

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GIBRALTAR SCHOOL EMPLOYEES LOCAL 1658, AFSCME, AFL-CIO

and

GIBRALTAR AREA SCHOOL DISTRICT

Case 40
No. 57640
MA-10701

Appearances:

Mr. Gerald Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 370, Manitowoc, Wisconsin 54220-0370, appearing on behalf of the Union.

Davis & Kuelthau, S.C., by **Attorney Mary S. Gerbig**, 414 East Walnut Street, Suite 240, Green Bay, Wisconsin 54301, appearing on behalf of the District.

ARBITRATION AWARD

Gibraltar School Employees Local 1658, AFSCME, AFL-CIO, hereafter Union, and Gibraltar Area School District, hereafter District or Employer, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances arising thereunder. The Union requested, and the District concurred, in the appointment of a Commission staff arbitrator to resolve a pending grievance. The undersigned was so designated and an arbitration hearing was held in Fish Creek, Wisconsin on September 24, 1999. The hearing was transcribed. The record was closed on January 27, 2000, upon receipt of transcript and post-hearing written argument.

ISSUE

The District frames the issue as follows:

Did the Employer violate the collective bargaining agreement by paying two different pay rates, the certified teacher aide rate and non-certified teacher aide rate, as defined in Article XIII, Appendix A, for two different District positions performed by the same individual?

The Union frames the issue as follows:

Did the Employer violate the 1997-1999 collective bargaining agreement by not paying Rebecca Meyer and Ann Wesley the teacher certification required rate of pay for all service as teacher aides during the school year 1998-99?

If so, what is the remedy?

The undersigned frames the issue as follows:

Did the Employer violate the 1997-1999 collective bargaining agreement by not paying Rebecca Meyer and Ann Wesley the Teacher Certification Required rate of pay for all service performed as an Aide during the 1998-99 school year?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE V – DEFINITIONS OF EMPLOYEES

- A. **Regular Full-Time Calendar Year Employee.** The term regular full-time calendar year employee shall be defined to mean any employee who works thirty-five (35) or more hours per work week throughout the calendar year.
- B. **Regular Full-Time School Year Employee.** The term regular full-time school year employee shall be defined to mean any employee who works thirty-five (35) or more hours per work week throughout the school year.
- C. **Regular Part-Time Employee.** The term regular part-time employee shall be defined to mean any employee who works less than thirty-five (35) hours per work week.
- D. **Temporary Employee.** A temporary employee is one who is hired for a period not to exceed ninety (90) days and who shall be separated on or before the end of said period; however, should a temporary employee be continued in employment or be rehired within ninety (90) days following the termination of his or her employment, the period of his or her temporary employment shall be considered toward fulfilling his or her probationary period.

Substitute bus drivers, if hired as a regular full-time employee or regular part-time employee, shall be credited with up to, but no more than, ninety (90) days as in the above paragraph.

- E. **Records.** Proper records indicating the status of each employee shall be completed at the time of employment and a copy of such status record shall be provided to the employee and the Union upon request.

ARTICLE VI – MANAGEMENT RIGHTS

Except as otherwise provided in this Agreement, the Board possesses the sole right to operate the school system and all management rights repose in it. These rights include, but are not limited to, the following:

- A. To direct all operations of the school system;
- B. To establish reasonable work rules and schedules of work;
- C. To hire, promote, transfer, schedule, and assign employees in positions within the school system;
- D. To suspend, demote, discharge, and take other disciplinary action for just cause against permanent employees;
- E. To relieve employees from their duties because of lack of work or any other legitimate reason(s);
- F. To take whatever action is necessary to comply with state or federal law;
- G. To determine the kinds and amounts of services to be performed as it pertains to school system operations, and the number and kinds of classifications to perform such services. (In the event new positions are to be created or the job duties of existing positions are to be changed, the Board shall serve prior written notice to the Union, and thereafter the Board and the Union shall meet and negotiate new wage rates for said positions);
- H. To take whatever action is necessary to carry out the functions of the school system in situations of emergency.

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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.

...

- 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.

...

ARTICLE XIII - WAGE SCHEDULE - PAY POLICY

- A. Wage Schedule.** Attached to, marked **Appendix A**, and made a part of this Agreement are the mutually agreed upon index and job classification. During the term of this Agreement, each employee shall receive the rate as indicated on the index for his or her years of service and classification.

...

