly mailed on two separate days, would both be lost for months and received by the Commission on the same day?

Assuming arguendo, that the request for arbitration was mailed on March 24, 1993, as asserted, that action does not meet the test under the contract. The contract requires the filing of a request. Such filing did not occur until May 20, 1993. No agency relationship was established for Mr. Kelm, and the record does not suggest that he is an agent for the WERC.

The term "filing," although not defined by the parties' labor agreement, is not ambiguous. The Commission's own rules concerning arbitration provide guidance in this regard. Wisconsin Administrative Code ERB 16.03(1) provides that:

A request that the Commission initiate arbitration shall be in writing and signed by the party or parties filing the request. If not a joint request, the party filing the same at the same time, shall cause a copy thereof to be sent to the other party . . .

Wisconsin Administrative Code, Sec. 10.08(4) provides, in material part, that papers required to be filed by Sec. 111.70, Stats.:

. . . shall be deemed filed upon actual receipt of the place at the place specified for such receipt before the close of business  
. . .

The Supreme Court of Wisconsin has further recognized the term

"filing" and the verb "to file" as carrying an obligation to ensure that the document is actually delivered to the proper office. (cites omitted) The Supreme Court has further found that "to construe or define "mailing" as "filing" is to ignore the plain meaning of the word. Mailing merely initiates the process by which an article will be delivered. (cites omitted) The Union's failure to observe the clear time lines set forth in the collective bargaining agreement must result in the dismissal of the grievance.

The Grievant works in the Audio Visual Department of the Senior High School. There is only one Audio Visual job at the High School included within the bargaining unit. As the Grievant testified, this is her job. Superintendent McGowan testified that the position occupied by the Grievant was listed in the collective bargaining agreement as a "Senior High Audio Visual Clerk." The Union offered no testimony to suggest that the position fit into a different classification. The contract, being clear on this point, must be enforced as written.

The classification of Donkle is undisputed. Donkle was classified as Secretary/Technician prior to the creation of the labor contract because her hourly wage best fit in that classification. Donkle's hourly wage was due to her seniority in the District.

The Union has not presented any allegation of any specific contract provision being violated by the actions of the District. Donkle's position was listed at the Secretary/Technician level for costing purposes only. Contrary to the Union's assertion, this is not a reclassification issue, but rather an initial placement issue.

The bargaining history clearly demonstrates that the Union believed and proposed that the Senior High Audio Visual position should be classified at the Secretary/Technician level. However, an amended final offer of the Union, dated May 31, 1991, has deleted the Audio Visual position at the High School and included within the Clerk/Typist classification the position of "Senior High Audio Visual Clerk."

The position of the Union concerning the placement of the Audio Visual position at the "Clerk/Typist" level remained the same in Employer Exhibit 5. Ultimately, both the Employer and the Union agreed that the Senior High Audio Visual Clerk position would be within the Clerk/Typist Aide I classification. The agreement of the parties that the Grievant was further classified as a "Clerk/Typist" is reflected in the seniority list mailed by the Union to the District on December 21, 1992, and within the collective bargaining agreement. (see Joint Exhibit 1, Appendix C)

Admittedly, the classification listings are not perfect. It is clear, however, that there is only one position in the bargaining unit at the High School in the Audio Visual Department and that is the position occupied by the Grievant. The position is clearly listed in the wage appendix at the Clerk/Typist level.

Contrary to the argument of the Union, posting is not controlling. Classifications are not required to be posted and job titles are not classifications.

For the Union to prevail, the arbitrator would have to move the position occupied by the Grievant from the Clerk/Typist classification and place that position in the Secretary/Technician classification. To do this, the arbitrator would have to restructure both of these classifications. Such restructuring is prohibited by the provision of the contract which states that

the "arbitrator shall not have any power or authority to add to, disregard, subtract from, or modify any of the terms of this Agreement or any amendments hereto nor to change the structure of a classification."

The Union has not established a violation of the collective bargaining agreement. The grievance must be denied.

DISCUSSION:

Timeliness

The District argues that the Union did not comply with the provisions of Article 19.4, Step 4, and, thus, the undersigned does not have jurisdiction to decide the merits of the grievance.

Specifically, the District argues that the Union did not file a written request with the WERC to appoint an arbitrator within the contractual time limit of twenty days.

