BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

BANGOR EDUCATIONAL SUPPORT
PERSONNEL ASSOCIATION

and

BANGOR SCHOOL DISTRICT

Case 19
No. 51030
MA-8468

Appearances:
Ms. Joan Haag, WEAC Organizing Consultant, appearing on behalf of the Association.
Mr. Robert Butler, WASB Staff Counsel, appearing on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Association and District or Employer, respectively, are signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing was held on August 19, 1994, in Bangor, Wisconsin. The hearing was not transcribed. Afterwards, the parties filed briefs and reply briefs, whereupon the record was closed October 21, 1994. Based on the entire record, the undersigned issues the following Award.

ISSUE

The parties were unable to agree on the framing of the issue.

The Association frames it as:

> Did the District violate Article VII of the collective bargaining agreement when it hired Tammy Fosler for a half time aide position currently held by Phyllis Lowe, thereby reducing Lowe's hours and placing her in a position of partial layoff? If so, what is the appropriate remedy?

While the Employer frames the issue as:

> Did the District violate Article VII of the collective bargaining agreement when it hired Tammy Fosler for a half-time aide position? If so, what is the appropriate remedy?

In making their respective cases, the parties raised and addressed several points in addition to those referenced above. Rather than list each of those matters here, the undersigned has decided to phrase the issue as follows:

> Did any of the Employer's actions herein violate the collective bargaining agreement? If so, what is the appropriate remedy?

A listing of all the points subsumed into this broad issue is found in the Discussion section.

PERTINENT CONTRACT PROVISIONS

The parties' 1992-95 collective bargaining agreement contains the following pertinent provisions:

> ARTICLE I
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> RECOGNITION
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> The Board recognizes the Association as the exclusive bargaining representative concerning wages, hours and conditions of employment for all regular full-time and regular part-time non-professional employees employed by the Bangor School District, excluding professional, supervisory, confidential, managerial, and casual employees, as certified by the Wisconsin Employment Relations Commission (Case 17, No. 47224, ME 3415).
>
> Excluded from the bargaining unit are all individuals hired as substitutes, summer help or as temporary employees hired for ninety (90) calendar or less. (sic)
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> . . .

ARTICLE II

MANAGEMENT RIGHTS

Management retains all rights of possession, care, control and management that it has by law, and retains the right to exercise these functions under the term of the collective bargaining agreement except to the precise extent such functions and rights are explicitly, clearly, and unequivocally restricted by the express terms of this Agreement. The rights include, but are not limited by enumeration to, the following rights:

A. To direct all operations of the school district;

B. To establish and require observance of reasonable work rules and schedules of work;

C. To hire, promote, transfer, and schedule and assign employees in position within the school district;

. . .

E. To layoff employees from their duties because of lack of work or any other financial reason;

. . .

ARTICLE V

EMPLOYEE DEFINITIONS

. . .

C. School Year Full-Time

A School year full-time employee is hereby defined as an employee who works the school year or more, but less than a calendar year, at least six (6) hours per day but less than forty (40) hours per week.

. . .

ARTICLE VII

REDUCTION IN FORCE, POSITIONS & HOURS

A. In the event the Board determines to reduce the number of positions (full layoff) or the number of hours in any position (partial layoff), the provisions set forth in this Article shall apply. Layoffs shall be made only for the reasons asserted by the Board, and shall not be used to discipline an employee for his or her performance or conduct.

. . .

D. RECALL

. . .

6. No new permanent appointments may be made by the District while there are employees who have been laid off or reduced in hours who are willing, available, and qualified to fill the vacancy.

. . .

FACTS

Grievant Phyllis Lowe began employment with the District as a part-time aide at the start of the 1992-93 school year. That year she worked 1.5 hours per day as a food service aide and 1.5 hours per day as a kindergarten aide (for a total of 3 hours per day). She was the only kindergarten aide.

