

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

GIBRALTAR SCHOOL EMPLOYEES,
LOCAL 1658, AFSCME, AFL-CIO

and

GIBRALTAR SCHOOL DISTRICT

Case 36
No. 53100
MA-9233

Appearances:

AFSCME Council 40, Post Office Box 370, Manitowoc, Wisconsin 54221, by
Mr. Gerald Ugland, Staff Representative, appearing on behalf of the Union.
Pinkert, Smith, Weir, Jinkins, Nesbitt & Hauser, 454 Kentucky Street, Post Office
Box 89, Sturgeon Bay, Wisconsin 54235-0089, by Mr. Jeffery M. Weir,
Attorney at Law, appearing on behalf of the Gibraltar School District.

ARBITRATION AWARD

Wisconsin Council 40, AFSCME, AFL-CIO, hereinafter referred to as the Union, requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance involving the Union and the Gibraltar School District over the District's decision not to post the newly created position of Pupil Service Confidential Secretary. The undersigned was so designated. A hearing was held on this matter at the District's offices in Fish Creek, Wisconsin on December 21, 1995, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. That hearing was consolidated with a unit clarification hearing before the undersigned, acting as a hearing officer for the WERC, on the question of confidential status of the Pupil Services Confidential Secretary. Due to a scheduling error by the court reporter, no stenographic record was possible, and the parties stipulated to a tape recording as the official record of the hearing, with each party preparing its own version of a transcript from the recordings. The District's version of the transcript was received on March 17, 1996. The Union's version of the transcript was received on March 26, 1996.

The District filed a brief on March 17, 1996. The Union submitted its brief on April 6th, and on April 19th the District advised the arbitrator that it would not be submitting a reply brief, whereupon the record was closed. Now having considered the evidence, the contract language and the record as a whole, the undersigned makes the following Award.

I. Issue

The issues in this case are:

1. Was the grievance appealed to Step 3 in a timely manner? If so,
2. Was the request for arbitration timely filed? If so,
3. Did the Board of Education violated the collective bargaining agreement in filling the post of Pupil Services Secretary? If so,
4. What is the appropriate remedy?

II. Relevant Contract Language

Article I - Recognition

The Employer recognizes the Union as the exclusive collective bargaining representative for all regular full-time and regular part-time custodial and maintenance employees, bus drivers, aides, cooks, kitchen servers and kitchen aides, and clerical employees, excluding the Superintendent, supervisors, confidential employees, managerial employees and all other employees of the School District.

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Article VII - Seniority

A. Definition. Seniority shall be defined to mean the actual calendar time elapsed since an employee's last date of hire. School recesses, during which an employee is unscheduled to work, shall not diminish his/her seniority; however, unpaid leaves of absence, other than layoffs or military leaves in excess of thirty (30) calendar days, shall diminish but not terminate an employee's seniority.

Seniority shall be determined on the basis of years, months, and days. Where two (2) or more employees are hired on the same day, a toss of coin or the cutting of cards shall determine the order of seniority among said same day hires.

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C. Job Posting.

1. Posting Period. Whenever the Employer deems it necessary to fill a new or vacant position in the bargaining unit the Employer shall list such position for a period of five (5) working days. The Employer shall furnish a written notice of the new or vacant position to each employee. The written notice shall be mailed to each employee. Each employee interested in applying for the listed position shall submit a written application to the District Administrator office within five (5) working days after receipt of the job listing notice.

2. Award. Within five (5) working days after the completion of the job posting period, qualifications being relatively equal, the senior employee applicant shall be awarded the position. Qualified bargaining unit employee applicants shall be given preference over all non-bargaining unit applicants.

3. Notice Content. The job listing for all new and vacant positions shall contain a statement as to the wage rate, job description, and hours of work,

4. Temporary Vacancies. The Employer may make temporary assignment to any vacant position until the posting provision is completed.

5. Trial Period. An employee, upon being promoted to a higher paying position, shall serve a trial period of thirty (30) calendar days in the position. An employee who does not satisfactorily complete the trial period or who wishes to return to his or her former position shall be returned to his or her former position and former rate of pay.

In the event the Board determines an employee is not qualified to fill a position before the end of the thirty (30) calendar day trial period, the Board reserves the right to return the employee to his or her former position and former rate of pay, subject to the grievance procedure. Continued service in a position beyond the trial period shall be considered as evidence of the satisfactory completion of the trial period.

6. Classification Seniority. Employees in the same classification shall receive first preference for any position posted in the same classification in rank order of their bargaining unit seniority.

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Article IX - Grievance Procedure

A. Definition of a Grievance. A grievance is defined as any misunderstanding regarding the interpretation or application of a specific provision of this Agreement. If grievances of a like nature arise concurrently, they shall be consolidated. Grievances may be processed through all of the steps of this procedure. Nothing in this Agreement shall preclude an employee from taking up a complaint that is not covered by this Agreement with the Superintendent.

The Union may file a grievance on behalf of its members.

A grievant is the person or Union filing the grievance.

The term "days" when used in this article shall, except where otherwise indicated mean working days; thus weekend days, holidays, vacation days, sick leave days and emergency leave days are excluded.

B. Purpose. To secure at the lowest possible administrative level equitable solutions to problems which may arise from time to time.

C. Steps In Procedure

Step 1. Immediate Supervisor

a. An earnest effort shall be made to settle the matter informally between the grievant and his/her immediate supervisor.

b. If the matter is not resolved the grievance shall be presented in writing by the grievant to the immediate supervisor within ten (10) work days after the facts upon which the grievance is based, first occurred or became known. The immediate supervisor shall give his written answer within five (5) work days of the time the grievance was presented to him/her in writing.

Step 2. Administrator

If not settled in Step 1, the grievance may, within five (5) work days after receipt of the written answer in Step 1, be appealed in writing to the Administrator with a copy to the Union, if desired, in an effort to resolve the grievance. The Administrator shall give a written answer no later than five (5) work days after receipt of the appeal.

Step 3. Board of Education.

If not settled in Step 2, the grievance may, within five (5) work days, be appealed in writing to the Board of Education. (Union to receive a copy of the appeal.) The Board of Education shall give a written answer within five (5) work days after its next Board Meeting.

Step 4. Binding Arbitration of Grievances.

1. Process. In order to process a grievance to Binding Arbitration, the following must be complied with;

a. Written notice of a request for such arbitration shall be given to the Board within ten (10) work days of receipt of the Board's last answer.

b. The matter must have been processed through the grievance procedure within the prescribed time limits.

c. The issue must involve the interpretation or application of a specific provision(s) of this agreement.

2. Wisconsin Employment Relations Commission. When a request has been made for binding arbitration, the Employer and employee representatives shall appeal to the Wisconsin Employment Relations Commission to appoint an arbitrator.

3. Hearing. The arbitrator shall meet with the representatives of both parties, hear evidence, and give an opinion as soon as possible after the close of the hearing.

4. Jurisdiction. It is understood that the function of the arbitrator shall be to provide an opinion as to the interpretation and application of specific terms of the agreement. This arbitrator shall have no power to advise on salary adjustments, except the improper

application thereof, nor to issue any opinions advising the parties to add to, subtract from, modify, or amend the terms of this Agreement.

5. Decision. All decisions of the arbitrator shall be final and binding upon both parties.

D. Time Limitations. The parties agree to follow each of the foregoing steps in the processing of a grievance. If the Employer fails to give written answer within the time limits set out for any step, the employee may immediately appeal to the next step. Grievances not processed to the next step within the prescribed time limits shall be considered dropped. Time limitations may be extended by the written agreement of the parties.

E. Statement of Grievance. The written grievance shall give a clear and concise statement of the alleged grievance, including the facts upon which the grievance is based, the issue involved, the specific section(s) of the Agreement alleged to have been violated and the relief sought.

F. Arbitrability. Any question of the arbitrability of the grievance must be raised no later than the administrator level. The parties shall share equally the cost of the transcript if required by the arbitrator.

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III. Factual Background

The District is a municipal employer providing general educational services to citizens in the area of Fish Creek, on the Door County peninsula. In providing these services, it employs 68 teachers and 25 support personnel, including 6 clerical employees. Two of the clerical employees, the District Administrator's secretary and the District bookkeeper, are confidential employees who are excluded from the bargaining unit. The remaining clerical employees are represented by the Union, in a bargaining unit defined by the contract as including:

. . . all regular full-time and regular part-time custodial and maintenance employees, bus drivers, aides, cooks, kitchen servers and kitchen aides, and clerical employees, excluding the Superintendent, supervisors, confidential employees, managerial employees and all other employees of the School District.

At the end of the 1994-95 school year, Virginia Henz retired as the guidance secretary. Henz had provided the primary clerical support for Jeff Steffen, the District's Director of Special Education and School Psychologist. In anticipation of Henz's retirement, Steffen and Bob Dahlstrom, the District Administrator, discussed changing the secretary's job to have the position more involved in case management work and more focused on Steffen's clerical needs, including those associated with his supervision of special education teachers and aides. As a result of these discussions, they proposed to the School Board abolition of the 10-month position formerly occupied by Henz, and creation of the new 12-month position of Pupil Services Confidential Secretary. The School Board voted to create the new position at its meeting on May 22, 1995.

On May 26th, the District placed an advertisement for the job in the local newspaper:

STAFF VACANCY NOTICE
THE GIBRALTAR AREA SCHOOLS WILL HAVE THE FOLLOWING VACANCY
PUPIL SERVICES CONFIDENTIAL SECRETARY
TWELVE MONTH POSITION - TO BEGIN JULY 31, 1995
PLEASE CONTACT: Mr. Robert F. Dahlstrom
District Administrator
Telephone: ***
APPLICATION DEADLINE JUNE 16, 1995
AN EQUAL OPPORTUNITY EMPLOYER

The District did not send a notice of the vacancy to each District employee as would normally be done in cases of job postings under the collective bargaining agreement. On June 7th, Dahlstrom received a note from Union Steward Richard Kjell, asking whether the District intended to post the new position in accordance with the contract. The next day Dahlstrom wrote back, stating the District's position that the incumbent in the new job would be a confidential employee, excluded from the bargaining unit by the terms of the Recognition Clause. Kjell submitted a grievance to Steffen as the immediate supervisor for the job on June 13th, asserting that the District was violating the contract by not posting the vacant position. Steffen denied the grievance, reiterating the District's position that the job was confidential. Kjell appealed to the District Administrator at Step 2 of the grievance procedure, and Dahlstrom denied the grievance in exactly the same terms as Steffen had used. Dahlstrom's letter denying the grievance was dated June 27th.

On July 3rd, Kjell wrote a letter to School Board President Charles Voight, appealing the grievance to the Board level and asking Voight to contact Gerald Ugland, the Union's staff representative, to schedule a hearing. He took the letter to Voight's home, but Voight was not in. Kjell left it with Voight's wife. She accepted the letter, told Kjell that she would see that Voight got it, and placed it on his desk. Although this was the first time a grievance had ever reached the Board level, and thus the first time an appeal to the Board had been delivered to Voight's home, Kjell had made deliveries to the home before at the direction of Dahlstrom's secretary. On those

occasions, if Voight was not in, he left the papers with Voight's wife or son.

At an early morning School Board meeting on July 17th, Voight asked Dahlstrom if the Union had appealed the grievance over the Pupil Services Secretary to the Board level. Dahlstrom said there had been no appeal. The District's interview committee met with applicants for the position that evening. Among the persons interviewed were Kathy Marquez, a member of the bargaining unit, and Elizabeth Rockendorf, an outside applicant. Two days later the job was offered to Elizabeth Rockendorf.

When Ugland did not hear a response from the District for a month, he wrote a letter to Voight, dated August 7th, saying that the Union was proceeding to arbitration unless the Board contacted him to schedule a hearing. Dahlstrom wrote back, saying that no appeal to the Board step had been received, and that the time for appealing the grievance had passed. On August 11th, Voight called Dahlstrom and told him he had found the letter on his desk. Dahlstrom wrote Ugland, advising him of this development, but asserting that service of the appeal on Voight's wife was not the same as service on the Board, because she was not a member of the Board of Education. He repeated the District's position that the grievance was no longer viable.

Ugland wrote to Voight on August 22nd, stating his position that the appeal to the Board level was timely, and offering to have the Board hear the grievance. Ugland noted that the Union had served notice of intent to arbitrate, but said that it would hold that action in abeyance pending a Step 3 hearing, if the Board would agree to hold such a hearing. The letter also advised Voight that the Union was filing a unit clarification petition with the Wisconsin Employment Relations Commission over the Pupil Services Secretary. 1/

On August 28th, the Board considered Ugland's request for a Step 3 hearing and decided that the grievance was not timely. The next day, Dahlstrom wrote a letter, conveying the Board's position to Ugland. On September 18th, Ugland sent a letter to the Wisconsin Employment Relations Commission, together with the appropriate forms and filing fee, requesting the assignment of an arbitrator.

Additional facts, as necessary, will be set forth below.

IV. Procedural Arbitrability

A. The Position of the District on Arbitrability

The District takes the position that the grievance is not arbitrable on two grounds, both related to timeliness. Initially, the District asserts that the appeal to Step 3 was not taken within

1/ The grievance arbitration and the unit clarification were consolidated for hearing before the undersigned in his capacity as a staff arbitrator and a hearing officer for the WERC, and a single record was generated for both cases.

the five working days after the denial at Step 2, as required by the clear language of the contract.

While Kjell claims to have left the appeal at Board President Voight's home on July 3rd, he gave the envelope to Voight's wife, not to Voight. This is not sufficient service under the law. The contract is silent as to how service is to be accomplished, but it is clear under Wisconsin statutes that service on a municipal corporation such as the School District must be through personal service on the clerk or the president, or through service on an agent of the District, such as the Administrator. Service on the wife of the School Board President does not suffice under law, and there is no evidence of a past practice that would allow such service under the contract. Even though Kjell asserts that Voight later said he had looked at the documents and misunderstood what they were, there is no evidence that this claimed review of the documents took place within the five day period for notice of appeal. Indeed, the timeline

for this conversation suggested by Kjell, two weeks after delivery, is clearly outside of the appeal period. The minutes of the Board's July 17th meeting, in which Mr. Voight asks whether the Union is pursuing the grievance, clearly show that Voight did not have actual knowledge of the appeal within the five day period. Since there was neither actual nor constructive service on the School Board, and since the contract unambiguously states that grievances which are not appealed in a timely manner are considered dropped, the grievance should be denied as not arbitrable.

Assuming for the sake of argument that the Step 3 appeal was made in a timely fashion, Dahlstrom gave clear notice to the Union at Step 2 that the grievance was denied. This was accomplished on June 27th. That was the last answer served on the Union. The contract requires that any appeal to arbitration must be undertaken within ten days of the Board's last answer. Even if the follow-up correspondence about the Union's desire for a Step 3 hearing is treated as an "answer", the last of this was dated August 29th. Ugland's request for arbitration was submitted to the WERC on September 18th. There is no calculation which brings this request within ten days of the last answer. Thus the appeal to arbitration was not undertaken in a timely fashion.

B. The Position of the Union on Arbitrability

The Union denies that there is any procedural defect in the grievance. Steward Richard Kjell hand delivered an appeal to the Board step to School Board President Charles Voight's home on July 3rd. Kjell, in his capacity as a District employee and at the direction of District officials, had delivered papers from the District to Voight's home in the past, and had left them with Voight or, if he was unavailable, with Voight's wife or son. The delivery of the notice of appeal to the 3rd Step was accomplished in exactly the same way as the delivery of other District related papers, and this should suffice. Voight admitted later that he had received the appeal, but had only glanced at it, and had not realized what it was. Kjell's actions were taken in good faith, and in the reasonable belief that Voight's wife would give him the envelope and he would then read it. This is more than adequate service under the collective bargaining agreement.

The District's claim that the appeal to arbitration was not made in a timely fashion is likewise unfounded. The Union waited a reasonable period for the District to respond to the Step 3 appeal, and then gave notice that it would proceed to arbitration unless the District promptly scheduled a Step 3 hearing. This position was repeated in subsequent correspondence. The Union at all times gave the District notice that it was willing to give the Board a chance to consider the grievance, but was reserving its right to take the matter to arbitration. To construe this reasoned and diligent approach against the Union would ignore the fact that it was the District, and not the Union, that failed to follow the grievance procedure and created whatever confusion might have existed.

C. Discussion of Arbitrability

Questions of procedural arbitrability present threshold issues for the arbitrator. Arbitration is simply the final step of the grievance procedure, not a separate forum for airing complaints. Thus the arbitrator's jurisdiction extends only to those grievances which have properly been advanced to the final step under the terms of the procedure. In this case, the District alleges that there are two defects in the Union's processing of this grievance, in that the grievance was not appealed in a timely fashion to either the Board or to arbitration. Neither of these arguments is persuasive.

Richard Kjell delivered the Step 3 appeal to Charles Voight's home on July 3rd, which was within the five work day period for such appeals under the contract. From the record, it appears that Voight's wife took delivery of the papers and placed them on his desk, but did not tell him about the delivery. Granting that this would not constitute sufficient service for legal pleadings under the Wisconsin statutes, this grievance is not a lawsuit. Grievances and grievance procedures are informal alternatives to court litigation, and requiring Union stewards and school administrators to serve their grievances and answers in the same fashion as attorneys serve their pleadings would be completely at odds with the very nature of the process. Step 3 of grievance procedure simply says that "the grievance may, within five (5) work days, be appealed in writing to the Board of Education." The contract is silent as to how an appeal to the Board must be served, other than that it must be done in writing, and without some evidence that the parties contemplated a system of technical legal service, I can find no basis for believing that the niceties of civil procedure were grafted onto this process when it was bargained.

There might be very substantial problems of proof for the Union if this were a case in which Voight denied ever receiving the envelope containing the appeal. This is not such a case. There is no question that the appeal was delivered to Voight's home in a timely fashion. It was given to Voight's wife, who said she would give it to him. It was not given to a toddler, or a neighbor, or left on the porch. It may well be that Kjell would be better advised to get a receipt in the future, or to deliver appeals to Dahlstrom if the President or Clerk are not available, but in delivering this notice to Voight in the same way as he had delivered other District documents in the past, Kjell acted reasonably and he had a reasonable expectation that Voight would promptly receive the appeal. 2/ He could not have reasonably foreseen that the envelope would go unnoticed on Voight's desk. Kjell's actions are not much different than Steffen's and Dahlstrom's when they mailed their grievance answers to Kjell's home, without taking steps to insure that he personally took delivery of the mail. The Union took reasonable

2/ If the District wishes to insist on a specific system for serving appeals, it has the right to do so, as long as it gives clear notice of the requirements to the Union, and the system is not so unduly burdensome as to frustrate the operation of the grievance procedure. No such notice was ever given prior to this case.

and timely steps to comply with the requirements of the grievance procedure, and I cannot conclude that the parties' contract requires more than this to avoid a challenge to procedural arbitrability. 3/

The mix-up on the Step 3 appeal was certainly not the result of bad faith on either side, and nothing in this Award should be read to suggest that Voight or his family were somehow negligent or at fault. Even where all parties act reasonably, events can take an unforeseen turn. The question in this case is whether such a turn should result in a penalty against one party or the other. Reasonable steps are all that the contract requires, and unless the grievance procedure is to become so formalized and rigid as to completely eliminate any chance for a mishap, no such penalty can be imposed.

Turning to the second procedural challenge, the allegation of untimely notice of appeal to arbitration, I find that this claim is simply incorrect as a matter of fact. The Board has five work days after the Board meeting following a Step 3 appeal to answer the grievance. The Union then has ten work days to give notice of appeal to arbitration. The contract excludes weekends and holidays from the calculation of work days. Ugland's letter to Voight on August 7th said:

This is to inform the Board that the referenced grievance is being appealed to arbitration. It should be noted that the Board of Education failed to contact me to arrange a Step 3 hearing, although a request for a Step 3 hearing was delivered to you. The Board additionally failed to respond to the grievance. Despite the Board's untimeliness, the Union will consider appearing for a Step 3 hearing if it is scheduled through me. Without that arrangement the Union will proceed to arbitration of the grievance.

Although Dahlstrom testified at the arbitration hearing that he did not view this letter as notice of an appeal to arbitration, it is very nearly impossible to read it any other way. Thus clear notice of an appeal to arbitration was mailed on August 7th.

There was, of course, no Step 3 response by the Board because the Board did not realize that any appeal had been taken. This clouds the timelines for an appeal to arbitration, since those timelines run from the time of the Board's response at Step 3. However, even by the strictest interpretation possible, holding the Union to knowledge of the date of the Board meeting at which

3/ The opposite side of this coin would come into play if this were a Union challenge to an attempt by the Board to proceed with a 3rd Step hearing in what would otherwise be an untimely fashion. The manner of delivery was not unreasonable, but it clearly was imperfect. The failure of Voight to realize what the envelope contained, or the import of its contents, would not be so unreasonable under these circumstances as to bar the Board from insisting on a Step 3 hearing even if the normal time for such a hearing under the grievance procedure had passed.

an appeal should have been considered, treating the Board's silence as an answer, and requiring the Union to make an appeal to arbitration within ten work days of that "answer", the appeal to arbitration is timely. The only evidence concerning a Board meeting after the July 3rd appeal was that a morning meeting was held on July 17th. The Board had five work days (seven calendar days) to respond after that meeting. Assuming for the sake of analysis that the lack of a response by July 24th should have given the Union notice that the appeal was denied, the Union had ten work days (14 calendar days) from that point to appeal to arbitration. This would set the last day for a response at August 7th, which was the date of Ugland's letter.

V. The Merits

A. The Position of the Union on the Merits

The Union takes the position that the District quite clearly violated the contract. The collective bargaining unit is defined as including clerical employees, and the new job of Pupil Placement Secretary is a clerical position. Although it is a new position, it falls within the scope of the Recognition Clause:

The Employer recognizes the Union as the exclusive collective bargaining representative for all regular full-time and regular part-time custodial and maintenance employees, bus drivers, aides, cooks, kitchen servers and kitchen aides, and clerical employees, excluding the Superintendent, supervisors, confidential employees, managerial employees and all other employees of the School District. (Emphasis added)

The District's claim that the position is excluded from the bargaining unit as confidential is not supported by the evidence in the record, as the Pupil Services Secretary has virtually no involvement with labor relations matters, and any minor confidential duties that might be assigned to the position can easily be assigned to other confidential employees.

Article VII of the contract calls for posting new and vacant positions by mailing notices of the vacancy to all members of the bargaining unit. As between internal applicants with relatively equal qualifications, the senior employee is entitled to the job. As between qualified internal applicants and any external applicant, the senior internal applicant is entitled to preference. The District completely ignored this language in filling the Pupil Services Secretary's job, and thus violated the contract. The appropriate remedy is to have the job posted, and to grant the successful internal applicant the job retroactive to July 31, 1995 with backpay and benefits.

B. The Position of the District on the Merits

The District takes the position that the newly created job of Pupil Services Confidential Secretary is not part of the bargaining unit, since the incumbent is expected to function as a

confidential employee, which is a specific exclusion from the definition of the bargaining unit. The Pupil Services Secretary is extensively involved in confidential matters pertaining to student records, student medical information and other areas of privacy inherent in her work with the School Psychologist and Special Education department. In addition, she is expected to attend meetings at which confidential labor relations matters may be discussed, and prepare correspondence and memos related to employee evaluations, discipline and grievances involving Jeff Steffen's supervisory duties.

Even if the Pupil Service Secretary is found to be within the bargaining unit, the arbitrator should recognize that the District has substantially complied with the contract in filling the position. The opening was publicly advertised in the area newspaper, and members of the bargaining unit were thus notified of the opening. Only one of them, Kathy Marquez, chose to apply. She was considered, but not selected. While the manner of advertising the job may have been a purely technical violation of the contract, the intent of the posting provision was satisfied and the choice of Rockendorf should not be set aside. Thus any remedy should be limited to a declaration that the contract applies prospectively to Rockendorf.

C. Discussion on the Merits

The outcome of this grievance on the merits is intimately connected with the pending petition for unit clarification before the Wisconsin Employment Relations Commission. Obviously, if the WERC concludes that the Pupil Services Confidential Secretary is involved in or exposed to confidential labor relations matters to such an extent that the incumbent cannot be considered a municipal employee, the contract does not apply to her, and there can be no violation. If, on the other hand, the job is found not to be confidential, the contract does apply to the position, and governs the manner in which it is filled.

Article VII of the collective bargaining agreement sets forth the posting procedure:

1. Posting Period. Whenever the Employer deems it necessary to fill a new or vacant position in the bargaining unit the Employer shall list such position for a period of five (5) working days. The Employer shall furnish a written notice of the new or vacant position to each employee. The written notice shall be mailed to each employee. Each employee interested in applying for the listed position shall submit a written application to the District Administrator office within five (5) working days after receipt of the job listing notice.
2. Award. Within five (5) working days after the completion of the job posting period, qualifications being relatively equal, the senior employee applicant shall be awarded the position. Qualified bargaining unit employee applicants shall be given preference over all non-bargaining unit applicants.

3. Notice Content. The job listing for all new and vacant positions shall contain a statement as to the wage rate, job description, and hours of work.

The procedure used to fill the Pupil Services Confidential Secretary position was different than that dictated by Article VII and, contrary to the District's position, these differences are more than mere technicalities. The act of advertising the position in the paper without posting it has two implications. The first is that many District employees may have been unaware of the opening. Whereas the posting procedure calls for job listing notices to be mailed to each unit member, thus insuring that they have actual notice of job opportunities, a newspaper ad may or may not be seen by the employees. The fact that Marquez noticed the ad says nothing about the other members of the bargaining unit. It is therefore entirely possible that many employees who might have been interested in this opening failed to apply because they did not know the job was available.

The second implication is that an employee who does see the advertisement for a confidential secretary, but receives no job listing notice, could quite reasonably conclude that the job was not within the bargaining unit. Its title suggests that it is not, and the content of the advertisement is quite different than that required for a unit job posting. There is no specification of wage rate, job description or hours of work, the only three items of information required for postings of bargaining unit jobs. The period for applications was three weeks, rather than the ten days for posting and applying under the contract. A reasonable person, even if unaware of the District's position that this job was not in the bargaining unit, would probably have concluded it was not simply from the manner in which it was advertised. An employee with vested seniority rights, fringe benefits and just cause protection under a collective bargaining agreement might well choose to pass over a job that does not insure such rights. In addition, an employee who might feel that his or her combination of seniority and qualifications would provide a competitive advantage in the posting procedure might have a different view of applying for a job if prior service is not a factor in the selection process. Thus the failure to post in accordance with the contract could have served as to substantially discourage applications, even from those employees who did see the advertisement.

The effect of advertising this job in the newspaper rather than through the posting procedure cannot be termed merely a technical violation of the contract. Neither can it be assumed that the selection criteria used to pass over Marquez in favor of an outside applicant were the same as those that would have been used if the interview committee had been guided by Article VII. These are substantial deviations from the collective bargaining agreement, impacting the rights of all other unit employees. For these reasons, I conclude that, if the WERC finds that the Pupil Services Confidential Secretary is appropriately included in the bargaining unit, the District must remedy the violation by restoring the status quo ante as of July, 1994 when the job was

filled. This would involve posting the position in accordance with contract and treating Rockendorf, should she apply, as an outside applicant. The successful applicant, whether Rockendorf or another, would then be entitled to any lost wages or benefits under the contract, retroactive to the July 31, 1995, the date on which the job was filled.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

1. The grievance was appealed to Step 3 in a timely manner;
2. The request for arbitration was timely filed;
3. The manner in which the Board of Education filled the post of Pupil Services Secretary was substantially and materially at odds with the method required by the collective bargaining agreement.
4. In the event that the Wisconsin Employment Relations Commission determines that the position of Pupil Services Secretary is appropriately included in the collective bargaining unit represented by the Union, the manner in which the Board of Education filled the post constitutes a violation of Article VII of the collective bargaining agreement. The appropriate remedy for such a violation will be:
 - a. To immediately post the job of Pupil Services Secretary in accordance with the procedure set forth in Article VII, C, and to fill the position in accordance with the terms of that Article;
 - b. To treat Elizabeth Rockendorf and any other applicant who was not employed by the District before July 31, 1995, as an outside applicant under Article VII, C;
 - c. To make the successful applicant, whether Rockendorf or an internal applicant, whole by paying that person the difference between any wages and benefits which they would have received had the job been posted as a bargaining unit position and filled on July 1, 1995, and the wages and benefits the successful applicant actually received between July 1, 1995 and the point at which the job is filled;
5. In the event that the Wisconsin Employment Relations Commission determines that the position of Pupil Services Secretary is appropriately excluded from the collective bargaining unit represented by the Union, the grievance is denied.

6. The arbitrator will retain jurisdiction over this grievance for a period of thirty days after the issuance of the Wisconsin Employment Relations Commission's decision in Case #11, No. 53093, ME(u/c)-794, involving the confidential status of the Pupil Services Confidential Secretary, for the sole purpose of clarifying the remedy ordered herein.

Dated at Racine, Wisconsin this 4th day of June, 1996.

By Daniel Nielsen /s/
Daniel Nielsen, Arbitrator