The Board's denial of the Step 3 grievance was communicated to the Union in a letter from the District's Superintendent to Union Grievance Chairperson Sylvan Quinn, which letter was dated March 1, 1993. At hearing, the Union introduced a letter dated March 24, 1993 from Donna L. Petersen, President of the Union, which was addressed to "A. Henry Hempe, Chairman, Wisconsin Employment Relations Commission, PO BOX 7870, Madison, WI 53707-7870" and which stated as follows:

The Fort Atkinson Educational Support Staff (FESS) is hereby filing the WERC to appoint an arbitrator from the commission or its staff to decide two grievances. Said arbitrator will confer with the Fort Atkinson School Board and FESS and shall hold a hearing on this matter before issuing its decision.

Please submit the name of the arbitrator and a list of possible meeting dates for the two parties to be considered, to the individuals listed below.

Although Petersen did not testify at hearing, the Union submitted a Receipt for Certified Mail P 135 252 326 sent to "A. Henry Hempe, Chairman, WERC, P.O. Box 7870, Madison, WI 53707-7870" which was date stamped by the USPS at Fort Atkinson, WI on March 24, 1993. The Union also submitted a Domestic Return Receipt which indicated that Article Number P135252326, addressed

to "A. Henry Hempe, Chairman, WERC, P.O. Box 7870, Madison, WI 53707-7870," was received by Dave Kelm by certified mail on March 25, 1992. Kelm is a State of Wisconsin employe, whose duties include picking up State of Wisconsin mail which is delivered to the United States Post Office in Madison, Wisconsin.

As both parties recognize, the Domestic Return Receipt received by Kelm is stamped "1992," rather than "1993." However, given the USPS date stamp from Fort Atkinson, Wisconsin, the undersigned is satisfied that the date on the Domestic Return Receipt should be March 25, 1993, rather than March 25, 1992. Thus, excluding Saturdays, Sundays and holidays, as required by Article 19.3, Article Number P135252326, was received by Kelm within twenty (20) days of the Union's receipt of the Board's Third Step response.

The records of the Wisconsin Employment Relations Commission indicate that Petersen's letter of March 24, 1993 was stamped as received by the Wisconsin Employment Relations Commission on May 20, 1993. The record, however, does not provide any explanation for the delay between Kelm's receipt of the Domestic Return Receipt on March 25, 1993 and the Commission's date stamp of May 20, 1993. Nor does the record provide any explanation for the fact that a March 25, 1993 letter from Union President Petersen is also stamped as received by the Wisconsin Employment Relations Commission on May 20, 1993.

The District relies upon provisions of the Wisconsin Administrative Code and decisions of the Wisconsin Supreme Court to argue that filing does not occur until the grievance request is delivered to the Commission's office in Madison. However, it is not evident that the parties gave any consideration to the Wisconsin Administrative Code or decisions of the Wisconsin Supreme Court when the parties adopted the language of Article 19.4, Step 4. 2/ Absent such evidence, the undersigned does not consider the provisions of the Wisconsin Administrative Code or, the decisions of the Wisconsin Supreme Court, relied upon by the District to be controlling.

The record provides a reasonable basis to conclude that Article Number P135252326 is the March 24, 1993 letter from Union President Petersen. The undersigned is satisfied that the filing

---

2/ Since the grievance arose under the initial contract between the parties, there is no evidence of past practice concerning the parties' application of the language of Article 19.4, Step 4. Nor is there any evidence of bargaining history concerning the parties' intent with respect to Article 19.4, Step 4.



requirement of Article 19.4, Step 4 was met when Dave Kelm received Article Number P135252326. Since Kelm received the Union's request to submit the grievance to arbitration within the twenty (20) day time limit set forth in Article 19.4, the undersigned has concluded that the grievance was appealed to arbitration in a timely manner. 3/

---

3/ As the Union argues, the contract does not require the Union to notify the District when it requests the WERC to appoint a grievance arbitrator. The letter of March 24, 1993, indicates that a copy of the letter was sent to David Ward, Clerk of the District's Board of Education, at Ward's home address. The District Administrator, who is the custodian of the District's records, did not receive the copy which was allegedly sent to Ward. Ward, however, did not testify at hearing and the record does not establish whether or not Ward ever received such a letter.

## Merits

At issue is whether the position awarded to the Grievant in December of 1992 falls within the classification of Secretary/Technician, Aide II or the classification of Clerk/Typist, Aide I. The Union, contrary to the District, argues that the position falls within the higher paid classification of Secretary/Technician/Aide II.