At the June, 1993 School Board meeting, Elementary Principal Lyn Tierney informed the Board that the kindergarten enrollment was set at 53 students for the upcoming school year. This was a substantial increase over the previous year. She asked the Board to consider hiring a full-time aide for the kindergarten due to rising enrollment. The Board deferred action on Tierney's request.

In mid-August, 1993, Tierney told kindergarten teacher Leota Compton that she would have an aide for the 1993-94 school year and the Lowe would be the aide. Tierney also told Compton that Lowe would be full time until the Board decided whether the kindergarten enrollment warranted a full-time position. Tierney then talked with Lowe about the same subject

matter. Tierney asked Lowe if she would start the 1993-94 school year working full-time (as opposed to working part-time) due to increased kindergarten enrollment. Lowe replied that she would. Tierney then told Lowe that the School Board would review the matter in a month (at the September Board meeting) and decide whether the kindergarten enrollment warranted keeping the kindergarten aide at full-time status.

At the August, 1993 School Board meeting, Tierney asked the Board to employ Lowe on a full-time basis for at least the first week of school. The minutes of that meeting indicate that the Board initially deferred action on Tierney's request. Later in the meeting though, the Board revisited the matter. When it did, it passed a motion which approved "Lowe as full-time kindergarten aide until the next meeting." It appears from the record that Board meetings are held monthly.

Following the Board's action, Lowe started working full time as the kindergarten aide (specifically 6.5 hours per day, 5 days per week). Lowe testified at the hearing that she thought she was going to work full time for the entire school year.

At the September, 1993 School Board meeting, Tierney asked that there be two half-time (kindergarten) aides. A motion to this effect was made, seconded and passed. With this action, the Board decided to employ two part-time kindergarten aides for the 1993-94 school year rather than one full-time kindergarten aide.

The next day, Tierney informed Lowe of the Board's decision to employ two half-time kindergarten aides rather than a full-time aide. Tierney also told Lowe that the reason the Board did so was to save money on benefits.

Shortly thereafter, the District posted for a half-time teacher aide. After it was posted, Lowe asked Tierney if she should apply for it (i.e. the posted half-time aide position). Tierney replied that if she did, she (Lowe) would not get the job because she was already employed by the District. Lowe did not apply for the posted half-time aide position. Lowe testified at the hearing that the reason she did not apply for the posted position was because she believed, based on what Tierney told her, that she would not get the position if she applied.

No District employes posted for the half-time aide position, so it was not filled internally. Instead, the District hired Tammy Fosler off the street in October, 1993. Fosler was not a District employe prior to being hired to fill this position. After Fosler was hired, Lowe's hours were reduced from 6.5 hours per day, 5 days per week to 6.5 hours per day on Monday, Wednesday and alternate Fridays, with Fosler working the remainder of the time. This change occurred about October 5, 1993.

Lowe worked part-time as a kindergarten aide until March 21, 1994, when she became the full-time kindergarten aide. She worked full time until the end of the school year. She was laid

off after the school year ended due to declining kindergarten enrollment.

The Union filed a grievance on Lowe's behalf which was processed to arbitration.

The record indicates that no District official told Lowe that she would have full-time employment with the District for the entire 1993-94 school year. Additionally, Lowe did not receive any written promise of same, such as an individual employment contract which specified full-time employment for the 1993-94 school year. The District distributed the 1993-94 individual employment contracts to the support staff in January, 1994.