APPENDIX A

- A.** Effective July 1, 1997, the hourly rates of pay shall be as follows:

<u>Classification</u>	<u>Hire</u>	<u>Ninety (90) Calendar Days</u>	<u>Six (6) Months</u>
Clerical			
Clerk	\$10.24	\$10.50	\$11.60
Secretary	\$10.24	\$10.50	\$11.60
Aides			
Teacher Certification Not Required	\$10.24	\$10.50	\$11.60
Teacher Certification Required	\$10.75	\$11.01	\$12.11
Maintenance			
Cleaning Person	\$9.85	\$10.10	\$11.20
Kitchen			
Server	\$9.07	\$9.33	\$10.42
Kitchen Aide	\$9.59	\$9.85	\$10.94
Assistant Cook	\$9.95	\$10.21	\$11.30
Cook	\$10.46	\$10.72	\$11.81

Bus Drivers

Bus Driver	\$11.10	\$11.36	\$12.45
Lead Bus Driver	\$11.10	\$11.36	\$12.45

B. Effective July 1, 1998, the hourly rates of pay shall be as follows:

<u>Classification</u>	<u>Hire</u>	<u>Ninety (90) Calendar Days</u>	<u>Six (6) Months</u>
Clerical			
Clerk	\$10.52	\$10.79	\$11.92
Secretary	\$10.52	\$10.79	\$11.92
Aides			
Teacher Certification Not Required	\$10.52	\$10.79	\$11.92
Teacher Certification Required	\$11.05	\$11.31	\$12.44
Maintenance			
Cleaning Person	\$10.12	\$10.38	\$11.51
Kitchen			
Server	\$9.32	\$9.59	\$10.71
Kitchen Aide	\$9.85	\$10.12	\$11.24
Assistant Cook	\$10.22	\$10.49	\$11.61
Cook	\$1		
0.75	\$11.01	\$12.13	
Bus Drivers			
Bus Driver	\$11.41	\$11.67	\$12.79
Lead Bus Driver	\$11.41	\$11.67	\$12.79

BACKGROUND

On August 5, 1997, the parties executed their 1997-99 collective bargaining agreement. Appendix A of this collective bargaining agreement recognized two classifications of Aide, i.e., Teacher Certification Not Required and Teacher Certification Required, and provided the Teacher Certification Required classification with a wage rate that was approximately fifty-cents per hour more than the Teacher Certification Not Required wage rate. Prior collective bargaining agreements contained only one classification of Aide in Appendix A.

During the 1997-98 school year, the District employed Rebecca Meyer and Ann Wesley, hereafter Grievants, as Kindergarten Aides. At that time, District Board policy 7.13 stated as follows:

Beginning with the 1996-97 school year, teacher aides for the following positions will be required to have a Wisconsin teacher certification, if such a person is available:

<u>POSITION</u>	<u>CERTIFICATION</u>
Kindergarten Aide	K, 1-3, 1-6, 1-8
Preschool Aide	PS, 1-3, 1-6, 1-8
Early Childhood Aide	PS, 1-3, 1-6, 1-8
Elementary L.D. Aide	K, 1-3, 1-6, 1-8

All other positions may be filled with non-certified staff.

Revised policy Adopted 06/24/96

The Grievants received the Teacher Certification Required wage rate for all work performed during the 1997-98 school year.

Prior to the end of the 1997-98 school year, District Superintendent advised the Grievants that, due to declining enrollments, their Kindergarten Aide positions would not be continued in the 1998-99 school year. Subsequently, Grievant Meyer was offered, and accepted, employment for the 1997-98 school year. Grievant Wesley was laid-off at the end of the 1997-98 school year, but was recalled to employment in August of 1998.

On or about March 5, 1999, Union Stewards Sherrie Daubner and John Cox met with Principal Jeff Steffen. At this meeting, the Union Stewards expressed a concern that the Grievants were not being paid at the Teacher Certification Required wage rate. Union Steward Daubner, unlike Principal Steffen, considered the March 5, 1999 meeting to be Step 1(a) of the grievance procedure.

On March 11, 1999, Principal Jeff Steffen issued the following letter to Ann Wesley:

Re: Contractual Agreement: Salary Adjustment

On Thursday, March 5th, 1999 I had a conversation with John Cox and Sherrie Daubner, union stewards, regarding your present work assignments and rate of pay. According to the present master agreement it is expected that you would receive the higher aide hourly rate (\$12.44/hour) for the period in which you support the Kindergarten program, and the lesser aide rate (\$11.92) for the duties you perform which are not affiliated with this grade assignment. The following chart reflects your assignment, assigned hours, and expected pay rate:

<u>Assignment</u>	<u>Hours/Day</u>	<u>Rate of Pay</u>
Kindergarten Aide	3.75	\$12.44
Study Hall Monitor	3.75	\$11.92

I have reviewed your present rate of pay and acknowledge that it does not reflect the adjusted salary. I have requested that Mrs. Hickey, the District Bookkeeper, make the necessary arrangements to reimburse this shortage (\$1.95/day) retroactive to the beginning of the 1998-99 school year and provide you future payment at the proper rate of service.

If you have further questions, please feel free to contact me.

On March 11, 1999, Principal Jeff Steffen issued the following letter to Rebecca Meyer:

Re: Contractual Agreement: Salary Adjustment

On Thursday, March 5th, 1999 I had a conversation with John Cox and Sherrie Daubner, union stewards, regarding your present work assignments and rate of pay. According to the present master agreement it is expected that you would receive the higher aide hourly rate (\$12.44/hour) for the period in which you support the Preschool:EEN program, and the lesser aide rate (\$11.92) for the duties you perform which are not affiliated with the Early Childhood Program. The following chart reflects your assignment, assigned hours, and expected pay rate:

<u>Assignment</u>	<u>Hours/Day</u>	<u>Rate of Pay</u>
EEN Support	3.25	\$12.44
Study Hall Monitor	4.25	\$11.92

I have reviewed your present rate of pay and acknowledge that it does not reflect the adjusted salary. I have requested that Mrs. Hickey, the District Bookkeeper, make the necessary arrangements to reimburse this shortage (\$1.69/day) retroactive to the beginning of the 1998-99 school year and provide you future payment at the proper rate of service.

If you have further questions, please feel free to contact me.

Each of these letters cc'd Pat Hickey and the Superintendent, but did not cc the Union.

On March 23, 1999, Union Steward Sherrie Daubner filed a written grievance with the District alleging that "Certified Teacher Aides are not being paid the \$.50 per hour that they are entitled." On April 16, 1999, Superintendent Seyfer responded to the grievance as follows:

April 16, 1999

Re: Response to Grievance 99.1
Level 2
Filed by Gibraltar Employees,
Local 1658, AFSCME, AFL-CIO

To: Sherrie Daubner, Steward
From: Stephen Seyfer, Superintendent

Grievance: Two (2) employees, Rebecca Meyer and Ann Wesley, were hired initially as Teacher Certified Aides. They now are employed as .5 Teacher Certified Aides and .5 Teacher Aides. Due to the fact that they were hired as Teacher Certified Aides, each should be paid at the Teacher Certified Aide wage rate regardless of their assignment. The grievance seeks total compensation to Ms. Meyer and Ms. Wesley for all wages available thus far in the 1998-99 school year at the Teacher Certified Aide rate.

Findings:

1. Ms. Meyer began her district employment on August 27, 1996, as a Teacher Certified Aide in a full-day Kindergarten class. Teacher certification was a requirement for employment to this position.
2. On June 15, 1998, Ms. Meyer was notified by letter that the full-day Kindergarten aide position was discontinued by school board action for the 1998-99 school year. In addition she was notified that lay-off procedures would be implemented to assure her of continuing employment as she was more senior to other Certified Teacher Aide employees. Also, she was notified of other employment for which she was qualified.
3. In August, 1998, Ms. Meyer accepted assignment as a .5 Teacher Certified Aide for the Early Childhood Program and as a .5 Teacher Aide for high school student supervision.

4. In error, the district did not initially pay Ms. Meyer the Teacher Certified Aide rate for her .5 Teacher Certified Aide position. When that error was made known to the district, all past pay at the rate was compensated.

5. The Teacher Certified Aide position and the Teacher Aide position are two distinctly different assignments. Each position works with a separate school in a distinctly different part of the school building and at clearly defined times. There does not appear to be any discrepancy in distinguishing the difference between the two positions.

6. Ms. Wesley was hired by the school board on November 11, 1996, to complete the school year as a Certified Teacher Aide for the half-day Kindergarten class. Teacher certification was a requirement of employment.

7. On June 16, 1998, Ms. Wesley was notified by letter that the half-day Kindergarten aide position was discontinued by school board action for the 1998-99 school year. As the least senior Teacher Certified Aide, Ms. Wesley was issued a lay off notice.

8. Subsequent to her lay off notice, Ms. Wesley was informed of other employment in the district for which she was qualified. In August, 1998, Ms. Wesley accepted assignment as a .5 Teacher Certified Aide and as a .5 Teacher Aide for high school student supervision.

9. In error, the district did not initially pay Ms. Wesley the Teacher Certified Aide rate for her .5 Teacher Certified Aide position. When that error was made known to the district, all past pay at that rate was compensated.

10. The Teacher Certified Aide position and the Teacher Aide position are two distinctly different assignments. Each position works with a separate school in a distinctly different part of the school building and at clearly defined times. There does not appear to be any discrepancy in distinguishing the difference between the two position.

Ruling on the Grievance:

The current practice of compensating Ms. Meyer and Ms. Wesley at the Teacher Certified Aide wage rate for their employment as a Teacher Certified Aide, and, at the Teacher Aide wage rate for their employment as a Teacher Aide is appropriate.

The positions for which each was initially employed by the school district were duly terminated. Each person subsequently accepted employment for a full-time assignment comprised of two differentiated positions. The positions of Teacher

Certified Aide and Teacher Aide were clearly defined prior to their acceptance of their current assignments. In addition, each position has a differentiated wage rate. It is appropriate in this case to pay an employee the appropriate wage for the appropriate employment.

C. district file

The grievance was denied at Step 3 and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES

Union

Article IX, F, requires that the issue of arbitrability be raised no later than the administrative level. Since there is no evidence that the Employer did so, it is precluded from raising the issue of arbitrability.

Article XIII, A, includes the following sentence: "During the term of this agreement, each employee shall receive the rate as indicated on the index for his or her years of service and classification." Appendix A provides that when a teacher aide is required to have and maintain teacher certification, the teacher aide will receive the higher rate of pay. Such a construction is consistent with the evidence of bargaining history.

At the time that the parties bargained additional pay for teacher aides who are required to have teacher certification, neither party mentioned split assignments or paying different wage rates for different times of day. Nor has the Employer provided any exhibits to establish that the Grievants occupy a split position with two different rates of compensation.

Article V, E, requires that the Employer inform each employe of their status. The employes and the Union did not receive the written notice required by the agreement.

Elementary School Principal Jeff Steffen acknowledged that, in 1998-99, Rebecca Meyer occupied the same position as Rebecca Rericha had in 1997-98 and that Rericha's position required teacher certification. When the July 1, 1997 to June 30, 1999 collective bargaining agreement was settled, Rericha was paid retroactively under the new agreement at the teacher certification required wage rate for all hours worked, including supervision of lunch and study hall. It is preposterous for the Employer to claim that such payment was a mistake. Rericha's position was clearly treated as a teacher certification required position.

Elementary Principal Steffen confirmed that Meyer was required to be a certified teacher when she was hired and that the job posting she bid on required teacher certification. Steffen confirmed that teacher certification was required for Meyer's work as a Kindergarten Aide during the 1996-97 and 1997-98 school years. Meyer was paid at the teacher

certification required wage rate for the whole 1997-98 school year, including the lunch period she supervised.

In 1998-99, the District assigned the same duties to Meyer as it had previously assigned to Rericha, but paid Meyer at Teacher Certification Not Required wage rate. If we viewed Meyer's schedule as two separate positions one of them would be a split shift wrapped around another shift. This confabulation is an absurd attempt to save a few dollars.

In August of 1998, Superintendent Seyfer advised Wesley of a potential position involving supervision of study halls and elementary aide work. No mention was made of whether or not certification was required for this position. Nor was there any discussion of wage rate. If we viewed Wesley's schedule as two separate positions, one of them would be considered to be a split shift.

There was no posting of the positions held by Meyer or Wesley for the 1998-1999 school year. It is not evident that the positions held by Meyer and Wesley were each posted as two separate part-time positions. Steffen acknowledged that, in order for Wesley and Meyer to retain their 1998-99 positions, they would have to retain certification as a teacher.

The record does not demonstrate that, prior to accepting their 1998-99 employment that Meyer, or Wesley, understood that it involved two different positions. Wesley's testimony demonstrates that she viewed the Employer's "positions" to be "assignments."

In summary, the Employer did not pay Rericha's position as two distinct positions. The Employer did not act as though it created two sets of two positions when it offered the positions to Meyer and Wesley. The Employer did not pay the Grievants as if they had two distinct positions until the Union filed a grievance. The Employer's theory of this case is inconsistent with its present theory for all of 1997-98 and for six months in 1998-99.

The Employer has violated the collective bargaining agreement by not paying the Teacher Certification Required wage rate for all hours worked. In remedy of this contract violation, the Employer should pay each Grievant the Teacher Certification Required wage rate for all service in the 1998-1999 school year and for all continuing service in a position that requires teacher certification, in addition to any wage-related benefits, and to make the Grievants whole.

District

The District has the management right to create teacher aide positions, to determine the number of positions, and to determine whether it requires full-time or part-time services in any particular teacher aide position. Consistent with its management rights, the Board has implemented Policy 7.13, designating certain teacher aide positions as requiring certification.

On a case-by-case basis, the Board has exercised its management right to require teacher certification for specific teacher aide positions based upon the exceptional educational needs of particular students.

After the Board decided to discontinue the regular full-time Kindergarten Aide positions held by Wesley and Meyer, Meyer and Wesley were each offered a combination Teacher Certification Required and Teacher Certification Not Required position. Each accepted the offered position. The contract does not require administration to affirmatively inform Wesley and Meyer of the pay rate for each of these teacher aide positions.

The District created job descriptions for various teacher aide positions prior to the negotiation of the Teacher Certification Required wage rate. These job descriptions demonstrate that the Aide positions are distinguished on the basis of certification required or not required, duties, and time and place in which duties are performed. These descriptions also distinguish between jobs that are primarily supervisory and those that require instructional duties. Meyer and Wesley knew there were teacher aide positions that required certification and teacher aide positions that did not require certification.

Meyer and Wesley were informed and understood that each was offered two different types of part-time teacher aide positions. The Board and the Superintendent acted within the scope of, and in accordance with, Article VII when they discontinued Wesley's and Meyer's Kindergarten Aide positions and offered Meyer and Wesley a combination of a Teacher Certification Required position and a Teacher Certification Not Required position for the 1998-99 school year.

The collective bargaining agreement does not require that an employe be paid in the higher certified teacher aide rate, without regard to the position or positions that the employe holds, merely because the employe possesses teaching certification. Bargaining history indicates that the Board specifically rejected any attempt by the Union to bargain such a provision into the contract. As confirmed by the testimony of District bargaining representative Birmingham, it was the Board's intent to pay a higher rate of pay to employes that performed services in teacher aide positions for which the Board required certification.

Previously, bargaining unit employes have occupied a full-time position comprised of more than one classification and the District has paid employes the wage rate of each classification for work performed in that classification. As the District's Bookkeeper testified, when she calculated back pay for all non-certified staff, she mistakenly paid Rericha at the higher rate for aide work that did not require certification. The District's error in not paying the Grievants at the Teacher Certification Required wage rate for the portion of their work that required teacher certification was rectified as soon as the District became aware of the error.

Principal Steffen admitted that the positions which Meyer and Wesley held required certification and that certification needed to be maintained. Steffen, however, never said that

the positions that required certification were full day positions. The obligation to maintain certification for one part-time position does not magically transform the other part-time position into a position that does require certification.

The District agrees with the Union that it must raise the issue of arbitrability under the collective bargaining agreement no later than the administrative level. The Union, however, should be held to the issue it grieved and not be allowed to arbitrate new issues that the District has not been given the opportunity to address through the contractual grievance process. The grievance statement filed on March 23, 1999 is based solely upon Article XIII, the wage schedule.

Article V, E, requires the District to inform employees of their status upon request. The Union has not presented any evidence that any request was ever made under Article V, E.

Acceptance of the Union's argument produces an absurd result. The District's position is supported by the contract language, as well as by the evidence of bargaining history. The Arbitrator should not allow the Union to achieve through this arbitration that which was firmly rejected within the course of negotiations. The grievance is without merit and should be dismissed with prejudice.

DISCUSSION

As the Union argues, under the parties' contractual grievance procedure, issues of arbitrability must be raised no later than the administrator level. The record does not demonstrate that the issue of arbitrability was raised no later than the administrator level. Moreover, the District did not raise an issue of arbitrability when it formulated its statement of the issue. As the Union argues, the District has waived any right to raise an issue of arbitrability in this grievance.