While the District posted the disputed position as "AV Secretary/Media Aide," such a position is not referenced in the parties' collective bargaining agreement. The District argues, however, that the Grievant is occupying the position of "Senior High Audio Visual Clerk," which position is listed in Article 11.1 under the Clerk/Typist Aide I classification.

Given the fact that the contract does not expressly define the duties of a "Senior High Audio Visual Clerk," the language relied upon by the District is not clear and unambiguous with respect to the issue in dispute. Accordingly, it is appropriate to consider evidence of the parties' bargaining history to determine whether or not the parties' mutually agreed that the position occupied by the Grievant is that of "Senior High Audio Visual Clerk."

The position occupied by the Grievant is essentially the same position as had been occupied by Mary Lou Donkle at the time she left the position in June of 1992. The District concedes that Donkle was classified as a Secretary/ Technician/Aide II. The District maintains, however, that the parties negotiated a change in the classification when the parties placed the position of "Senior High Audio Visual Clerk" under the Clerk/Typist, Aide I classification in Article 11 of their initial contract.

Sec. 11.2 of the Union's preliminary final offers of September 21, 1990 and April 15, 1991 state that "On the salary schedule, Secretary Technician" includes "AV High School." The Union's preliminary final offer of May 31, 1991 contains Sec. 11.1, Classifications, which does not reference "AV High School" in the Secretary/Technician, Aide II classification and references "Senior High Audio-Visual Clerk" in the Clerk/Typist, Aide I classification.

On or about February 14, 1992, the Union and the District entered into a series of stipulations, one of which was the Section 11.1 language contained in the parties initial collective bargaining agreement. As a result of this stipulation, Sec. 11.1 lists the "Senior High Audio Visual Clerk" in the classification of Clerk/Typist, Aide I. It is not evident that the parties had any discussions regarding the rationale underlying the Union's

elimination of "AV High School" from the Secretary/Technician classification and the Union's addition of the "Senior High Audio-Visual Clerk" to the Clerk/Typist, Aide I classification.

The evidence demonstrates that, at the time of hearing, there was only one AV position at the High School, i.e., the position occupied by the Grievant. The District argues, therefore, that the "Senior High Audio-Visual Clerk" listed in Article 11.1 must be a reference to the position occupied by the Grievant.

Neither the language of Sec. 11.1, nor the conduct of the parties, demonstrates that the Section references all bargaining unit positions. Indeed, following the issuance of the interest arbitration award, at a time when the parties were drafting their initial contract, the District's bargaining representative expressly recognized that there were existing positions which were not referenced in Sec. 11. 4/ Thus, the fact that the Secretary/Technician, Aide II classification does not expressly reference the position held by the Grievant is not persuasive evidence that the parties did not intend the position to be in the Secretary/Technician, Aide II classification.

It is generally recognized that an employer has the right to determine whether or not it will fill a position. Thus, it is reasonable to conclude that, by listing the position of Senior High Audio Visual Clerk in the collective bargaining agreement, the parties are recognizing that the position is in the bargaining unit. It does not necessarily follow that the parties are also agreeing that the position is currently occupied by a bargaining unit employe.

It is true that, during negotiations, the Union had access to the District's 1983-84 Handbook for Secretaries which lists "Senior High School Audio-Visual Clerk" under the Clerk classification. However, when the Union commenced negotiations with the District, it received base year information from the District which indicated that Donkle's position in 1986, 1987-88, 1988-89 and 1989-90 was that of "Senior High AV Secretary."

It is not evident that, during negotiations with the Union, the District ever advised the Union that it considered Donkle's position to be that of "Senior High Audio Visual Clerk." Indeed, Union Bargaining Representative Borkenhagen confirmed that, during contract negotiations, he was never advised that any specific individual occupied the positions listed in the District's 1983-84 Handbook, 5/ nor was he advised that the District considered Donkle's position to be that of a Senior High Audio-Visual Clerk.  
6/

The testimony of the District's Superintendent establishes that when the District attempted to place employes within classifications for the 1989-90 school year, the District classified Donkle as a Secretary/Technician. According to the

---

4/ Association Exhibit #31.

5/ T. at 68.

6/ T. at 84.

District's Superintendent, this classification was chosen because it best fit Donkle's wage rate. Apparently, the District considered Donkle's wage rate to be due to her longevity with the District rather than the nature of her duties. It is not evident, however, that, at the time that the parties negotiated their initial contract, the District ever advised the Union of its reason for classifying Donkle as a Secretary/Technician.

It is not uncommon, during the negotiation of an initial contract, to "red circle" or "grandfather" employees who, by virtue of longevity, have a wage rate which exceeds the wage rate of the employee's classification. Indeed, Appendix "A" of the parties' collective bargaining agreement expressly recognizes that "a number of employees are off schedule . . ." It is not evident, however, that the parties had any negotiation discussions on the issue of classifying Donkle's position as a Clerk/Typist, Aide I and placing her off schedule.

The District argues that the Seniority list mailed by the Union on December 21, 1992, establishes that both parties considered the Grievant to be a Clerk/Typist. The undersigned agrees. However, as evidenced by Union Representative Borkenhagen's letter of December 21, 1992, the list was agreed to in November of 1992. At that time, the Grievant was a Clerk/Typist in the Athletic Department. Since the seniority list was developed prior to the time that the Grievant was awarded the position of AV Secretary/Media Aide, the seniority list is not indicative of any mutual intent with respect to this position.

As the Union argues, and the District concedes, the District's negotiation documents consistently identify Donkle's position as being that of a Secretary/ Technician/Aide II. Moreover, Appendix "B" of the parties' collective bargaining agreement also expressly recognizes that Donkle was in the Secretary/Technician/Aide II classification.

While the District argues that the negotiation documents which classify Donkle as a Secretary/Technician/Aide II were for costing purposes only, the undersigned disagrees. The documents demonstrate that, at the time that the parties' commenced their contract negotiations, the District and the Union considered Donkle's position to be classified as a Secretary/Technician/Aide II. The undersigned is persuaded that this express linking of the Donkle position to a specific classification is the best evidence of the parties' intent with respect to the classification of the position held by Donkle.

In summary, neither the evidence of bargaining history, nor any other record evidence, persuades the undersigned that the parties agreed that the position of Senior High Audio Visual Clerk was the position held by Donkle. Thus, contrary to the argument of the District, the placement of the position of Senior High Audio Visual Clerk in the classification of Clerk/Typist, Aide I is not persuasive evidence that the parties mutually agreed to classify the position held by Donkle as a Clerk/Typist, Aide I.

As discussed above, it is not evident that the Grievant's position of AV Secretary/Media Aide is significantly different

from the position occupied by Donkle at the time that the parties negotiated their initial contract. For the reasons discussed above, the undersigned is persuaded that the parties mutually intended the position held by Donkle to be classified as a Secretary/Technician/ Aide II. The undersigned is satisfied that, when the Grievant assumed the position of AV Secretary/Media Aide, she was contractually entitled to be paid as a Secretary/Technician/Aide II, rather than as a Clerk/Typist, Aide I. Accordingly, the District violated Appendix "A" of the collective bargaining agreement by paying the Grievant as a Clerk/Typist, Aide I.

Contrary to the argument of the District, the Award issued by the undersigned is not adding to, disregarding, subtracting from, or modifying any terms of the Agreement, or making any amendments to the agreement. Rather, the undersigned is requiring the District to comply with the terms of the agreement by paying the Grievant the Secretary/Technician/Aide II wage rate which was bargained for her position. Nor is the undersigned changing the structure of a classification, contrary to Sec. 19.4. The undersigned is not moving the "Senior High Audio Visual Clerk" to the Secretary/Technician/Aide II classification. Rather, the undersigned is not accepting the District's argument that the "Senior High Audio Visual Clerk" position is the position which is occupied by the Grievant.

Based upon the above and the record as a whole, the undersigned issues the following

AWARD

1. The grievance was appealed to arbitration in a timely manner.
2. The District violated the collective bargaining agreement by classifying Sandy Brokl's position of AV Secretary/Media Aide as a Clerk/Typist, rather than as a Secretary/Technician/Aide II.
3. In remedy of this contract violation, the District is to immediately make whole Sandy Brokl by restoring all wages and fringe benefits lost as a result of the failure of the District to classify the AV Secretary/Media Aide position as a Secretary/Technician/Aide II.

Dated at Madison, Wisconsin, this 7th day of April, 1994.

By           Coleen A. Burns          /s/

---

Coleen A. Burns, Arbitrator