POSITIONS OF THE PARTIES

The Association contends that the District violated Article VII when it posted and hired a new employe into half of Lowe's existing full-time kindergarten aide position. According to the Association, Lowe should have been retained in a full-time position. This contention is premised on the Association's belief that Lowe had a permanent full-time position with the District for the 1993-94 school year. To support this claim, the Association submits that at the beginning of the 1993-1994 school year, Lowe was assigned by her principal to be a full-time employe. In the Association's view, this action extended Lowe's existing part-time aide position into a permanent full-time position. The Association contends that no District representative ever told Lowe she was a temporary employe or that the full-time kindergarten aide position she was filling was simply a temporary assignment. As a result, the Association argues she was not a temporary employe and did not fill a temporary assignment. The Association asserts that when the District divided the full-time kindergarten aide position in half, this resulted in Lowe's being cut from full-time employment to half-time. In the Association's view, this reduction in Lowe's hours amounted to a partial layoff covered by Article VII. Next, with regard to what happened after the part-time aide position was posted, the Association argues that Lowe tried to apply for the posted part-time position, but was dissuaded from doing so by Principal Tierney who told her that she wouldn't get the job if she applied. The Association contends that by saying this, Lowe was in effect prohibited from applying for the posted position. Finally, with regard to the District's subsequent hiring of Fosler, the Association asserts that Lowe was qualified for the posted part-time position. To support this claim, it notes that Lowe was hired initially for the aide position in August, 1993, and later in March, 1994, when she again began working full time as the kindergarten aide. According to the Association, this action establishes that Lowe was qualified for the posted part-time aide position. The Association argues that since Lowe was qualified for the posted part-time position, it was a violation of Article VII for the District to hire a new employe to fill that position. In order to remedy this alleged contractual breach, the Association asks the arbitrator to rule in Lowe's favor and make her whole for lost wages and annuity, plus interest, for the time period she was not a full-time employe.

The District contends that Lowe was not contractually entitled to a full-time kindergarten

aide position. It asserts at the outset that it did not have to retain Lowe in a full-time position because she was not, in fact, a permanent full-time employe. The District therefore disputes the Association's contention that Lowe had a permanent full-time position with the District. In the District's opinion, the full-time position which Lowe filled for about a month (August, 1993 to early October, 1993) was temporary in nature. According to the District, Lowe filled two part-time positions at the start of the 1993-94 school year; one was her contracted part-time aide position and the other was the part-time aide position she filled on a temporary basis pending the posting of that part-time position. The District notes that it did not give Lowe a contract for the additional temporary assignment, nor did it guarantee that her temporary assignment was permanent in nature. The District also cites the contractual Recognition clause for the proposition that temporary employes are excluded from the bargaining unit and the contract's application. According to the District, Lowe was a temporary employe when she filled the expanded kindergarten aide position so she was not a represented bargaining unit employe. The District therefore contends it did not reduce Lowe's original part-time aide position. Next, the District submits that after it decided to have two part-time kindergarten aide positions rather than one full-time position, it posted the new part-time position. The District asserts that Lowe had the right to apply for that position, but she failed to do so. The District argues that by failing to apply for the posted position, she waived her right to contest who ultimately got the position. Finally, the District contends it did not violate Article VII when it hired Fosler to fill the new half-time aide position. To support this premise, the District first relies on the Management Rights clause for the proposition that it has the right to hire employes and assign them work. Second, the District asserts that Lowe was not as qualified for the position as Fosler was because Fosler's academic credentials include a degree in elementary education, while Lowe did not have a high school degree. The District therefore asks that the grievance be denied.

DISCUSSION

My discussion begins with an overview of the following basic facts. Lowe was a part-time aide in the 1992-93 school year. At the beginning of the 1993-94 school year, she began working full time as a kindergarten aide. After she worked full time for about a month, she was returned to part-time status. This happened when the District decided to employ two part-time kindergarten aides rather than one full-time kindergarten aide. Lowe was given one of the part-time kindergarten aide positions. The other part-time kindergarten aide position was posted internally. There were no bidders for it, so the Employer hired someone from the outside (Fosler) to fill that part-time position.

In making their respective cases, the parties raised and addressed the following questions about the actions just noted. First, did Lowe have a permanent full-time position with the District for the 1993-94 school year? The Association contends that she did, while the District asserts she simply had a temporary full-time assignment. Second, after the Board decided to create two part-time aide positions and placed Lowe in one of them, was her partial layoff covered by Article VII

A? The Association contends that it was while the District disputes this contention. Third, after the District posted the vacant part-time aide position, was Lowe denied access to posting for it? The Association argues in the affirmative and the District in the negative. Finally, was the person the District hired for the half-time aide position (Fosler) more qualified than Lowe? The District argues that she was while the Association disputes this contention. In the analysis which follows, I will address each of the foregoing points in the order listed above.

Attention is focused first on the question of whether Lowe had a permanent full-time position with the District for the 1993-94 school year. While Lowe testified at the hearing that she thought she had been given a permanent full-time position for the entire school year, I find there is nothing in the record which justifies such an expectation. In point of fact, both Tierney and the Board indicated by their words and actions that Lowe's full-time status was not permanent. First, Tierney never told Lowe that her full-time status was permanent. Instead, when Tierney asked Lowe to start the school year working full time, she then went on to say that the Board would review the matter in a month and decide whether the kindergarten enrollment warranted a full-time position. Tierney also told Compton, the kindergarten teacher, the same thing. This statement put Lowe on notice that while she might work full time for the school year, it was not an absolute certainty yet because the Board had not made a final decision. Second, the Board's formal actions here did not assure Lowe of permanent full-time status. When the Board addressed the instant matter at its August, 1993 meeting, the motion that was passed provided that Lowe would be full time "until the next meeting." If the Board's motion had not included the phrase "until the next meeting," no limitation would have been imposed on Lowe's full-time status. Thus, she would have been full time for the entire 1993-94 school year. However, the fact of the matter is that the motion imposed a limitation on Lowe's full-time status, and the limitation was that Lowe was (just) full time "until the next meeting." By adding this proviso, the Board indicated it would revisit Lowe's status at its next meeting which, as it turned out, is exactly what happened. Like Tierney then, the Board did not assure Lowe of permanent full-time status. Third, Lowe did not receive anything in writing from the District, such as an individual employment contract, which specified full-time employment for the entire 1993-94 school year. Consequently, it is held that Lowe was not given a permanent full-time position with the District for the 1993-94 school year.

Since Lowe was not given a permanent position, what type of position was she given? In labor relations, positions are traditionally referred to as being either permanent or temporary. The Association notes correctly that neither Tierney nor the Board ever described Lowe's full-time position as being "temporary." Be that as it may, a position which is not permanent falls, by necessity, into the other category (i.e. temporary). Inasmuch as the full-time position which Lowe filled at the start of the 1993-94 school year was not permanent, it stands to reason that it must have been temporary in nature.

That said, this leaves the question of whether it was the employe or the assignment which was temporary here. Specifically, was Lowe a temporary employe or was she in a temporary assignment? I find it was the latter rather than the former. In so finding, the undersigned rejects

the Employer's "temporary employe" theory. Under this theory, Lowe was, or somehow became, a temporary employe when she filled the temporary full-time assignment at the start of the 1993-94 school year, and as a temporary employe was excluded from the bargaining unit via the Recognition clause (Article I). Suffice it to say that I find this argument unpersuasive. The Employer is hard pressed to claim that Lowe was a temporary employe in August, 1993, when she is listed by name in the costing figures contained at the end of the parties' 1992-95 collective bargaining agreement. Rhetorically speaking, why would the parties list a temporary employe

in their contractual costing figures when those figures cover just bargaining unit employes? Her listing therein conclusively establishes that she was not a temporary employe. It is therefore concluded that it was the assignment that was temporary here, and not the employe.

Having so found, the focus turns to whether the Employer was empowered to make such an assignment (i.e. a temporary assignment). A review of the contract indicates it does not address whether the Employer can make temporary assignments. Thus, the parties have not included language in their present agreement covering this situation. In the absence of any contractual prohibition against making temporary assignments, the Employer has the authority under the Management Rights clause (Article II) to make them. Applying this principle to the facts involved here means that Lowe's temporary assignment to work full time did not violate the contract.

Next, attention is turned to the Board's decision to employ two part-time kindergarten aides rather than one full-time aide. It is noted at the outset of this discussion that it is an accepted arbitral principle that management has the right to create new jobs except as restricted by the contract. The contract involved here does not limit or restrict the Employer's ability to create new jobs and/or positions. To the contrary, it authorizes same in the Management Rights clause. This clause is broad enough to give the Employer the right to create new jobs and/or positions. That is exactly what happened here. The Board decided that due to rising enrollment in the kindergarten, the existing part-time aide position did not satisfy its staffing needs. As previously noted, it initially decided to have Lowe temporarily work full time. A month later it decided to employ two part-time kindergarten aides rather than one full-time kindergarten aide. There is nothing in the contract that precludes the Employer from making either of these decisions. That being the case, the Employer did not violate the contract by creating two part-time kindergarten aide positions rather than one full-time position.

The Board's decision to create two part-time aide positions had the practical effect though of cutting Lowe from full-time employment to half-time. From Lowe's perspective, this was a partial layoff. However, it was not a partial layoff covered by Article VII, A. This is because when that section refers to a layoff or a partial layoff from a "position," it is referring to a permanent position. As previously noted, Lowe did not hold a permanent position when she was cut back so that section is inapplicable. Certainly if Lowe had held a permanent full-time position when she was cut back to half time, this would have been a partial layoff covered by Article VII, A. However, since she did not hold a permanent position at the time, her partial layoff was not covered by, or subject to, Article VII, A. Since that section is inapplicable here, it stands to reason that the Employer did not violate same.

Next, attention is turned to the posting involved here. After the Board decided to have two part-time kindergarten aides, it gave one position to Lowe and posted the other internally. The Association does not challenge either of these actions. Instead, it objects to what happened after the position was posted. What happened was that when Lowe asked Tierney if she should apply

for the posted half-time position, Tierney replied that if she did she (Lowe) would not get it because she was already employed by the District. According to the Association, Tierney's statement dissuaded Lowe from signing the posting. In the opinion of the undersigned, it does not matter if Tierney's statement had that affect because even if Lowe had signed the posting and been the only bidder, she would not have gotten it. The reason is obvious--if Lowe got the posted position, this would have changed her from part-time into full-time. The Board previously decided it did not want a full-time kindergarten aide. Employes are not empowered to change their job status from part-time to full-time on their own motion, and that in effect is what would have happened if Lowe had bid for and gotten the other part-time position. Under these circumstances then, it is held that Tierney's statement to Lowe regarding the posting is of no consequence herein.

The final matter which the parties addressed was the District's hiring of Fosler to fill the vacant part-time aide position. The record indicates that the District hired Fosler off the street for the vacant part-time aide position after no existing employes posted for it. Such was their right. The District is certainly empowered to hire people off the street to fill vacancies when there are no internal applicants. Since the District has the right to hire, Fosler's hiring need not be reviewed by the undersigned. It is therefore held that Fosler's hiring did not violate the contract. Moreover, while the parties argued extensively about the relative qualifications of Fosler and Lowe, the undersigned sees no need to comment on same given this holding. Thus, no opinion is offered on the relative qualifications of Fosler and Lowe.

To summarize, the following findings have been made. First, Lowe did not have a permanent full-time position with the District for the 1993-94 school year. Rather, she had a temporary assignment to work full time. Second, after the Board decided to create two part-time aide positions and placed Lowe in one of them, her partial layoff was not covered by Article VII, A because she did not fill a permanent position. Third, after the District posted the vacant part-time aide position, it does not matter if Lowe was denied access to the posted position because had Lowe bid for and gotten the position, this would have made her full time. The Board did not want a full-time kindergarten aide. Finally, with regard to the hiring of Fosler for the vacant part-time aide position, it is held that her hiring did not constitute a contract violation. Overall then, none of the Employer's actions herein violated the collective bargaining agreement.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

None of the Employer's actions herein violated the collective bargaining agreement. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 25th day of January, 1995.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator