

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

ADAMS-FRIENDSHIP SCHOOL DISTRICT

and

LOCAL 2165, AFSCME, AFL-CIO (SUPPORT
STAFF)

Case 36
No. 52445
MA-8972

Appearances:

Mr. Michael J. Julka, Lathrop & Clark, 122 West Washington Avenue, Suite 1000,
P.O. Box 1507, Madison, Wisconsin 53701-1507, on behalf of the District.

Mr. Philip Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO,
7111 Wall Street, Schofield, Wisconsin 54476, on behalf of Local 2165.

ARBITRATION AWARD

According to the terms of the 1994-96 collective bargaining agreement between Adams-Friendship Area Schools (hereafter District) and Local 2165, AFSCME, AFL-CIO (Support Staff) (hereafter Union), the parties requested that the Wisconsin Employment Relations Commission appoint an impartial arbitrator to hear and resolve the dispute between them regarding the proper pay level for Grievant Rita Zietlow beginning with the 1994-95 school year. The Commission appointed Sharon A. Gallagher, a member of its staff, to hear and resolve this dispute. A hearing was held on August 15, 1995 at Adams, Wisconsin. No stenographic transcript of the proceedings was made. The parties agreed to submit their initial briefs postmarked to the undersigned by October 13, 1995. The parties reserved the right to file reply briefs and they did so by November 1, 1995. The record was thereupon closed.

Issues:

The parties were unable to stipulate to the issues to be determined in this case. The Union suggested the following issues for determination:

Did the Employer violate the collective bargaining agreement by placing promoted employe Rita Zietlow at the start rate rather than the eight-year pay step after her promotion? If so, what is the proper remedy?

The Employer suggested the following issues in this case:

Did the District violate the 1994-95 collective bargaining agreement when the Grievant was transferred from a part-time position to a full-time position, by paying her at the start rate for calendar year employes on Appendix A? If so, what is the appropriate remedy?

The parties agreed that the undersigned could frame the issues based upon the relevant evidence and argument in this case. Based upon the relevant evidence and argument in this case, I find that the issues that should be determined herein are as follows:

Did the District violate the 1994-96 collective bargaining agreement when it paid Rita Zietlow at the start rate after she successfully posted for a Calendar Year Secretary I position in the 1994-95 school year? If so, what is the proper remedy?

Relevant Contract Provisions:

ARTICLE IX - SENIORITY

9.01 It is understood and agreed that the rules of seniority shall prevail. There shall be three (3) seniority lists for employees covered by Local 2165:

- A. Bus Department
- B. Custodial, Maintenance, Mechanic, Secretarial (Calendar Year)
- C. Cook, Secretarial, Teacher Assistant (School Term)

...

9.06 Seniority is gained in employment of Adams-Friendship Area Schools in the department named in 9.01 (a), (b), and (c) and does not warrant the employee a guarantee of moving from one position to another, unless qualified for such open position. Employees shall be entitled to post for new or vacated positions within the bargaining units represented by Local 2165 before they are open to the public. Employees who move from one department to another shall not retain their seniority earned in the previous department. However, employees will be permitted to carry over all accumulated benefits in their credit.

APPENDIX A

1.01A The Wage Classification Schedule and rates
of pay for employees covered by this Agreement, effective July 1,
1994, are as follows:

1994-1995

	<u>Start</u>	<u>60 Days</u>	<u>1 Year</u>	<u>4 Years</u>	<u>8 Years</u>	<u>12 Years</u>	<u>16 Years</u>	<u>20 Years</u>	<u>24 Years</u>
SCHOOL TERM EMPLOYEES									
A. Cooks Helper (Hired before 7/1/94)	7.18	7.57	7.87	7.92	7.98	8.03	8.08	8.14	8.19
Helper (Hired after 7/1/94)	5.18	5.57	5.87	5.92	5.98	6.03	6.08	6.14	6.19
B. Cook I (Hired before 7/1/94)	8.41	8.66	9.15	9.20	9.26	9.32	9.37	9.42	9.47
Cook I (Hired after 7/1/94)	6.41	6.66	7.15	7.20	7.26	7.32	7.37	7.42	7.47
C. Cook Manager (Hired before 7/1/94)	8.54	8.77	9.25	9.30	9.36	9.41	9.47	9.52	9.57
Cook Manager (Hired after 7/1/94)	6.54	6.77	7.25	7.30	7.36	7.41	7.47	7.52	7.57
D. Custodian II	8.53	8.77	9.25	9.30	9.36	9.41	9.47	9.52	9.57
E. Clerk Typist II	7.08	7.46	7.97	8.02	8.07	8.12	8.19	8.24	8.29
F. Secretary II	7.70	8.08	8.57	8.63	8.68	8.74	8.79	8.85	8.90
G. Secretarial Assistant	7.70	8.08	8.57	8.63	8.68	8.74	8.79	8.85	8.90
H. Library Secretary	7.55	7.94	8.37	8.42	8.48	8.53	8.59	8.64	8.69
I. Teacher Assistant	7.48	7.87	8.31	8.37	8.42	8.48	8.53	8.59	8.64
CALENDAR YEAR EMPLOYEES									
J. Custodian I	8.87	9.11	9.90	9.96	10.01	10.06	10.12	10.17	10.23
K. Vehicle Mech I	11.32	11.61	12.35	12.40	12.46	12.51	12.56	12.62	
12.67									
L. Vehicle Mech II	10.99	11.23	12.02	12.07	12.12	12.17	12.23	12.29	
12.34									
M. Maintenance I	10.19	10.45	11.20	11.25	11.30	11.35	11.42	11.47	11.52
N. Maintenance II	9.89	10.16	10.93	10.99	11.04	11.10	11.15	11.21	11.26
O. Secretary I	8.87	9.11	9.90	9.96	10.01	10.06	10.12	10.17	10.23

1995-1996

	<u>Start</u>	<u>60 Days</u>	<u>1 Year</u>	<u>4 Years</u>	<u>8 Years</u>	<u>12 Years</u>	<u>16 Years</u>	<u>20 Years</u>	<u>24 Years</u>
SCHOOL TERM EMPLOYEES									
A. Cooks Helper (Hired before 7/1/94)	7.43	7.83	8.15	8.20	8.26	8.31	8.36	8.42	8.48
Cooks Helper (Hired after 7/1/94)	5.43	5.83	6.15	6.20	6.26	6.31	6.36	6.42	6.48
B. Cook I (Hired before 7/1/94)	8.70	8.96	9.47	9.52	9.58	9.65	9.70	9.75	9.80
Cook I (Hired after 7/1/94)	6.70	6.96	7.47	7.52	7.58	7.65	7.70	7.75	7.80
C. Cook Manager (Hired before 7/1/94)	8.83	9.08	9.57	9.63	9.69	9.74	9.80	9.85	9.90
Cook Manager (Hired after 7/1/94)	6.83	7.08	7.57	7.63	7.69	7.74	7.80	7.85	7.90
D. Custodian II	8.83	9.08	9.57	9.63	9.69	9.74	9.80	9.85	9.90
E. Clerk Typist II	7.33	7.72	8.25	8.30	8.35	8.40	8.48	8.53	8.58

F. Secretary II	7.97	8.36	8.87	8.93	8.98	9.05	9.10	9.16	9.21
G. Secretarial Assistant	7.97	8.36	8.87	8.93	8.98	9.05	9.10	9.16	9.21
H. Library Secretary	7.81	8.22	8.66	8.71	8.78	8.83	8.89	8.94	8.99
I. Teacher Assistant	7.74	8.15	8.60	8.66	8.71	8.78	8.83	8.89	8.94

CALENDAR YEAR EMPLOYEES

J. Custodian I	9.18	9.43	10.25	10.31	10.36	10.41	10.47	10.53	10.59
K. Vehicle Mech I	11.72	12.02	12.78	12.83	12.90	12.95	13.00	13.06	13.11
L. Vehicle Mech II	11.37	11.62	12.44	12.49	12.54	12.60	12.66	12.72	12.77
M. Maintenance I	10.55	10.82	11.59	11.64	11.70	11.75	11.82	11.87	11.92
N. Maintenance II	10.24	10.52	11.31	11.37	11.43	11.49	11.54	11.60	11.65
O. Secretary I	9.18	9.43	10.25	10.31	10.36	10.41	10.47	10.53	10.59

...

BACKGROUND:

The parties have had a collective bargaining relationship since the 1970's. The parties' collective bargaining agreement covering the years 1976-77 included language in Article IX - SENIORITY which was different from the Seniority language contained in Article IX of the effective labor agreement. The relevant language in the 1976-77 contract read as follows:

ARTICLE - SENIORITY

9.01 It is understood and agreed that the rules of seniority shall prevail.

...

9.02 Seniority shall consist of the total calendar time elapsed since the date of original employment with the Adams-Friendship Area Schools, provided, however, that no time prior to a discharge for cause or a quit shall be included, and provided that seniority shall not be diminished by temporary layoff or leaves of absence of less than one (1) year duration. To retain seniority upon recall from layoff, an employee must notify the Employer within five (5) work days of his intention to return and must report for work within an additional ten (10) work days.

...

9.06 Seniority is gained in a particular category of employment and does not warrant the employee a guarantee of moving from one department to another, unless qualified for such position. Unit employees shall be entitled to post for new or vacated positions within the bargaining unit before they are opened to the public.

Significantly, the 1976-77 agreement did not delineate the "departments" in the District.

The 1977-78 collective bargaining agreement between the parties did not provide for any changes in Section 9.01. The parties, however, made significant changes in Sections 9.02

and 9.06 in this agreement, as follows:

9.02 Seniority shall consist of the total calendar time elapsed since the date of original employment with the Adams-Friendship Area Schools (July 1, 1959), in the department named below; provided, however, that no time prior to a discharge for cause or a quit shall be included; and provided that seniority shall not be diminished by temporary layoff or leaves of absence of less than one (1) year duration. To retain seniority upon recall from layoff, an employee must notify the Employer within five (5) work days of his intention to return and must report for work within an additional ten (10) work days.

- (a) Bus Department
- (b) Custodial, Maintenance, Clerical & Food Service Department

. . .

9.06 Seniority is gained in employment of Adams-Friendship Area Schools in the Department named in 9.02 (a) and (b) and does not warrant the employee a guarantee of moving from one position to another, unless qualified for such open position. Employees shall be entitled to post for new or vacated positions within the bargaining units represented by Local 2165 before they are open to the public. Employees who move from one department to another shall not retain their seniority earned in the previous department; provided, however, employees will be permitted to carry over all accumulated sick leave in their credit.

The Union proposed the changes made (above) in Section 9.06 and the Board of Education agreed. The Union's reason for the proposed change was to develop separate seniority lists so that employees would not retain their prior seniority after a transfer from one department to another. No discussion occurred regarding what if any affect the quoted change in 9.06 would have on an employee's pay rate following a transfer.

In the 1982-83 collective bargaining agreement, the parties made additional changes in Article IX - Seniority, at the Union's request, as follows:

9.01 It is understood and agreed that the rules of seniority shall prevail. There shall be three (3) seniority lists for employees covered by Local 2165:

- A) Bus Department;
- B) Custodial, Maintenance, Clerical (Full-time);

C) Food Service, Clerical, Aides (Part-time).

9.02 In the event of a reduction in the working force or the deletion of a position from the table of organization, the employee(s) with the most seniority from within the respective seniority list shall be allowed to bump a less senior employee, within said list, provided he/she is qualified to perform the available work. This bumping process shall continue until the proper amount of employees to be laid off is achieved. The last person laid off shall be recalled, within their respective lists, provided he/she is qualified to perform the available work. No new employee shall be hired until all laid off employees, who wish employment and are available, have been called back to work.

9.03 Seniority shall consist of the total calendar time elapsed since the date of original employment with the Adams-Friendship Area Schools (July 1, 1959), in the department named above; provided, however, that no time prior to a discharge for cause or a quit shall be included; and provided that seniority shall not be diminished by temporary layoff or leaves of absence of less than one (1) year duration. To retain seniority upon recall from layoff, and employee must notify the Employer within five (5) work days of his/her intention to return and must report for work within an additional ten (10) work days.

. . .

9.07 Seniority is gained in employment of Adams-Friendship Area Schools in the Department named in 9.01 (a), (b) (sic) and does not warrant the employee a guarantee of moving from one position to another, unless qualified for such open position. Employees shall be entitled to post for new or vacated positions within the bargaining units represented by Local 2165 before they are open to the public. Employees who move from one department to another shall not retain their seniority earned in the previous department; provided, however, employees will be permitted to carry over all accumulated benefits in their credit.

The Board understood that by making the above changes in Article IX, it was agreeing to separate seniority lists for Calendar Year employees, School Term employees and Bus Department employees. Again, the parties never discussed what if any affect these changes would have upon transferred employees' pay rates.

Beginning on July 1, 1989, Appendix A of the then-effective labor agreement listed the part-time and full-time job classifications (with a start rate for each and seven pay steps thereafter, covering up to step 20 years), as follows:

PART-TIME EMPLOYEES

- A. Cooks Helper
- B. Cook I

- C. Cook Manager
- D. Custodian II
- E. Clerk Typist II
- F. Secretary II
- G. Guidance Aide
- H. Library Aide
- I. Teacher Aide

FULL-TIME EMPLOYEES

- J. Custodian I
- K. Vehicle Mechanic I
- L. Vehicle Mechanic II
- M. Maintenance I
- N. Maintenance II
- O. Secretary I
- P. Secretary II
(Admn. Office)

The record showed that in June, 1982, Jim McMillion transferred from a part-time teacher aide position (which he had held since March, 1981) to a full-time custodial position. McMillion thereupon lost the more than one year's part-time seniority he had earned and was placed at entry level pay for the new position. McMillion did not file a grievance over his loss of seniority or his placement on the pay schedule after his transfer.

The parties offered evidence regarding another situation which occurred during negotiations to a successor agreement to the 1982-83 contract, concerning then part-time employe Linda Phillips, whose position was entirely Federally funded. The Board wished to transfer Phillips to a full-time position in order to better meet Federal mandates. The Union raised the question what Phillips' seniority and her pay rate would be after the transfer. The Board initially took the position that Phillips would lose her part-time seniority and be moved back to the entry level step for the new position. The Union resisted this and the issue of Phillips' placement held up the agreement between the parties to a successor contract. The parties ultimately agreed to the following settlement, confirmed in writing on November 18, 1985 by then-Union Representative Cindy Fenton, as follows:

. . .

It is my understanding that Ms. Phillips will be treated in the following manner.

1. She will be the least senior person on the full-time seniority list.
2. She will retain her status on the part-time seniority list.
3. Placement of Ms. Phillips on the salary schedule as a Secretary II with eight or more years of seniority.

If the above is not accurate, please advise.

We further talked about both party's (sic) willingness to sit and discuss the current seniority provision contained in the contract between the District and Local 2165. I believe it would be possible to simplify the current contractual language with advantages to both sides. My current schedule does not permit any discussion at this point; however, starting about the end of January or the middle of February, I would be more than happy to sit down and try to simplify the seniority provision of the current contract.

. . .

Significantly, the parties never engaged in any negotiations regarding the seniority provision of the then-effective contract after Ms. Fenton sent her November 18, 1985 letter.

Finally, the evidence showed that in September, 1992 part-time secretary Ros Fairfield transferred to a full-time custodial position, at which time she lost approximately 13 years of part-time seniority and was placed at the entry level for pay purposes of her new position. Ms. Fairfield did not file a grievance regarding her seniority or pay treatment following her transfer.

The parties strongly disagreed regarding the value of these past transfer situations, each arguing that the Phillips case supported their arguments herein. In addition, the District offered seven further examples of Bus Driver employees transferring from their separate bargaining unit into full-time support unit custodial or full-time support unit secretarial positions. The District indicated that in each bus driver situation which occurred from 1977 through 1992, the bus drivers lost their bus driver seniority and were placed at the entry pay level for their new full-time positions, in accord with the District's prior procedures in all cases except the Phillips case.

FACTS:

Rita Zietlow, the Grievant, has worked for the District for the past ten years. Zietlow was initially hired as a School Term EEN Aide (Teacher's Aide). Zietlow then moved into a School Term secretarial position (Secretary II), approximately one and one-half or two years after her hire. As a School Term Secretary II, Zietlow retained her "part-time" seniority and benefits after this transfer.

Zietlow served as Union Steward for several years and at the time of the instant hearing she was Secretary of the Union. Zietlow stated that as Union Secretary, she attended negotiations for the 1993-95 labor agreement. During negotiations, the District stated that it wished to add new duties to make Zietlow's School Term Secretary II position to make it a full-time Calendar Year position. Zietlow stated that the Union requested that her position as a school term Secretary II be eliminated and that a calendar year Secretary I position be created (to be paid on the same pay

schedule as the Secretary II position had been) to replace the Secretary II position. The District agreed to the Union's suggestion. It should be noted that no promise was made to Zietlow that she would necessarily receive the position, and no mention was made at negotiations regarding the rate of pay that the successful candidate for the new calendar year Secretary I position could expect to earn. Zietlow recalled that District Administrator Beaver told her at negotiations that a successful internal candidate would go to the bottom of the full-time department seniority list. Union Representative Wickland stated that he recalled that the District representatives indicated that the successful candidate would be placed in the new Secretary I position at Step 0. 1/ After the District created the Calendar Year Secretary I position, the District deleted Zietlow's former position (School Term Secretary II) from its table of organization, pursuant to its agreement with the Union.

On August 19, 1994 the District issued the following posting for the Secretary I job to all bargaining unit members:

. . .

Secretary I (full-time position)

Rate of Pay: Per contract

Location: Adams-Friendship High School
(Guidance Department and High School Office)

Hours: Per contract

Special Qualifications: Typing test required

Detailed job description is available at the Administration Office. If you have any questions, please contact me.

Applications will be accepted by the Business Manager until 3:30 p.m., September 2, 1994.

. . .

Zietlow was the only unit member who applied for the new Secretary I position. She received the position after going through the District's normal hiring process. Zietlow began working in the Secretary I position on September 2, 1994. After Zietlow received the Secretary I position,

1/ During negotiations for the 1993-95 labor agreement, for clarification purposes, the parties agreed to change Appendix A and list the categories of Wage Classifications for positions from "Full-time" and "Part-time" to "Calendar Year" and "School Term".

Zietlow continued to perform the duties she had formerly done as a School Term Secretary II, but she was also assigned new duties (as a Calendar Year Secretary I) which she had never performed previously as a Secretary II. 2/

Due to an "error" admittedly made by District Bookkeeper Mary Putnam, Zietlow was paid at the eight year rate for a Secretary I from September 3, 1994 through November 11, 1994. In November, 1994 Ms. Putnam (the District's Bookkeeper for 20 years) issued a memo to District Administrator Beaver upon discovering her error. That memo read in relevant part as follows:

. . .

In checking the last payroll, I discovered that I had Rita in the wrong step for her wages. She should have been at the starting rate, not the 8 year level.

Below is how I figured the correction:

Starting Date 9/3/94 with 60 day increase at 11/3/94 I paid her 400 hours x 10.01 \$4004.00

9/15-10/28 should have been	8.87/hr	2838.40-
10/31-11/2	8.87/hr	212.88-
11/3-11/4	9.11/hr	145.76-
11/7-11/11	9.11/hr	364.40-
		\$3561.44-
Owed to District		442.56

I will change the hourly rate for the next payroll. Please see how she would like to pay this back. I hesitate to take it out all at once.

. . .

After receiving a copy of this memo, Zietlow filed the instant grievance. 3/

2/ Prior to her receipt of the full-time Secretary I position, Zietlow had worked for about eight years as a School Term Secretary II, performing duties for the guidance counselor, doing attendance and providing relief for High School office staff.

3/ There is no dispute regarding the accuracy of the \$442.56 figure, assuming the undersigned finds in favor of the District that an overpayment has been made that should be reimbursed to the District.

BRIEFS:

Union:

The Union urged that the relevant contract language is clear and unambiguous. The Union contended that the term "seniority", as used in Section 9.06, is not synonymous with the length of service wage assignments contained in Appendix A of the labor agreement. The Union observed that, in general, the seniority concept is used to describe and guaranty employe rights, but that seniority does not refer to wages. The Union noted that the concept of length of service increases in wages is a concept distinct and separate from seniority, as evidenced by the

existence of Appendix A in the labor agreement. In the Union's view, the provision that employes who move from one department to another are permitted to carry over "all accumulated benefits in their credit" means that employes should carry over their length of service wage assignments as a part of these accumulated benefits.

The Union argued that the evidence proffered by the District regarding past practice is either actually inconclusive or supports the Union's arguments, not the District's arguments on this point. In this regard, the Union noted that in seven out of ten past cases cited by the District, bus driver employes (members of a separate bargaining unit) moved to positions in the support staff bargaining unit. The Union urged that former bus drivers (who are not hourly paid) could not logically move into a position in the Support Staff bargaining unit at any other than the "start rate" for the position. In addition, the Union asserted, Article 12.03 of the Support Staff contract specifically states that bus drivers are to receive the Appendix A start rate if they move to a support staff position. Of the remaining three examples, the Union urged, one involved employe McMillion who had only about one year's seniority at the time of his transfer so that he was likely to have been unaware of any loss of length of service wage assignment. Finally, the example of Ros Fairfield was an aberration, according to the Union, and in any event, the Union had been unaware of the Fairfield and McMillion situations.

Furthermore, the past treatment of Linda Phillips, the Union contended, supports the Union's arguments in this case because the parties agreed that Phillips, upon moving from a part-time to a full-time Support Staff position, should retain her seniority and her length of service wage assignment. The Union observed that no evidence was proffered to show that the parties intended the agreement regarding Phillips to be non-precedential. The Union also asserted that Bookkeeper Putnam's initial, common sense action to pay the Grievant according to her length of service in the District was the correct one. The Union therefore sought an award sustaining the grievance and making the Grievant whole.

District:

The District argued that Section 9.06 of the labor agreement applies to the Grievant's transfer, as Zietlow moved from one bargaining unit department to another by her selection for the Calendar Year Secretary I position at the High School. The District further asserted that the history of collective bargaining shows that the parties, at the Union's suggestions, intended to cut off all seniority rights including length of service wage assignments, by their division of employees into three departments (Bus Drivers, School Term and Calendar Year) and by the language of Section 9.06. In addition, in the District's view, the evidence showed that District Bookkeeper Putnam consistently included wages in the concept of seniority so that all employees who transferred departments were placed at the "start rate" for the new position they gained.

In regard to the treatment of Linda Phillips, the District argued that the Phillips case supports the District's arguments herein. The District observed that the Union's insistence that Phillips retain both her seniority and length of service wage assignment proves that the Union then knew that Section 9.06 would not support such an interpretation. The letter confirming settlement from Union Representative Fenton also contained language tying placement on the wage schedule to seniority.

The District argued that even if Section 9.06 were found to be ambiguous or silent on the disputed points in this case, the evidence of past practice demonstrates that since at least the 1970's, all employees who have transferred to a different department have been moved back to the "start rate" for their new positions. The District also argued that past practice would require the Grievant to repay the District \$442.56, the amount the District overpaid the Grievant by mistake. The District noted, in addition, that Calendar Year employees receive greater benefits than School Term employees (greater health insurance family coverage, more paid holidays, vacation, and sick days). In this case, Zietlow also received an increase in her hourly rate at the time of her transfer (from \$8.68 to \$8.87) and the possibility of higher wages on the Calendar Year Department pay scale in the future.

In all the circumstances of this case, the District sought denial and dismissal of the grievance and an order requiring Zietlow to pay the District \$442.56.

Reply Briefs:

Union:

The Union asserted that Section 9.06 of the labor agreement clearly applies only to seniority issues, not to wages. Likewise, in the Union's view, Appendix A also clearly applies only to wages, making this case a simple one in which the grievance must be sustained. Nonetheless, the Union urged that even if Section 9.06 were applicable to wages, Section 9.06 states that employees should be "permitted to carry over all accumulated benefits in their credit" upon their transfer, so that transferred employees must be given credit for their accumulated length of service for wage

purposes, despite the District's claims to the contrary.

The Union contended that the District's argument that past practice should apply because the contract is silent or ambiguous regarding pay rates of transferred employees is belied by the clear terms of the contract. The Union noted that the contract is not silent regarding rates of pay based on service time and that length of service and seniority are distinct but potentially overlapping concepts. In the Union's view, the fact that ten years ago Union Representative Fenton incorrectly used the word "seniority" rather than "length of service" in her confirming letter to the District regarding the Phillips settlement, does not require denial of the grievance.

The Union also argued that the evidence of past practice proffered by the District did not establish a true past practice. The Union urged that the prior transfers of bus drivers, members of a different bargaining unit, are not relevant to this case and that a few internal unit transfers had such a negligible impact on the employees' wages (due to their low length of service at the time of transfer) that they were apparently overlooked by both the employees and the Union. Furthermore, the Union asserted, the Phillips case, the only relevant past practice instance shown here, actually supports the Union's view of this case and demonstrates the harshness and absurdity of placing employees who transfer departments at the "start rate". The Union contended that its reasonable interpretation of the contract should be applied over the District's unreasonable, harsh and absurd interpretation. The Union therefore sought an award sustaining the grievance.

District:

The District urged that the Union mischaracterized certain facts in its initial brief. First, the District observed that contrary to the Union's assertions, the parties stipulated that Zietlow was assigned new duties following her transfer and that she was treated as a new hire when she posted and applied for the Secretary I position. In addition, the District noted that the evidence failed to support the Union's contention that this grievance occurred and was exacerbated because of Bookkeeper Putman's independent interpretation and application of the collective bargaining agreement.

The District asserted that the length of service columns in Appendix A only address when employees will receive raises; that the contract is silent on the issue at hand -- how employees should be paid after they transfer from one department to another; and the fact that the parties have listed School Term employe classifications separately from Calendar Year employe classifications, serves only to reinforce the distinctions between these departments. The District also urged that the Union's initial arguments that "seniority" and "length of service" do not reference each other, ignore the parties' expressed intent to link them in Section 9.06, as supported by the instances of past practice proffered by the District.

The case of Linda Phillips, in the District's view, strongly supports the conclusion that the Union negotiated for better treatment for Ms. Phillips, realizing that the contract language was to

the contrary. Union Representative Fenton's reference to Phillips being given a Secretary II position with "eight or more years of seniority" and Fenton's request to bargain regarding "seniority" in the future, demonstrated the Union's acknowledgement and acceptance of the District's prior interpretation of the agreement. Finally, the fact that the Phillips settlement was never made a part of the 1985-86 agreement, that the Union never thereafter requested to bargain regarding seniority and the fact that the agreement itself continued to be silent on the subject, showed that no precedent between the parties was intended by the Phillips settlement.

In the District's opinion, the fact that the last sentence of Section 9.06 fails to reference wages requires a conclusion that the labor agreement is silent and therefore ambiguous on this subject. The District attached documents to its reply brief which were not offered or admitted at the hearing herein regarding past Bus Driver unit contract language. 4/ The District argued that the past treatment of Bus Drivers (who are listed as a separate department in the Support Staff contract) who have transferred into a department in the Support Staff unit are fully applicable to this case.

The District contended that the Union's claims that it was unaware of the District's treatment of employees Fairfield and McMillion, should be given little weight. The District observed that McMillion had lost more than one year of part-time or School Term seniority and that he would have lost two steps on the salary schedule when he transferred into the calendar year custodial position in 1982. Thus, in the District's view, the Union engaged in mere speculation when it asserted McMillion would not have noticed a loss of pay status at the time of his transfer.

In regard to the Linda Phillips situation, the District argued that that case was unique by the terms of the settlement, and the Union's failure to follow up and request further negotiations, demonstrated that the parties intended the Phillips case to have no precedential value. Rather, in the District's view, the facts of the Phillips transfer wholly supported the District's past practice evidence and its interpretation of Section 9.06.

Discussion:

The starting point in this case is Section 9.06 of the contract. There is no reference in this section of the effective labor agreement to what rate of pay should be applied to an employee who successfully transfers "from one department to another". However, Section 9.06 clearly states that such transferred employees "shall not retain their seniority earned in the previous department" but they "will be permitted to carry over all accumulated benefits in their credit." The Union has argued that the phrase "all accumulated benefits" must include the transferred employees' length of

4/ These documents, offered after the close of the hearing concerning which the Union had no right to confront District witnesses or to argue thereon in any of its briefs, are hereby rejected and have not been considered in reaching this Award.

service wage assignments. In my view, the quoted language simply fails to support such an argument. On this point, I note that in labor relations, wage assignments are not generally considered synonymous with accumulated and credited benefits. If the parties had intended to include length of service wage assignments among accumulated benefits, they could easily have drafted language to cover that intention. They did not do so. In addition, in my opinion, the reference to loss of seniority in Section 9.06 also fails to specifically cover the pay situation of a transferred employee. Hence, I find that Section 9.06 of the contract is silent regarding the proper pay rate to be accorded to an employee who transfers from one department to another.

The question then arises whether Appendix A and/or Section 9.01 provide any guidance to determine the substantive issues in this case. In this regard, I note that Section 9.01 clearly provides for three separate seniority lists covering three separate departments: Bus Department, Calendar Year Department, and School Term Department. Appendix A carries on this departmental structure, listing wages for each classification covered by the Support Staff contract under either the heading "School Term employees" or "Calendar Year employees". Furthermore, the contract contains a step pay system for each classification, beginning with a "start" step and ending eight steps later, with a "twenty-four year" step. Thus, nothing in Appendix A specifically delineates how an employee who transfers from department to department should be paid after their transfers. Rather, Appendix A merely provides for a timeframe when employees can expect to receive increases once they are in a particular classification. Similarly, Section 9.01 is of no real help in determining the issues herein. That section simply lists the three departments, consistent with Section 9.06 and Appendix A.

Thus, given the silence of the labor agreement, evidence of past practice and bargaining history is relevant and admissible in this case to fill in the gaps in the labor agreement. In regard to bargaining history, the record demonstrated that the parties have never discussed the issue presented by this case during many years of collective bargaining negotiations. In regard to past practice, I note that the parties disputed not only the situations that should constitute the parties' past practice, but also the value and interpretation that these situations should be given.

The District offered evidence regarding the transfer of seven Bus Drivers (from 1977 through 1992) into Support Staff unit Calendar Year Custodial or Secretary positions. For the following reasons, I find these situations irrelevant to this case. First, the Bus Drivers have constituted a separate bargaining unit represented by a separate AFSCME Local in the District for many years. Here, the Grievant has been and is now a member of the support staff unit. The Bus Driver local union did not appear in this case. The parties failed to clearly demonstrate the content of past Bus Driver labor agreements and how those agreements have been administered to show a link between the Bus Driver situations and those involving Support Staff unit members who have transferred from one department to another.

There remain three instances relating to employees who transferred from one department to another within the Support Staff unit: Linda Phillips, Ros Fairfield and Jim McMillion. The

evidence showed that the District put Fairfield and McMillion at the "start" rate in their new custodial Calendar Year positions, that McMillion (who transferred in June, 1982) lost over one year's School Term department seniority when he transferred and that Fairfield (who transferred in September, 1992) lost almost thirteen years' School Term department seniority when she transferred. As noted above, no grievances were filed by either of these individuals or the Union regarding their treatment following their transfers.

The Union has argued that it was unaware of the fact that McMillion and Fairfield were placed at the "start" rate following their transfers. The record does not contain any evidence regarding what that "start" rate was for the positions into which Fairfield and McMillion transferred or what hourly pay rate Fairfield and McMillion had received before their transfers, for an appropriate comparison. Nor does the record contain any evidence that the Union was ever made aware of the consequences of the transfers of McMillion and Fairfield. Thus, although the situations constitute a part of the history of employe treatment by the District, it would be unfair in these circumstances to find that the Fairfield and McMillion cases constitute a part of a true past practice, as the elements of knowledge and mutuality are missing.

However the Linda Phillips situation was well known to the Union. It concerned Phillips' transfer from a part-time (or School Term) secretarial position to a full-time (Calendar Year) secretarial position. The dispute over Phillips' pay and seniority following her transfer, held up the contract settlement between the parties reached in 1985. The Phillips dispute was the subject of Union Representative Fenton's November 18, 1985 settlement letter (quoted above). As a result of the Phillips settlement, Phillips was placed at the eight year pay step in her new position and she was retained on the part-time (School Term) seniority list and also listed on the full-time (Calendar Year) seniority list, becoming the only District employe to ever be listed on both of these seniority lists.

The terms of the Phillips settlement agreement are significant in my view. Such an agreement would not have been necessary had the contract been interpreted and applied as the Union has argued here. Fenton's references to seniority in her November 18, 1985 letter (rather than length of service), also reinforce the District's arguments in this case. Finally, Fenton's request to negotiate in the future concerning the contract's "seniority" provision, her failure to renew or follow up on her request to negotiate regarding this issue, her failure to gain the District's agreement to make the November 18th letter a part of the successor labor agreement and/or to secure the District's agreement that her November 18th letter would set a precedent in the future, all tend to show that the Phillips settlement constituted an exception to the established general rule normally applied by the District.

In my view, although the Phillips case is insufficient on its own to constitute a past practice, the facts of the case shown here as well as the language used in the Fenton letter and Fenton's failure to seek further negotiation or to secure an agreement to the contrary, indicate that the Union thereby acquiesced in the District's original interpretation and application of Section 9.06.

The District has argued that the Grievant should be required to reimburse it for the District's overpayment of wages due to Bookkeeper Putnam's error. In my view, the Union failed to proffer sufficient evidence to show that such reimbursement has not been consistently required in the past. In this case, the District made a relatively large error which resulted in the Grievant receiving an overpayment, which she could reasonably have been expected to notice on her paychecks. In all of the circumstances of this case, including the undisputed evidence that the District has consistently required employees to repay wage overpayments, I find that the Grievant must repay the District \$442.56. Therefore, I issue the following

AWARD

The District did not violate the 1994-96 collective bargaining agreement when it paid Rita Zietlow at the start rate after she successfully posted for a Calendar Year Secretary I position in the 1994-95 school year. The grievance is therefore denied and dismissed in its entirety and the Grievant is ordered to pay the District the \$442.56 the District overpaid the Grievant through Ms. Putnam's error.

Dated at Oshkosh, Wisconsin this 8th day of January, 1996.

By Sharon A. Gallagher /s/