The District argues that the Grievants' 1998-99 employment was comprised of two part-time positions, i.e., a Teacher Certification Not Required Aide position and a Teacher Certification Required Aide position. The Union argues that each Grievant occupied a single position, i.e., a Teacher Certification Required Aide.

The District contends that it has the contractual right to pay the Teacher Certification Not Required rate of pay for all work performed in the Teacher Certification Not Required position and to pay the Teacher Certification Required rate of pay for all work performed in the Teacher Certification Required position. The Union argues that all work performed by the Grievants must be compensated at the Teacher Certification Required rate because the employees were required to have and maintain teacher certification during the 1998-99 school year.

Prior to the 1997-99 collective bargaining agreement, the District had Aide positions for which teacher certification was required and Aide positions for which teacher certification was not required. The 1997-99 collective bargaining agreement was the first agreement to differentiate these two positions on the basis of wage rate.

The evidence of bargaining history on the 1997-99 collective bargaining agreement demonstrates the following: the Union proposed that Aides who held teacher certification be paid more than those who did not have teacher certification; the District responded with a proposal that paid more to Aides who were required by the Board to hold teacher certification for their position; the parties discussed whether the additional wage would be paid on the basis of teacher certification desired or required; the parties agreed that the additional wage would be paid when the Board required teacher certification in the Aide position; there was discussion about what would happen if an employee moved from a position that required certification to a position that did not require certification; and that the District stated that it reserved the right to pay the lower wage rate if the new position did not require teacher certification. Following these discussions the parties agreed upon the following language:

Aides who are required by Board policy to be certified by the State of Wisconsin as a teacher and for their present position will be increased by fifty cents (50¢) per hour effective on July first of the first day of this agreement.

The agreed upon language was not put into the contract, but served to change Appendix A. Prior to the change, Appendix A contained one Aide classification. After the change, Appendix A contained two Aide classifications, i.e., Teacher Certification Required and Teacher Certification Not Required. The Appendix A wage rate of the Teacher Certification Required Aide classification is approximately fifty-cents per hour more than that of the Teacher Certification Not Required Aide classification.

Article XIII(A) of the 1997-99 collective bargaining agreement states as follows:

Attached to, marked **Appendix A**, and made a part of this Agreement are the mutually agreed upon index and job classification. During the term of this Agreement, each employee shall receive the rate as indicated on the index for his or her years of service and classification.

Construing Appendix A and Article XIII(A) as a whole leads to the conclusion that Aides in the Teacher Certification Required classification are paid at the Teacher Certification Required wage rate and that Aides in the Teacher Certification Not Required classification are paid at the Teacher Certification Not Required wage rate. The evidence of bargaining history establishes that the parties mutually agreed that the appropriate classification is determined on the basis of whether or not the position being occupied by the Aide is one in which the Board requires teacher certification.

Appendix A and Article XIII(A) neither permit, nor prohibit, the District from establishing part-time Teacher Certification Required or part-time Teacher Certification Not Required Aide positions. Nor do they permit, or prohibit, the District from employing a single individual in a part-time Teacher Certification Required position and a part-time Teacher Certification Not Required position. Rather, these provisions are silent on these matters.

As the Union argues, when the parties negotiated the two Aide classifications into the 1997-99 collective bargaining agreement, there were no discussions of split assignments, or paying different wage rates. However, the absence of such discussion does not mean that the District does not have the right to establish part-time Aide positions. Nor does it establish that the District may not employ a single individual in a part-time Teacher Certification Required Aide position and a part-time Teacher Certification Not Required Aide position. Rather, the absence of any bargaining discussion on these specific issues means that the undersigned must look to other evidence, such as the language of the 1997-99 collective bargaining agreement and the parties' prior conduct, to determine each party's rights.

Article VI, Management Rights, provides the District with the right to "determine the kinds and amounts of services to be performed as it pertains to school system operations, and the number and kinds of classifications to perform such services" and "assign employes in positions within the school system." By this language, the District has retained the right to: determine the number of Teacher Certification Not Required Aide and Teacher Certification Required Aide positions within in the District; to determine whether or not these Aide positions are full or part-time; and to assign work to employes within classification.

The District has employed individuals to work in two different classifications at the same time and continues to employ such individuals without apparent complaint from the Union. For example, one individual is employed in a Bus Driver position and in a Kitchen position. Another individual is employed in a Kitchen Server position and a Cleaning Person position. These individuals receive the wage appropriate to the work being performed. Thus, the individual who is employed as a Kitchen Server and a Cleaning Person is paid at the Kitchen Server wage rate when performing Kitchen Server work and is paid at the Cleaning Person wage rate when performing Cleaning Person work.

The collective bargaining agreement does not define either the work of the Teacher Certification Required Aide classification, or the work of the Teacher Certification Not Required Aide classification. Inasmuch as the 1997-99 collective bargaining agreement is the first to differentiate between the two Aide positions, there is no longstanding or well-established evidence of past practice to establish the parties' mutual intent with respect to this issue.

To be sure, during the 1997-98 school year, the District paid Rebecca Rericha at the Teacher Certification Required Aide wage rate for performing essentially the same duties that were performed by Grievant Meyer during the 1998-99 school year. Regardless of whether or not, as the District argues, this payment to Rericha was a mistake, one instance is not sufficient

to establish a binding past practice.

District Board Policy 7.13 was in existence at the time that the parties negotiated their 1997-99 collective bargaining agreement. Under this policy, the Board required teacher certification for four positions, *i.e.*, Kindergarten Aide, Preschool Aide, Early Childhood Aide, and Elementary L.D. Aide, and expressly stated that all other positions may be filled with non-certified staff. The testimony of District administrative staff demonstrates that, as circumstances warrant, other Aide positions may be required to have teacher certification.

The Board policy did not define the duties of a Kindergarten Aide, Preschool Aide, Early Childhood Aide, or Elementary L.D. Aide. Although the District introduced job descriptions for Instructional Aide, Elementary L.D. Aide, Early Childhood Aide and Special Education EEN Program Support Aide, these job descriptions are not dated. The testimony of Elementary Principal Steffen, that “they go back in time” is not sufficient to establish that these job descriptions were in existence at the time that the parties negotiated their 1997-99 collective bargaining agreement. Absent such evidence, the job descriptions are not reliable evidence of any mutual understanding with respect to work that falls within, or without, each Aide classification.

In summary, the only evidence of the parties’ mutual understanding with respect to what constitutes Teacher Certification Not Required Aide work and what constitutes Teacher Certification Required Aide work is the evidence of the parties’ bargaining history. Specifically, the parties have agreed that work performed in an Aide position for which the Board requires teacher certification is paid at the Teacher Certification Required rate and work performed in an Aide position for which the Board does not require teacher certification is paid at the Teacher Certification Not Required rate.

Grievant Meyer’s 1997-98 position of Kindergarten Aide was eliminated for the 1998-99 school year. According to Grievant Meyer, at the end of March or the beginning of April, 1998, Superintendent Seyfer called Rebecca Rericha, Grievant Wesley, and Grievant Meyer into his office and stated that, as a result of low enrollment, the District would not allow Kindergarten Aides for the 1998-99 school year; Grievant Meyer’s seniority would allow her to take Rebecca Rericha’s position; Rebecca Rericha would fall down to the next position; that Grievant Wesley would probably be laid-off; and that Superintendent Seyfer did not make any statement regarding pay rate or teacher certification.

Superintendent Seyfer recalls that, in the Spring of 1998, he offered Grievant Meyer the position of a teacher certified aide and a study hall supervisor and that she accepted that position. (T at 189) This testimony indicates that Grievant Meyer was offered one position, with two assignments. Superintendent Seyfer did not contradict Grievant Meyer’s testimony that she was told that her seniority would allow her to take Rebecca Rericha’s “position” for the 1998-99 school year.

In subsequent testimony, Superintendent Seyfer recalls that, when he spoke with Grievant Meyer, he explained to her “that the positions that we would have for 1998-99 would

study hall supervisor working in the high school. (T at 193) Superintendent further recalls that he “ascertained from her to my understanding what I was talking about” and that “she accepted that position”. (194)

As a review of the above establishes, Superintendent Seyfer’s testimony is not entirely consistent. At times, he refers to Grievant Meyer’s 1998-99 employment as two positions, and, at other times, he refers to this employment as one position. However, taken as a whole, Superintendent Seyfer’s testimony indicates that he offered, and Grievant Meyer accepted, one position with a variety of duties, rather than two distinct part-time positions.

