BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**FOND DU LAC EDUCATION ASSOCIATION/
WINNEBAGOLAND UNISERV**

and

FOND DU LAC SCHOOL DISTRICT

Case 58
No. 58470
MA-10962

(AODA Coordinator)

Appearances:

Davis & Kuelthau, S.C., Attorneys at Law, by **Attorney Mary Gerbig** and **Attorney Mark Vetter**, appearing on behalf of the Fond du Lac School District.

Wisconsin Education Association Council, by **Ms. Laura Amundson**, and Winnebagoland UniServ, by **Mr. Armin Blaufuss**, Executive Director, appearing on behalf of the Fond du Lac Education Association.

ARBITRATION AWARD

The Fond du Lac Education Association (hereinafter referred to as the Association) and the Fond du Lac School District (hereinafter referred to as the District) requested that the Wisconsin Employment Relations Commission designate the undersigned as arbitrator to hear and decide a dispute concerning the District's decision not to assign bargaining unit member Joe Cismoski as the AODA coordinator in the 1999-2000 school year. The undersigned was so designated. A hearing was held in Fond du Lac on April 11 and 12, 2000, at which time the parties were afforded full opportunity to present such testimony, exhibits, stipulations, other evidence and argument as were relevant to the case. The parties submitted post-hearing briefs and reply briefs, the last of which were exchanged through the undersigned on August 2, 2000, whereupon the record was closed. The parties requested that the undersigned issue an expedited Award, setting forth the result of the grievance, in order that the result might be known before the commencement of the school year.

Now, having considered the evidence, the arguments of the parties, the contract language and the record as a whole, the undersigned makes the following Award.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

CITED CONTRACT PROVISIONS

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ARTICLE II

A. RECOGNITION

The Board of Education (referred to hereafter as "Board") of the Fond du Lac School District, recognizes the Fond du Lac Education Association (referred to hereafter as "F.E.A.") as the exclusive bargaining representative as defined in Wisconsin Statutes 111.70 and as determined by a legal election on January 19, 1967, for all professional personnel including full or part-time certified classroom teachers, librarians, guidance counselors, speech therapists, extended education program teachers, and special subject teachers, but excluding substitutes, supervisors, attendance officer, executives, full-time administrators, office clerical, custodial and other non-certified personnel.

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C. BARGAINING UNIT WORK

1. Subject to the conditions of this provision, bargaining unit work shall only be performed by persons who are members of the bargaining unit and who are certified under state law to perform such work.

a. Incidental bargaining unit work may be assigned to non-bargaining unit personnel. Incidental bargaining unit work may not exceed .2 of a full-time position in any certification area.

2. Bargaining unit members shall be entitled to all benefits of this Agreement except as follows:

a. Determinate Leaves of Absence

Article VIII, A. 1, 2, 3, 4, B, D, E, F, G, H, M and N shall be inapplicable to teachers hired to fill the position of a regular bargaining unit employee on a determinate leave of absence. The non-renewal procedures in Section 118.22 of the Wisconsin Statutes shall only be applicable to those teachers who are hired to fill the position of a regular bargaining unit employee on a determinate leave of absence for more than a semester if such teachers are covered by the definition of a "teacher" in that statute. Letters of temporary substitute employment shall be given to such employees and they will automatically be terminated or non-renewed, if applicable, at the end of the employment term, expressed in the letter of temporary substitute employment.

b. Indeterminate Leaves of Absence

1) The District shall have the right to use a substitute teacher for indeterminate leaves of absence for a period of time up to and including 90 contract days.

2) After this period of time the District shall issue a letter of temporary substitute employment to whichever teacher it chooses to fill this position pursuant to Article II(C)(2)(a) of the collective bargaining agreement. It is understood by the parties that the person receiving the letter of temporary substitute employment may not be the same person who was substituting during the 90-day period.

3) This letter of temporary substitute employment shall be terminable at the end of the semester or upon the return of the regular teacher, whichever occurs earlier.

With respect to indeterminate leaves of absence, it is understood by the parties that letters of temporary employment shall be issued only to qualified, certified teachers.

c. Teachers employed under a Letter of Temporary Substitute Employment for an entire semester or more, who are employed in a regular bargaining unit position during the next school year, shall be provided all benefits under this Agreement, including seniority. In addition, if the teacher is employed in the same position during the next school year, the teacher shall also receive credit for one year's service toward the probationary period. The term "same position" shall mean K-6 at the elementary level and the same area of certification at grades 7-12 except in subject specific areas such as tech ed. and family and consumer education (FACE) where the specific area shall constitute the "same position."

3. Bargaining unit work is defined as work which may only be performed by a person under a teaching certificate or license issued by the Department of

Public Instruction and/or is work that is regularly assigned to bargaining unit members during the regular work day.

ARTICLE VII

GRIEVANCE PROCEDURE

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F. The grievance procedure shall be carried forth in the following manner.

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The arbitrator shall be limited to the interpretation of the express terms of the Agreement. The arbitrator shall in no way add to, subtract from, modify or delete the revision of the Agreement. The decision of the arbitrator will be final and binding upon the parties.

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ARTICLE VIII

PERSONNEL POLICIES

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G. REDUCTION IN STAFF POLICY

1. Layoff

a. The Board shall provide the F.E.A. with notice of positions it is considering eliminating or reducing on or before May 15 of the current school year. The F.E.A. is entitled to a conference with the Board prior to the final layoff notice. Teachers to be laid off for the ensuing school year shall be notified in writing of such layoff no later than June 1 of the current school year.

1) The individual contracts of regular part time teachers may be adjusted in writing by the Board no later than the last day of the school year.

b. If it becomes necessary, in the Board's discretion, to reduce the number of employee positions or the number of hours in any position, the Board may

lay off the necessary number of teachers. Layoffs shall not be made to circumvent the other job security or discipline provisions of this Agreement. In the event that reduction of personnel shall become necessary, the provisions set forth shall apply.

1) The Board shall accomplish the reductions through normal attrition.

2) At its discretion, the Board may utilize volunteers to accomplish the reductions required.

3) Should further reduction be necessary, the Board shall first retain those teachers possessing current teaching certificates with the greatest amount of seniority in the District, who are qualified by virtue of their certification to teach in those areas of discipline to be preserved.

4) Full time personnel selected for a reduction in hours may choose to be fully laid off, without loss of any rights or benefits as set forth below. Part-time teachers reduced more than 25% of a full-time position and/or suffering a loss of fringe benefits as a result of the reduction may choose to be fully laid off, without loss of any rights or benefits as set forth below.

2. Recall

Teachers who are laid off shall be offered recall in reverse order of layoff to vacant positions which they are certified to fill.

3. Full-time and part-time positions

a. Full-time teachers shall be recalled only to full-time positions provided that such teachers shall have the option of accepting a part-time position without jeopardizing their recall to a full-time position.

b. Part-time Teachers

1) Part-time teachers who were on non-probationary status for the 1989-90 school year shall have the option of choosing to remain only part-time or the option of filling full-time positions as the District's staffing needs dictate. Those electing the first option shall have no right to assume full-time positions. Those electing the second option will have the obligation to assume full-time positions as they become available.

2) Part-time teachers who were on probationary status for the 1989-90 school year and all subsequent new teachers employed on a part-time basis shall have the option of electing to be employed on a Letter of Temporary

Substitute Employment or the option of a regular teaching contract. Those teachers electing the first option shall be subject to the conditions expressed in Article IIC2a. Those teachers electing the second option shall be subject to all provisions of the agreement except that they shall serve a three-year probationary period. Those teachers electing the second option will also have the obligation to assume full-time positions as they become available.

4. Recall Notice

The District shall give written notice of recall from layoff by sending a registered or certified letter to the F.E.A. and to said teachers, at their last known addresses. It shall be the responsibility of such teachers to notify the Board of any change in address.

Any teachers so notified shall respond within seven (7) calendar days from receipt of said notice whether they accept or reject the position. If teachers reject positions for which they are certified to teach and such position is offered consistent with the aforementioned provisions of this Article, such teachers shall be considered to have resigned from the employ of the District and all of their benefits shall cease.

Teachers who have been laid off will have recall rights for a period of three (3) years from the effective date of layoff.

Teachers who have been laid off will have recall rights for a period of three (3) years from the effective date of layoff.

5. Miscellaneous Provisions

a. No new or substitute appointments shall be made by the District while there are laid off teachers available who are qualified to fill the vacancies.

b. Teachers will not lose their recall rights if they secure other employment during the layoff.

c. The F.E.A. shall have the right to file a grievance for teachers who are not recalled if it appears that their re-employment rights have been violated.

d. While on layoff and with recall rights, the individual shall continue to participate in the Group Medical, Dental, and Life Insurance benefits under the group provided the premiums are paid by the individual as long as they are unemployed. Unemployed is working less than 30 hours per week.

e. The teacher's sick leave accumulation and seniority shall remain in force and be a part of the record while on layoff status. The period of time on layoff will not be counted as time for accumulated additional sick leave or counted in the total number of years of seniority.

6. Seniority

a. Seniority is defined as the length of service, as a full- or part-time bargaining unit member, within the District as of the date of most recent employment within the District. An employee's length of service will be broken if the employee resigns, is discharged or non-renewed.

1) Administrative personnel who have accumulated bargaining unit seniority and who resume employment within the bargaining unit shall not be able to exercise any seniority rights under subsection 1.a. and c. of this Article until the expiration of one (1) calendar year after which they resumed bargaining unit employment.

b. In the event of more than one teacher having the same length of service in the District, seniority ranking will be determined in the following sequence:

1) The date of signing the continuing individual teacher contract.

2) Teaching experience in this District which occurred prior to their current employment period.

3) Teaching experience in other districts including elementary and/or secondary public and/or private schools, colleges or universities, and technical schools, but excluding teaching officially defined as substitute teaching.

4) Drawing by lot. The F.E.A. and all teachers so affected shall be notified in writing of the date, place and time of the drawing. The drawing shall be conducted at a time and place that will allow affected teachers and the F.E.A. to be in attendance.

c. By November 1 of each school year, the Board will publish and distribute to all teachers and the F.E.A. a seniority list ranking all certificated employees from the time of their most recent employment. This list shall also itemize after each name, such employee's area(s) of certification. A finalized list shall be provided the F.E.A. by February 15 of each year which list shall include all corrections, deletions, and additions of employees for the school year.

7. Teachers whose positions are being eliminated or reduced shall be able to "bump" only less senior teachers in any area in which the affected teacher holds certification as long as the concept of reaching the lease [sic] senior person is maintained. They may also affect involuntary transfers or involuntary reassignments of less senior teachers for the purpose of "bumping" as long as the end result is to lay off the least senior person.

CITED STATUTORY PROVISIONS

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MUNICIPAL EMPLOYMENT RELATIONS

111.70 Municipal employment. (1)

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(b) "Collective bargaining unit" means a unit consisting of municipal employes who are school district professional employes or of municipal employes who are not school district professional employes that is determined by the commission to be appropriate for the purpose of collective bargaining.

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(i) "Municipal employe" means any individual employed by a municipal employer other than an independent contractor supervisor, or confidential, managerial or executive employe.

(j) "Municipal employer" means any city, county, village, town, metropolitan sewerage district, school district, or any other political subdivision of the state which engages the services of an employe and includes any person acting on behalf a municipal employer within the scope of the person's authority, express or implied.

ISSUES

The parties were unable to stipulate to an issue and agreed that the Arbitrator should determine the issue in his Award. The Association proposed that the issue be stated as follows:

1. Did the Fond du Lac Board of Education and/or its agents violate the Master Agreement when it/they failed to assign Joe Cismoski to the AODA work for the 1999-2000 school year? If so,

2. What is the appropriate remedy?

The District believes that the issues are:

1. Did the District violate the Agreement when it removed the AODA position from the bargaining unit? If so,

2. Did the District violate the collective bargaining agreement when it laid off the Grievant for the 1999-2000 school year? If so,

3. What is the appropriate remedy?

The District's formulation of the issue treats as a distinct question the propriety of the layoff procedures used in this case and suggests that that issue is only presented if the Arbitrator concludes that the removal of the AODA position was a violation of the contract. However, if the removal of the position was a contract violation, the propriety of the layoff procedures is, in and of itself, irrelevant. The Grievant would not have been laid off but for the removal of the position. If there was a violation in removing the position from the unit, the issue concerning the layoff procedures is whether the Grievant failed to mitigate his damages when he refused to bump. That is part and parcel of the appropriate remedy for the violation. If there was no violation in reassigning the AODA Coordinator duties to someone outside the bargaining unit, the layoff issue is whether the Grievant, having refused to bump, still had to be offered the vacancy that subsequently developed. Accordingly, the issues may be fairly stated as follows:

1. Did the District violate the Agreement when it assigned the AODA position to someone outside of the bargaining unit?

2. If not, did the District violate the Collective Bargaining Agreement when it laid off the Grievant for the 1999-2000 school year?

3. If either questions 1 or 2 are answered in the affirmative, what is the appropriate remedy?

STIPULATIONS

The parties stipulated to the following relevant facts:

1. The AODA (Alcohol and Other Drug Abuse) position was created in response to the 20 Standards initiative by the Wisconsin Department of Public Instruction (DPI) and has been supported by District, State and Federal funds. The District is the fiscal agent for all funds disbursed by DPI. A portion of the funding for the Coordinator position salary was from District monies, which was separate from DPI dispersed funds.

2. In 1989-90, Joe Cismoski held the Fond du Lac School District AODA Coordinator position. Lowell Sahlstrom, Director of Pupil Services, supervised Mr. Cismoski in the AODA Coordinator position. Mr. Cismoski held the AODA position from the point that funding was available for the position.

3. In 1989-90, Dr. Sahlstrom became ill. Mr. James Gryzwa acted as the temporary Director of Pupil Services until August, 1990.

4. In July, 1990, Mr. Gryzwa became the Pupil Service Director.

5. In 1991, Mr. Gryzwa developed the AODA Coordinator job description in response to a request from DPI. DPI provided funding for the AODA position and required verification in the form of a job description.

6. Prior to the 1990-91 school year, two certified teaching positions were reduced by fifty (50%) percent at Thiesen High School.

7. The individuals who held the reduced positions exercised their bumping rights under the collective bargaining agreement and, because they had seniority to Mr. Cismoski, "bumped" into the AODA Coordinator position and shared the position equally for the 1990-91 school year.

8. The individuals who "bumped" Mr. Cismoski had no previous experience in the AODA Coordinator position, but did have AODA core training. Because the individuals did not have as much training and experience as Mr. Cismoski, Mr. Gryzwa exercised a higher degree of direction and control with the individuals who held the AODA Coordinator position in 1990-91 school year than he exercised with Mr. Cismoski in the same position.

9. Mr. Cismoski held a teaching position in the area of science for the 1990-91 school year, as a result of the actions described in paragraphs 6, 7 and 8 above.

10. The positions of the two teachers filling the AODA position in 1990-91 were restored to 100% for the 1991-92 school year. Mr. Cismoski returned to the AODA Coordinator position for the 1991-92 school year.

11. Mr. Cismoski held the AODA Coordinator position continuously from the 1991-92 school year through to the end of the 1998-99 school year.

12. From August 1, 1991, to January, 1995, Mr. Gryzwa was the Director of Pupil Services.

13. During the time period from August, 1990, to January, 1995, Mr. Cismoski reported to and advised Mr. Gryzwa as to the grant monies available for the AODA program. Based on principal, teacher, other District personnel and community need, Mr. Cismoski made recommendations and prepared grant and entitlement proposals.

14. Jon Cousins was hired as the Director of Pupil Services in January of the 1994-95 school year. Mr. Cousins has held that position continuously to the present date.

15. During the time period from the 1995-96 school year through the 1998-99 school year, Mr. Cismoski reported to and advised Mr. Cousins as to the grant monies available. Based upon principal, teacher, other District personnel and community need, Mr. Cismoski made recommendations and prepared grant and entitlement proposals.

16. Beginning in the 1995-96 school year, Mr. Gryzwa returned to an administrator position focusing on Early Childhood programs and became Supervisor of the Title I and At Risk programs and assisted the Director of Pupil Services. From January, 1995, to the present, Mr. Gryzwa has been the Building Administrator at Fahey Elementary School.

17. On or about June 4, 1998, the District advised Mr. Cismoski via written correspondence that the continuation of the AODA program in its present form was under review due to budgetary constraints.

18. On or about April 27, 1999, James Freeman, Director of Personnel, requested via written correspondence that the Fond du Lac Education Association Executive Committee mutually agree to remove the AODA Coordinator position from the bargaining unit. The District advised the Association of its belief that the duties of the AODA Coordinator position were primarily managerial and administrative in nature.

19. On or about May 21, 1999, the District advised Mr. Cismoski via written correspondence that at the end of the 1998-1999 contract year he would no longer be the District's AODA Coordinator. Due to budgetary constraints, the District advised Mr. Cismoski that the AODA Coordinator position was being eliminated for the following contract year and gave him notice of the District's intent to lay off, consistent with the June 1 collective bargaining agreement requirement.

20. On or about May 21, 1999, the District advised via written correspondence Mr. Cismoski and Mr. Blaufuss that the District would be reassigning the duties and responsibilities the discontinued AODA Coordinator to an existing administrator.

23. On June 4, 1999, the Association informed the District that it was not mutually agreeable to removing the position from the bargaining unit and filed a grievance on behalf of Mr. Cismoski.

24. For the 1999-2000 school year, the District assigned the AODA Coordinator duties to Mr. Gryzwa, which began in August.

25. On or about July 9, 1999, the District filed a Petition for Unit Clarification, related to the AODA position.

26. In August or September, 1999, Mr. Gryzwa was named Supervisor of ATODA programs (Alcohol Tobacco and Other Drug Abuse).

27. On September 13, 1999, the Board of Education heard the appeal filed by the Association on behalf of Mr. Cismoski and denied the grievance.

28. On September 20, 1999, the Board of Education issued its written response denying the grievance.

29. On December 4, 1999, the parties began testimony in the Unit Clarification hearing. The hearing examiner held the hearing in abeyance pending the arbitration hearing.

30. The parties mutually agreed, via letters by WEAC Counsel Steve Pieroni and Mark Vetter, subsequent to a discussion with WERC Counsel Peter Davis, regarding the admissibility of case law concerning the bargaining unit status of similar ATODA positions. The parties have agreed to stipulate to said letters. The letter from Pieroni to Vetter stated:

> Dear Mark:
>
> This letter will confirm our previous telephone conversations concerning the grievance arbitration hearing and the unit clarification hearing involving the position previously held Joe Cismoski. We discussed holding the unit clarification hearing in abeyance pending the decision of Arbitrator Nielsen.
>
> The parties agreed not to object to the admissibility of case law concerning the bargaining unit status of similar ATODA positions which have been issued by the Wisconsin Employment Relations Commission. The parties reserved the right to argue the weight be given said decisions and/or to assert the appropriate remedy to be awarded in the arbitration hearing.
>
> If this comports with your understanding, please let me know.

Vetter sent a reply confirming Pieroni's summary of the arrangements.

Additional Background – Managerial Dispute

The Grievant, Joseph Cismoski, was the District's Coordinator for Alcohol and Other Drug Abuse programs (AODA). He held the position from its inception in 1989 until he was laid off at the end of the 1998-99 school year, with the exception of one year when he was bumped from the job by two more senior teachers, each of whom claimed half of the job during a layoff. The basic duties of the AODA Coordinator's job were spelled out in a 1991 job description provided by the District to the Department of Public Instruction:

> The following job description for the Fond du Lac School District's AODA Program Coordinator should be included in the 1991—92 Youth AODA Grant.

The district—wide Alcohol and Other Drug (AOD) Program Coordinator will function within the Pupil Services Department and have direct responsibility to the Director of Pupil Services. The individual will coordinate all aspects of the district's AOD program functioning. Responsibilities include:

1. Assist in the development, monitoring, and implementation of a K—12 developmental AODA prevention curriculum, Student Assistance Program (SAP) and other AOD programs for district students and staff.

2. Implementation and monitoring of district-wide AOD policies and procedures.

3. Provide direction and meet regularly with the AOD Program Advisory Committee (building level AOD or SAP coordinators).

4. Provide input to the budgetary process including the procurement of monies from grants.

5. Maintain effective working relationships with local service providers and meet on a regular basis with community prevention, intervention, and treatment personnel to assist in community—wide programs development and evaluation.

6. Monitor the function of support groups and identify training need of district personnel.

7. Act as a district resource person for AOD information and consultation.

The Grievant was laid off in response to budget problems. At essentially the same time, the District advised the Association that based upon its reading WERC case decisions, it believed that the position of AODA Coordinator was a managerial position and should not be included in the bargaining unit. Thus, it transferred the AODA duties performed by the Grievant to Administrator James Gryzwa and named him AODA Supervisor for the 1999-2000 school year, effective August 1, 1999.

The Association did not agree that the AODA position was managerial and asserted that the duties could not, in any event, be transferred outside of the bargaining unit due to the Bargaining Unit Work provision of the contract. The District responded with a unit clarification petition, seeking to exclude the AODA Supervisor's job from the bargaining unit as a managerial position. The WERC assigned the case to a hearing examiner, who began taking evidence on December 4, 1999. However, the Examiner advised the parties, after hearing a portion of the evidence, that the question of whether the work at issue was bargaining unit work was more appropriately an issue for a grievance arbitrator. The hearing was adjourned and the unit clarification case was held in abeyance pending this arbitration.

Additional Background – Layoff of Cismoski

When Cismoski was advised that he would be laid off, Personnel Director James Freeman offered him the opportunity to bump a less senior teacher in his area of certification. Cismoski advised Freeman that he could not bump because of a side agreement reached between the Association and a prior personnel director, Woody Bilse. According to the Grievant, the side agreement was reached after he was bumped in the 1990-91 school year and it prevented the AODA Coordinator from being bumped or conversely, from bumping another bargaining unit member. The Grievant did not have a copy of the side agreement and Freeman could not find a copy of any such agreement in the District's files. While the Association's representatives also said that there was such an agreement, they could not produce a written copy. Freeman had the Grievant sign a Memorandum, waiving his bumping rights.

Under the contract, a laid off teacher who declines an offered position is deemed to have resigned. After the Grievant declined to bump, Freeman classified him as a resignation. Thus, when a teacher resigned in late summer, opening a position for which the Grievant was largely certified, Freeman did not contact him to offer him the position. Neither did the Grievant seek the position, nor apply for any position with the District. Instead, he held a series of jobs in the field of public health, none of which provided full-time employment between the date of his layoff and the date of the arbitration hearing.

At the arbitration hearing, the Association produced a copy of the side agreement:

> I.S.S. teachers may exercise their bumping rights within the I.S.S. Program. A.O.D.A. teachers may exercise their bumping rights within the A.O.D.A. program.
>
> Currently employed A.O.D.A. and I.S.S. teachers may exercise their bumping rights into bargaining unit positions other than A.O.D.A. and I.S.S. positions. If a full-time or part-time A.O.D.A. and I.S.S. teacher is assigned to a position entirely outside of A.O.D.A. and I.S.S., the teacher may not bump back into an A.O.D.A. and I.S.S. position.
>
> New employes hired solely for an A.O.D.A. and I.S.S. position shall not be able to bump into other bargaining unit positions. Similarly, effective for the 1991-1992 school year, other bargaining unit members may not bump into A.O.D.A. and I.S.S. positions.

The copy was unsigned and undated and was discovered in Association files only four days before the arbitration hearing. Association Executive Director Armin Blaufuss testified that he remembered negotiating such an agreement with Woody Bilse in response to the Grievant's complaints at having been bumped in 1990-91. Association President Dick Mand also testified that the agreement was reached. Former Personnel Director Woody Bilse testified that he had no recollection of any such negotiations or any such agreement and that he would not have entered into such an agreement without advice of legal counsel and the consent of the School Board.

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

POSITIONS OF THE PARTIES

The Association – Initial Brief

The Association takes the position that the contract is absolutely clear. Bargaining unit work "shall only be performed" by members of the bargaining "who are certified under state law to perform such work." Bargaining unit work is defined as work which (1) may only be performed by a person under a teaching certificate or license issued by DPI "and/or" (2) work regularly assigned to bargaining unit members. There are only two exceptions to this clear rule. They are likewise clear, and narrow: Incidental work which is less than .2 of an FTE, and temporary assignments of 90 days or less to cover for leaves of absence.

The AODA work has been regularly performed by a bargaining unit member for over a decade. Yet the Board transferred it from a bargaining unit member, Joe Cismoski, to an administrator, Jim Gryzwa. The Board admits that this was not incidental work and there was no leave of absence involved, the only two circumstances in which the contract permits movement of work outside of the bargaining unit. Instead, the Board's justification is that it believed that the work was managerial based on Personnel Director Jim Freeman's reading of a WERC decision in another District. That is not an exception recognized by the contract. Even if an argument could be made that managerial work was somehow an implicit exception, the Board only had an opinion from its personnel director. It did not even file a unit clarification over the position until after this grievance was filed. Giving the contract its plain meaning, the Arbitrator must find that the transfer of this work from Joe Cismoski to a non-unit member was a clear violation and must order it returned to Cismoski.

The remedy for an illegal transfer of work must be the return of the work, and in this case, that means returning the work to Cismoski. The Association notes that there is a specific agreement isolating the AODA and In School Suspension positions from bumping – that is the incumbents are not exposed to bumping from without and they do not have the right to bump classroom teachers. Thus, if Cismoski is removed from the AODA position, he had no right to claim another job. While the District questions the history of this agreement, the Association negotiator who bargained it and the UniServ Director involved both had clear recollections of the discussions and produced the written version of the agreement. Furthermore, Cismoski knew of the agreement and based on that knowledge, properly declined an offer to bump a less senior classroom teacher when he was told he would be laid off. The District took this to be a waiver of all recall rights, which it plainly was not. Thus, when a vacancy occurred in Cismoski's certification area, the District never offered the job to him. Assuming solely for the sake of argument that the District had some ability to remove him from the AODA position, it clearly violated the contract by not offering him the subsequent vacancy. The possibility that he would have turned down this job is merely that – a

possibility. No one can know, because the offer was never extended. Thus, the District cannot treat this as resignation or a factor in reducing the back pay that must accompany the Arbitrator's award.

As noted, the District claims that the AODA Coordinator's job is managerial. The Association disputes that characterization, but even if it were true, the contract governs this issue for its term. There has been no ruling on the issue by the Commission or other competent body and the parties have not negotiated any specific exceptions to the contract's reservation of bargaining unit work to bargaining unit members. Thus, the Arbitrator must limit himself to the four corners of the collective bargaining agreement, must conclude that the transfer of the work violates the collective bargaining agreement and must provide a reinstatement and make whole remedy to Joe Cismoski.

The District – Initial Brief

The District takes the position that the AODA job in issue here is a managerial position and that the contract only applies to persons appropriately included in the bargaining unit. As a managerial position cannot, as a matter of law, be appropriately included in the bargaining unit, it follows that the AODA position is not subject to regulation by the contract. A managerial employe is one who (1) participates in the formulation, determination and implementation of public policy at a relatively high level of responsibility and/or (2) has the authority to commit the employer's resources. Comparing this job with the similar position found managerial in the WERC's NORTHWEST UNITED EDUCATORS decision (DEC. NO. 22530-A (12/21/98)), the evidence overwhelmingly establishes that these characteristics are integral parts of the AODA Coordinator's position. The Coordinator necessarily oversees the assessment, planning, development and implementation of prevention programs. That is the essential purpose of the position. Moreover, the Coordinator develops and manages the budget for the program, contracts with and supervises consultants and researches and pursues outside funding sources. Thus, the incumbent clearly has the authority to commit the employer's resources including the ability to obtain resources from other units of government. On each critical point relied upon by the Commission to determine the managerial status of the AODA Coordinator in NORTHWEST UNITED EDUCATORS, the answer is the same in the Fond du Lac School District.

It is the duties of the job, not the characteristics of the individual holding the job, that must govern the question of bargaining unit status. The AODA Coordinator's job, whether filled by Gryzwa or filled by Cismoski, fundamentally involves the performance of managerial work and the exercise of managerial discretion. Thus, it is not in the bargaining unit and is not subject to the labor agreement. As a matter of law, the District has the right to ask the Commission to clarify the bargaining unit so as to exclude managerial positions. This may be done at any time and the contract cannot foreclose that statutory right.

The District asserts that it acted reasonably throughout and made every effort to reduce the impact that its legitimate decision to reassign the AODA duties would have on Cismoski. The decision to reassign the duties was driven by budgetary considerations and the need to close a $625,000 gap between anticipated revenue and anticipated expenditures. One obvious step was to reassign the managerial duties of the AODA Coordinator to an existing managerial employe. While this unfortunately impacted on Mr. Cismoski, the District offered him an opportunity to bump a less senior teacher in his area of certification. Mr. Cismoski, having been given a year's worth of warning that this move was likely, waived his bumping rights. He candidly admits that he does not want to be a classroom teacher. That is his right. But by declining a job for which he was certified, Mr. Cismoski is deemed to have resigned. That is not the District's doing — it is the result of his free choice and the clear language of Article VIII of the collective bargaining agreement. In every respect, the District followed the collective bargaining agreement's procedures for layoff of teachers. Mr. Cismoski need not have been out of work at any point. That he has from time to time been out of work is the result of his preference not to teach and is not the result of any District action.

The District strongly questions the Association's reliance on an alleged side agreement changing the rules of bumping for the AODA Coordinator job. The Association claims that there were discussions in 1990 over the AODA and ISS jobs and that those discussions led to an agreement to isolate those jobs from the bumping procedures of the contract. A three-paragraph document was presented containing the terms of that alleged agreement. However, there was no correspondence with the District indicating agreement, no signature of a District representative, no review of the agreement by legal counsel for the District, no record of the agreement being presented to the Board of Education, no record of the agreement being presented to the Association's Executive Board. In fact no evidence of any kind indicating that such an agreement was actually reached other than the suspect testimony of Association officials. Former Personnel Director Woody Bilse testified that he had no recollection of such an agreement. The supervisors over the AODA Coordinator were never informed of such an agreement. Indeed, the copy of the alleged agreement was never produced until four days before this hearing.

Even if the Arbitrator concludes that the Grievant did have some sort of limitation on his bumping rights and even if the Arbitrator concludes that the District erred in removing the Grievant from his job, it remains the case that he had a duty to mitigate his damages. By refusing the offer of bumping when it was extended to him in good faith, he clearly failed in that duty. Moreover, since the time of his layoff, the Grievant has limited his job search to public health positions. This despite the fact that he is a certified science teacher, with a Master's Degree. His preference not to work as a classroom teacher is just that — his preference. It cannot be held against the District. He did not seek employment in his most obvious area of opportunity and the Arbitrator must weigh this in deciding whether any damages can be awarded to him.

The Association's Reply Brief

In reply to the District's arguments, the Association takes the position that the Employer makes a fundamental mistake in arguing that the Arbitrator has some type of authority to clarify the bargaining unit. The Arbitrator's job is limited to interpreting and applying the terms of the collective bargaining agreement and the parties have not agreed to extend his jurisdiction to statutory questions.

The contract clearly defines the meaning of "bargaining unit work" and that definition clearly includes the AODA Coordinator's position. Cismoski did the job, as a member of the bargaining unit, for ten years. He was never treated as a managerial employe. He followed the guidelines established by DPI, the Board of Education and other entities that regulated the AODA function. His work can most accurately be described as providing services to the managerial employes of the District, at their direction. Either Jim Gryzwa or John Cousins, as his supervisors, had to sign off on any important decision and on many minor decisions. Certainly his supervisors relied on his technical expertise, but the Grievant never had the type of decision making authority accorded a manager. His discretion was minimal and his policy involvement scant. He basically followed the existing procedures, sought to renew the existing grant and abided by the guidelines set by DPI and other governmental agencies. These are not the hallmarks of a managerial employe. Nor has the District identified any way in which Cismoski's membership in the bargaining unit somehow compromised or conflicted with his faithful performance of the AODA Coordinator's job. If the Arbitrator chooses to rely on WERC precedent, this position is much more akin to the Student Assistant Coordinator job addressed in NORTHLAND PINES, DEC. NO. 27154 (2/7/92). There, as here, the position had many outreach and ministerial duties, as well as some limited discretion to administer program money. There, as here, the degree of involvement in policy and resource allocation was "not a sufficiently high level to establish that [the incumbent] is a managerial employee."

The basic fact remains that the AODA Coordinator's job constitutes bargaining unit work within the meaning of the contract. Whether these duties might also be characterized as managerial is a matter for another forum. The agreement is what it is and the District cannot simply ignore it. Thus, the Arbitrator should order the Grievant reinstated. Along with that order, the Arbitrator should make the Grievant whole, notwithstanding the District's claim that he somehow failed to mitigate his damages.

In connection with the mitigation issue, the Association disputes the District's claim that the 1990 agreement isolating the AODA Coordinator's job from bumping is somehow suspect. Granting that the document was not located until shortly before the hearing, the agreement itself was raised almost immediately after the layoff notice. Personnel Director Freeman was told of it by Cismoski in May of 1999, and by UniServ Director Blaufuss in May or June of 1999. The agreement was cited in the grievance procedure, including at the Board level. Yet the District never even thought to ask Woody Bilse about it until the arbitration hearing was under way. The District cannot credibly criticize the Association for laxity in seeking information about the 1990 agreement.

The 1990 agreement makes perfect sense in the context of the earlier bumping of Cismoski from his position. The District wished to avoid having this position filled by persons with no expertise in prevention programs. Cismoski wished to be protected from bumping, but had no desire to bump anyone else. The Association was willing to accommodate both desires, and thus, the agreement to isolate this specialized position. The fact that the District did not keep track of this agreement is not the Grievant's fault. He immediately advised them of the no bumping side agreement and he cannot be penalized for the District's failure to know what agreements existed between it and the Association.

The District's Reply Brief

The District asserts that the Association's arguments are flawed. In arguing solely the impact of the bargaining unit work provision, the Association fails to take into account the fact that the position here is not a bargaining unit position. It may have been included in the bargaining unit for some time, but it is not in some fashion permanently reserved to the unit. The statutes give the District the right to raise the question of unit placement at any time. Here, the District considered the Commission's conclusion in NORTHWEST UNITED EDUCATORS and determined to have its managerial work performed by its managers. As part of that decision, the District decided to have Gryzwa take on new and expanded authority to supervise the staff, allocate the moneys and monitor their usage. The job filled by Gryzwa is not appropriately included in the bargaining unit and the Association cannot compel the District to have its managers subject to the contract.

Bargaining unit work preservation has been the topic of many arbitration awards and the main stream of opinion is that there must be absolutely clear contract language to defeat an employer's right to make reasonable decisions as to the allocation of work. Any review of such decisions must balance the interests of the parties. Here, some of the work has been performed by Cismoski and some of it has been performed by Gryzwa. There has never been an exclusive reservation of this work to the bargaining unit. The Board decided to consolidate all of the duties in one position and that position was necessarily a managerial position. The decision was driven by legitimate budgetary concerns and not by any desire to undermine the Association. It was made known to the Association and to Cismoski well in advance of the being finalized and the District made every effort to shield Cismoski from job loss. In every respect the District has acted reasonably, in good faith and in pursuit of its legal rights under the Board Rights clause and Section 111.70.

The District dismisses the Association's claim that it somehow failed to comply with the layoff and recall provisions of the contract. Cismoski was given proper notice of layoff and was given an opportunity to bump. He declined that opportunity and signed a memorandum waiving his bumping rights. Article VIII provides in the clearest possible terms that refusing a position constitutes a resignation. Once he had resigned, there was no further obligation to offer him available positions. The claimed side agreement restricting his bumping rights, which the Association offers to show that his refusal was not a resignation, was never

produced until the eve of the arbitration hearing and is simply not credible. No one on the District's side had any recollection of such an agreement and there is nothing in the record that the Arbitrator could possibly rely upon to infer that such an agreement actually existed.

Even if there was a contract violation involved in his removal from the AODA position, the Grievant had a duty to mitigate his damages. He had a duty to seek comparable employment. He is a certified teacher, but he refused the opportunity to bump into a teaching position basing his refusal on an agreement that no one could produce and no one in the District had any knowledge of. Thereafter, he never sought employment as a teacher, in the District or elsewhere. He limited his job search to public health positions. That was a matter of preference and the District cannot be made to pay for his choice not to be gainfully employed in his licensed field. Thus, the Grievant is not entitled to back pay from the District and any remedy must be limited to, at most, a reinstatement order.

DISCUSSION

The parties, somewhat understandably, approach this case from starkly different analytical perspectives. The Association asserts that this is purely a matter of applying the language of Article II to the undisputed facts and making a declaration of what is and what is not bargaining unit work. The District asserts that Article II does not come into play, since the contract only applies to bargaining unit positions and the AODA Coordinator, and its successor, the AODA Supervisor, are managerial positions are a matter of law.

Article II, C, addresses bargaining unit work and it says, in pertinent part:

> 1. Subject to the conditions of this provision, bargaining unit work shall only be performed by persons who are members of the bargaining unit and who are certified under state law to perform such work.
>
> . . .
>
> 3. Bargaining unit work is defined as work which may only be performed by a person under a teaching certificate or license issued by the Department of Public Instruction and/or is work that is regularly assigned to bargaining unit members during the regular work day.

The first portion of the cited language reserves bargaining unit work to unit members. The second portion defines what constitutes bargaining unit work. The latter half of the definition speaks to "work that is regularly assigned to bargaining unit members during the regular work day." The work of the AODA Coordinator position was regularly assigned to Cismoski, a member of the bargaining unit, on a regular basis for ten years. It constituted his entire job. On its face, this meets the definition of bargaining unit work contained in Article II.

The District's premise is that the contract language cannot be read as including work which, by its nature, renders the person performing the job a managerial employe within the meaning of Section 111.70. There are two fallacies underlying that argument. First, while it is true that a bargaining unit may not compel the inclusion of a managerial position within its ranks over the objections of the employer, there is no prohibition on a voluntary agreement between the parties which has the same effect. Certainly this application of the language may be a permissive subject of bargaining, but it is the nature of permissive subjects that bargaining over them and agreement on them are permitted. 1/ Indeed the language here does not go that far. It says nothing of the reservation of positions. It speaks to the reservation of "work" that has, through the District's own choice, been regularly assigned to bargaining unit members. This portion of the contract does not distinguish between types of work, only between work which has and has not been regularly assigned.

1/ The Arbitrator would stress that he draws a distinction between the statutory right of each municipal employe to engage in concerted activity and thus, to be included in a collective bargaining unit and the right of an Employer to exclude its managerial employes from bargaining units.

The second problem with the District's theory is that there has never been a determination that the job held by Cismoski rendered him a managerial employe. The person holding the position of AODA Coordinator in the NORTHWEST UNITED EDUCATORS case was found by the WERC to be a managerial employe, and there are many similarities between that person's duties and the duties previously performed by Cismoski. However, the determination of managerial status is not driven by job titles and the mix of duties in each case may yield differing results. Despite the District's earnest exhortation that the Arbitrator should determine whether Cismoski was a managerial employe or Gryzwa is a managerial employe, those are not issues of contract interpretation and have not been placed before the Arbitrator. The parties did agree that they would not object to one another's citation of WERC case law on managerial status, but they did not agree that the legal question of managerial status could be answered by the Arbitrator. The Arbitrator's jurisdiction is limited to "the interpretation of the express terms of the Agreement." 2/ The Commissioners of the WERC are in no way bound to any determination that an arbitrator makes as to inclusion or exclusion from the bargaining unit on statutory bases. By the same token, the Commissioners cannot define what the parties meant in their contract when they agreed that bargaining unit work should only be performed by members of the bargaining unit and gave a broad definition of bargaining unit work. These are separate questions for separate forums.

2/ The District's citation of the Recognition Clause does not cloak the Arbitrator with the authority of a WERC hearing examiner. The Association is not purporting to define the rights of managerial employes to be protected in their work. It is purporting to apply the language defining bargaining unit work and reserving it to the members of the bargaining unit.

The District clearly has the right to seek a determination by the WERC that the work performed by Cismoski renders him a managerial employe. If it is determined that the duties of the AODA Coordinator are such that the incumbent is a managerial employe, it may be that the District would have the right to take action on the expiration of the contract. At least for the term of the contract, however, it has agreed not to have that work, whatever its character, performed by persons outside of the bargaining unit. The District had the right to make such an agreement and having made it, it does not have the right to unilaterally withdraw from it.

Based on the foregoing, I conclude that the District did violate the collective bargaining agreement by having the work of the AODA Coordinator performed by a person outside of the collective bargaining unit. As the transfer of that work to Gryzwa was the direct cause of the layoff of Cismoski and the work continued to be performed during the course of the 1999-2000 school year, the appropriate remedy is to reinstate Cismoski and to make him whole for his losses, subject to his duty to mitigate his damages. At the request of the parties, the Arbitrator will retain jurisdiction over the question of damages. This includes the questions of whether Cismoski, in declining the opportunity to bump into a teaching position, waived his right to monetary damages, whether he made adequate efforts to find equivalent employment and all other questions related to the scope of the make whole remedy. Given the truncated format of the Award, the Arbitrator also retains jurisdiction, at the request of the parties, to provide a more fully developed statement of the reasons for the Award.

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

AWARD

1. The District violated the Agreement when it assigned the AODA position to someone outside of the bargaining unit;

2. The appropriate remedy is to reinstate the Grievant to the AODA Coordinator position retroactive to the time of his layoff and to make him whole for his losses, subject to his duty to mitigate his damages;

3. The Arbitrator will retain jurisdiction over this matter for the purpose of resolving any disputes over the remedy and to provide a more fully developed statement of the reasons for the Award, if requested by the parties.

Dated at Racine, Wisconsin, this 28th day of August, 2000.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

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