In an October 23, 1998 memo to Grievant Meyer, Principal Steffen states “The Early Childhood Aide position is to be a certified position and the study hall aide position is not.” Principal Steffen was not the District Representative who offered 1998-99 employment to Grievant Meyer. Thus, while this memo may shed light on Principal Steffen’s state of mind on October 23, 1998, it is not evidence of either Superintendent Seyfer’s understanding, or Grievant Meyer’s understanding, at the time that Grievant Meyer was offered and accepted 1998-99 employment.

Moreover, following this written opinion of Principal Steffen, the District did not pay Grievant Meyer as if she held one Teacher Certification Required Aide position and one Teacher Certification Not Required position. Rather, the District paid the Grievant as if she had one position. It was not until after the March 5, 1999 meeting with Principal Steffen, when Union Stewards questioned why the Grievants were not being paid at the Teacher Certification Required rate, that the District paid Grievant Meyer in a manner consistent with its claim that she held two distinct part-time positions.

Grievant Wesley, unlike Grievant Meyer, did not bump into a position. Rather, Grievant Wesley was laid-off and subsequently recalled to work.

Grievant Wesley recalls that Superintendent Seyfer contacted her in August of 1998, to advise her that “there was a need for a high school study hall monitor and some elementary aide assistants, which at that point wasn’t made clear as to what that would entail, but I was informed that pretty much half my day would be spent over at the high school in the study hall.” (T at 55) According to Wesley, the Superintendent did not mention wage rate at the time that he offered her employment for the 1998-99 school year. (T at 60) This testimony is ambiguous in that the Superintendent’s offer of employment may be construed to be one position with various assignments, or two positions.

Superintendent Seyfer recalls that he “called Ann Wesley to let her know of a pending position as she had a re-call right” and that he “offered her a position comprised of approximately one-half of her time as a teacher certified aide and one-half of her time as a study hall supervisor. And then she was – she accepted that position and that recommendation for recall was accepted by the School Board.” (T at 189) This testimony of Superintendent

position for the 1998-99 school year. It was not until after the March 5, 1999 meeting with Principal Steffen, when Union Stewards questioned why the Grievants were not being paid at the Teacher Certification Required rate, that the District paid Grievant Wesley in a manner consistent with its claim that she held two distinct part-time positions.

Conclusion

The District has the right to establish part-time Teacher Certification Required Aide positions and part-time Teacher Certification Not Required Aide positions. Additionally, the collective bargaining agreement does not restrict the District from employing one individual to occupy a part-time Teacher Certification Required Aide position and a part-time Teacher Certification Not Required Aide position. As with any bargaining unit position, the District's right to determine which individual will occupy a position may be circumscribed by other contractual rights, such as posting rights, lay-off rights, or recall rights.

In the present case, the Grievants' right to their 1998-99 employment is not at issue. The only issue to be determined is the appropriate pay rate.

As discussed above, the evidence is not entirely consistent. However, the most reasonable conclusion to be drawn from the evidence is that the District did not offer, and the Grievants did not accept, two part-time Aide positions, but rather, that the District offered, and the Grievants accepted, one Aide position for which teacher certification was required. Under these circumstances, the Grievants are contractually entitled to receive the Teacher Certification Required Aide wage rate for all services performed as an Aide during the 1998-99 school year.

As the District argues, it is not evident that an employee or the Union made any request for a record of status. Thus, whatever rights may be granted by Article V(E), they were not invoked in the present case.

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

AWARD

1. The Employer violated the 1997-1999 collective bargaining agreement by not paying Rebecca Meyer and Ann Wesley the Teacher Certification Required rate of pay for all service performed as an Aide during the school year 1998-99.

2. In remedy of this contract violation, the Employer is to
 - a) immediately pay to Rebecca Meyer and Ann Wesley, in one lump sum payment, the difference between the wages that they would have received in the 1998-99 school year had they been paid at the Teacher Certification Required wage rate for all service performed as an Aide and the wages that the Grievants were paid in the 1998-99 school year for all service performed as an Aide.
 - b) immediately make Ann Wesley and Rebecca Meyer whole for any fringe benefits lost as a result of the District's failure to pay the Grievants at the Teacher Certification Required Aide wage rate for all service performed as an Aide during the 1998-99 school year.

Dated at Madison, Wisconsin this 25th day of April, 2000.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator