

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SHAWANO-GRESHAM EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION

and

SHAWANO-GRESHAM SCHOOL DISTRICT

Case 25
No. 61904
MA-12099

(Linda Burris Grievance)

Appearances:

David Campshure, UniServ Director, United Northeast Educators, appearing on behalf of the Association.

James Kalny, Attorney, Davis & Kuelthau, appearing on behalf of the District.

ARBITRATION AWARD

The Shawano-Gresham Educational Support Personnel Association and the Shawano-Gresham School District were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance filed by Linda Burris. Hearing on the matter was held on February 19, 2003 in Shawano, Wisconsin, at which time the parties presented such testimony, exhibits and other evidence as was relevant to the grievance. The hearing was transcribed. The parties filed briefs and reply briefs by June 30, 2003, whereupon the record was closed. Having considered the evidence, the arguments of the parties, the applicable provisions of the contract, and the record as a whole, the arbitrator makes the following Award.

ISSUE

The parties were unable to stipulate to the issue to be decided in this case. The Association frames the issue as follows:

Did the District violate the parties' collective bargaining agreement when it involuntarily transferred the grievant, Linda Burris? If so, what is the appropriate remedy?

The District frames the issue as follows:

Does the collective bargaining agreement require posting prior to the reassignment of duties under the facts and circumstances of this case?

Since the parties were unable to agree on the issue, the undersigned has framed it. Based on a review of the record, the opening statements at hearing and the briefs, the undersigned has framed the issue as follows:

Did the District's actions involved herein violate the collective bargaining agreement? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 2001-2003 collective bargaining agreement contained the following pertinent provisions:

ARTICLE III – MANAGEMENT RIGHTS

Section 3.01: Management retains all rights of possession, care of, control of, and management of the District that it has by law, and retains the right to exercise these functions except to the precise extent such functions are restricted by the express terms of this Agreement. These rights include, but at [sic] not limited enumeration to, the following rights:

1. To direct all operations of the school system.

...

3. To hire, promote, transfer, schedule and assign employees in positions with the school system;

...

11. To determine the methods, means and personnel by which the school system operations are to be conducted.

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ARTICLE X – SENIORITY

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10.03 For purposes of this Agreement, all employees shall be placed in one or more of the following classifications based on their current assignments:

- a. Maintenance; Custodian, Cleaner
- b. Instructional Aide; Non-Instructional Aide
- c. Secretary I; Secretary II; Secretary III
- d. Computer Technician I; Computer Technician II
- e. Central Kitchen Manager; Cook; Cook/Server

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ARTICLE XII – JOB POSTING

Section 12.01: Vacancies – Whenever a vacancy occurs and the District decides to fill the vacancy or when a new position is created, it shall be made known to all employees through job posting.

Section 12.02: Notice of all vacancies shall be posted on bulletin boards in convenient locations in each school of the District for a period of five (5) workdays with the day following the posting being considered the first day. When school is not in session for students, copies of all postings shall also be sent to the Union President or his/her designee. Said posting shall contain the following information:

- a. Type of work
- b. Location of work
- c. Starting date
- d. Rate of pay
- e. Hours to be worked
- f. Classification
- g. Minimum requirements

Section 12.03: Interested employees may apply, in writing, to the Superintendent, or designee, within the five (5) day posting period.

Section 12.04: Vacancies shall be filed with the most senior qualified internal applicant. Whether or not any internal applicant is qualified shall be determined by the Board or its designee in its sole discretion. If no internal candidate is deemed qualified, the Board may advertise the vacancy to the outside public; interview and hire the outside applicant.

Section 12.05: If the District utilizes qualification tests such tests shall be uniformly administered to all internal and external applicants. The Association, upon request, shall be given such test results with the names of all applicants kept confidential.

Section 12.06. One-on-One Instructional Aides One-on-One Instructional Aides shall continue to be allowed to apply for open positions during the school year, as indicated in Section 12.03, and, if awarded the position, shall start in the new position effective with the following school year unless another date is mutually agreed to between the employee and the District Administrator or his/her designee. If the wage rate in the new position is higher than the employee is currently receiving as a one-on-one aide, the employee shall receive the higher wage rate and start accruing seniority, if in a new classification, as if he/she had started in the new position at the time he/she receives his/her letter of appointment to the new position.

BACKGROUND

The District operates a public school system for Shawano and Gresham, Wisconsin. The Association is the exclusive collective bargaining representative for regular full-time and regular part-time aides, custodial, maintenance, secretarial, clerical, and food service employees of the District.

The support staff employees who work in the job categories just referenced have been placed in various classifications. The classifications are identified in Sec. 10.03 of the collective bargaining agreement and in the salary schedule appendix.

There are two classifications for the aides: instructional aides and non-instructional aides. The classification that is pertinent to this case is instructional aide.

There are numerous types of instructional aides. For example, at the High School, there are library aides, aides for the Alternative School program, aides for the At-Risk program, aides for the English as a Second Language program, computer lab aides, one-on-one aides and aides for the Emotionally Disabled program (hereinafter ED aides).

All of the instructional aides just listed share a common job description. It is the job description for an instructional aide. Thus, there is not one job description for library aides, another for computer lab aides, another for ED aides, etc. The instructional aide job description provides in pertinent part:

POSITION GOAL:

To assist the teacher or other certified personnel in achieving instructional objectives by working with individual students or small groups.

PERFORMANCE RESPONSIBILITIES:

1. Works with individual students or small groups of students to reinforce learning of material or skills initially introduced by the teacher.
2. Assists the teacher in devising special strategies for reinforcing skills based on a sympathetic understanding of individual students, their needs, interests, and abilities.
3. Operates and cares for equipment used in the classroom for instructional purposes.
4. Helps student master equipment or instructional materials assigned by the teacher.
5. Distributes and collects workbooks, papers, and other materials for instruction.
6. Guides independent study, enrichment and remedial work set up and assigned by the teacher.
7. Assists with the supervision of students during emergency drills, assemblies, play periods, and field trips.
8. Assists with such large group activities as drill work, reading aloud, and storytelling.
9. Reads to students, listens to students read, and participates in other forms or oral communication with students.
10. Under the direction of the teacher, check notebooks, correct papers, and supervises testing and make-up work.
11. Types and prepares related classroom materials, work sheets, study guides, etc.

12. Alerts the classroom teacher to any problem or special information about an individual student.
13. Maintains the same high level of ethical behavior and confidentiality of information about students as is expected of certified staff.
14. Participates in inservice training, as assigned.
15. Performs such other duties as assigned.

The types of instructional aides pertinent to this case are ED aides and one-on-one aides. A brief overview of what each one does follows.

ED aides, as the name implies, work with students who are emotionally disabled. The number of students they work with varies; some ED aides work with one student, while others work with more than that.

One-on-one aides, like ED aides, also work with students with special needs. One-on-one aides work with students who are medically fragile and have special medical needs, such as needing tube feeding, diapering, or being moved throughout the system. What differentiates one-on-one aides from ED aides is that one-on-one aides receive special training to perform these tasks that the ED aides do not receive. If the student supervised by the one-on-one aide is not at school, the one-on-one aide is sent home. An instructional aide who works primarily with one student is not automatically a one-on-one aide; it depends on whether the aide has special training.

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The record indicates that the District has changed duty assignments within the support staff classifications on several occasions. The examples noted in testimony were as follows: 1) two computer lab aides were switched; 2) a library aide was reassigned to do computer work; 3) a hall monitor was reassigned to door security; 4) job duties have been shifted between secretaries; and 5) a non-instructional aide was reassigned to an in-school suspension room supervisor. None of these changed assignments were posted. Additionally, none of these changed duty assignments were grieved.

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The following bargaining history is pertinent herein. Attorney Dennis Rader, who negotiated the parties' initial collective bargaining agreement, testified that when the language was negotiated that ultimately became Sec. 10.03 of the collective bargaining agreement, the Association never told the District that that language proposed by the Association limited the District's ability to assign duties within the classification. The bargaining history also indicates that when the parties negotiated and agreed on the job posting language found in

Article XII, the Association never proposed, and the District never agreed, that job duties had to be posted.

FACTS

Linda Burris, the grievant herein, began working for the District five years ago as a non-instructional aide. Her first assignment was working as a hall monitor. Her second assignment was working as front door security. This change occurred without any posting.

Prior to the start of the 2000-01 school year, Burris was bumped by a more senior employee. When that happened, the District offered her a choice of three different job assignments, all of which were in the instructional aide classification. The job she selected was working as an instructional aide in the Emotionally Disabled program at the high school. This change, wherein Burris moved from the non-instructional aide classification to the instructional aide classification, occurred without any posting.

For the last two years, Burris primarily worked out of Mr. Waldvogel's classroom with students who were emotionally disabled. She assisted Waldvogel in instructing students in various subjects. She helped students with their homework, attended classes with them, showed them how to do things, kept them in line, called parents, talked with their teachers and sometimes made up games to teach them different learning strategies. The number of students that she worked with varied. Sometimes it was as many as six students while sometimes it was just one. Normally though, she worked with two students at a time.

While Burris was performing the duties just listed, ED aide Mary Reyes worked exclusively with one student, Jeremiah, as part of the Emotionally Disabled program. While Jeremiah's Individual Education Program (IEP) document says, in pertinent part, that he "would do well with a one-on-one aide", the District's Pupil Services Director, Dave Cullen, testified that "Jeremiah is pretty independent compared to a lot of these other kids." Jeremiah does not have special medical needs. When Jeremiah was absent from school, Reyes typically did not report to work. The high school staff register referred to Reyes as a "one-on-one aide." Additionally, Reyes' e-mail signature also referred to her as a "one-on-one aide".

In October, 2002, there were three ED aides at the High School: Linda Burris, Mary Reyes and Mary Sutter. As was noted earlier, Burris primarily worked with several ED students while Reyes worked exclusively with one student, Jeremiah. The record does not indicate who Sutter worked with.

That month, Reyes posted for, and was awarded, an instructional aide position at an elementary school.

After Reyes left the high school, the high school principal, Chris Ligocki, reassigned the ED aide duties that Reyes had performed to another ED aide at the high school. Specifically, he assigned those duties to Burris. As previously noted, Reyes worked exclusively with one student (Jeremiah), so Ligocki assigned Burris to do that work. Ligocki testified that in taking this action (i.e. assigning Burris to perform the duties previously performed by Reyes) he reviewed the District's needs, considered the job duties which needed to be performed, considered the personnel he had available to perform that work and made a decision that he thought was in the District's best interest.

Burris has been working one-on-one with Jeremiah since October, 2002. Every morning, before school starts, she takes Jeremiah down to the boys' locker room so he can take a shower. During the day, she accompanies him to his classes. In the spring of 2003, she took him off site three afternoons a week to a job where he was working to learn job skills through the JET program. If Jeremiah is absent from school, she is assigned to do other work.

None of the work duties just listed is beyond the scope of the job description for an instructional aide or not generally performed by an ED aide.

When Burris started working with Jeremiah, she was not given any medical training or any other preparation for working with him. The District did not change Burris' work hours or rate of pay after she started working with Jeremiah.

After Burris started working with Jeremiah, the District posted a vacancy for an instructional aide for the ED program at the high school. After the posting was made, Burris expressed an interest in applying for it because she considered the posted position to be her old job.

Burris and Principal Ligocki then met and discussed her interest in the posting. During their meeting, each became agitated with the other. Burris told Ligocki that she wasn't cut out for working with Jeremiah, that she couldn't handle it, and that she wanted to go back to her old job. Ligocki told Burris that she couldn't do that, and that if she couldn't handle it (i.e. working with Jeremiah), then she would have to quit.

No one in the bargaining unit posted for the vacancy, so the District hired someone from the outside. The person who was hired, Anthony Wilbur, was a short-term employee. After he left, the District posted again for an instructional aide for the ED program at the high school. Once again, after the posting was made, Burris expressed an interest in applying for it because she considered the posted position to be her former position. Once again, Ligocki did not allow Burris to post for the vacancy.

The Association grieved the District's actions involving Burris. The grievance alleged that the District violated the collective bargaining agreement when it "transferred" Burris from her position as an ED aide into a "one-on-one aide" position and then denied her the right to post for her former position. The requested remedy was that Burris be "reinstated" to her "posted position". The District denied the grievance. The grievance was processed through the contractual grievance procedure and was ultimately appealed to arbitration.

POSITIONS OF THE PARTIES

Association

The Association's position is that the District violated the collective bargaining agreement when it involuntarily transferred Burris from an instructional aide position working with multiple students to an instructional aide position working exclusively with one student. It elaborates on this contention as follows.

The Association acknowledges at the outset that the management rights clause gives the District the right to transfer employees between positions and manage the operations of the District. However, the Association asserts that clause does not give the District the unfettered right to assign job duties to positions and transfer employees as it pleases. According to the Association, the District's management right to assign job duties to positions and transfer employees between positions is restricted by another contract provision, namely Article XII (the job posting provision).

The Association's view of Article XII follows. That article requires the District to post all vacancies it intends to fill. The posting, in turn, has to identify the type of work, location of work, hours of work and classification. All bargaining unit employees are eligible to apply for the posting. The Association submits that this means the District cannot restrict which employees may apply for a posting. Finally, it notes that the language says that the vacancy is to be filled with "the most senior qualified applicant." If a senior bargaining unit employee meets the qualifications for the position, then he/she gets the job and the District cannot transfer a less senior employee into the position, or bring in a new hire. The Association believes that if the District is allowed to move an employee who has posted for one position within a classification to another position within the same classification, this will render the job posting provision meaningless.

The Association argues that the District's conduct herein violated the job posting language in three different ways. First, the Association avers that when there were no internal applicants for Reyes' position working with Jeremiah, the District involuntarily transferred Burris into that position. This contention is obviously premised on the notion that Reyes' position was first posted and then, after no interested employees came forward, Burris was transferred into Reyes' old position and was assigned her old duties.

Second, the Association contends that this involuntary transfer required Burris to perform a different type of work afterwards than she had done previously. According to the Association, the type of work Burris performed changed; she went from being an ED program aide to being a one-on-one aide. This contention is based on the premise that Reyes was a one-on-one aide. To support that premise, the Association relies on the following points: 1) that Reyes worked exclusively with one student (Jeremiah); 2) that an internal District memo referred to Reyes as a one-on-one aide; 3) that Reyes' District e-mail signature referred to her as a one-on-one aide; and 4) Ligocki's admission that Reyes was performing the work of a one-on-one aide. Building on the premise that Reyes was a one-on-one aide, the Association believes it is self-evident that Burris is now a one-on-one aide too because she is now doing the same work as Reyes did - working exclusively with Jeremiah. The Association maintains that this designation (i.e. that Burris is now a one-on-one aide) proves that her type of work changed after she took over Reyes' duties and should have been posted.

Third, the Association argues that the District violated the job posting article when it refused to let Burris post into the posted ED aide position. What the Association is referring to is this: after Burris learned of the ED aide posting, she told Principal Ligocki that she was interested in getting out of working with Jeremiah and going back to her old duties, but that he (Ligocki) would not let her post for the vacancy. The Association asserts that Ligocki had no right to do that (i.e. deny Burris her contractual right to post for that vacancy). The Association contends that by denying her the right to post for the vacancy, Ligocki acted in an arbitrary, capricious, malicious and unprofessional manner. The Association claims that if Burris had been allowed to post into her old ED aide position, she would have gotten it because she would have been the senior qualified applicant.

Next, the Association disputes the District's contention that Sec. 10.03 supports the District's position. According to the Association, the phrase "current assignments", which the District relies on, simply means that employees are placed in one or more of the five listed classifications based on the position(s) they held at the time - not positions they may have held in the past. Aside from that, the Association relies on the general arbitral principle that general contract language is restricted by more specific language. Applying that principle here, the Association asserts that the broad issue of seniority, like management rights, is modified by the more specific job posting language.

Next, the Association disputes the District's contention that there is a past practice of involuntarily transferring employees between positions within a classification. First, as the Association sees it, just two instances were cited to support the existence of a practice (i.e. the transfer of a hallway monitor to a door monitor and the transfer of two computer aides). The Association avers that two instances are not sufficient to establish a practice. Second, aside from that, the Association submits those two instances are factually distinguishable from what happened here. Third, responding to the fact that it did not grieve these past instances where

individuals were transferred within their classification, the Association asserts that it did not waive its right to grieve the issue herein. It cites Elkouri for the proposition that acquiescence with respect to past violations of a contract provision does not prohibit enforcement of that provision in the future.

Finally, in response to the District's bargaining history argument, it is the Association's view that the bargaining history is simply not relevant in this particular case. According to the Association, the meaning of Article XII is clear and unambiguous, so there is no need for the arbitrator to consider the parties' bargaining history in interpreting same.

The Association therefore asks the arbitrator to sustain the grievance. As a remedy, the Association asks that Burris be reinstated to her former ED aide position.

District

The District's position is that its conduct herein did not violate the collective bargaining agreement. It elaborates on this contention as follows.

The District sees this as an assignment of duties case. As a result, it avers that the contract provision applicable here is the management rights clause (Article 3.01). According to the District, that clause gives it the right to assign job duties to employees and assign employees in positions within the district. Applying that language to the instant facts, the District asserts that the management rights clause gave the high school principal the authority to assign Burris the work duties previously performed by Reyes. The District submits that when the principal made that assignment decision, he did not do so for arbitrary or capricious reasons. To support that premise, it cites his testimony that he considered how and by whom the District's operations were to be carried out and assigned personnel to conduct those operations. The District knows that Burris wants out of the assignment she has been given (i.e. working with Jeremiah). However, as the District sees it, this case should not be about whether the grievant likes her assignment or not; instead, it should be about the ability of the District's management to address the needs of the District by assigning duties to staff in the manner it deems best.

The District argues that there is no bargaining history evidence that shows that the parties intended to water down the express thrust of the language of Section 3.01. In fact, as the District sees it, the bargaining history is to the contrary. To support that premise, it cites the testimony of District negotiator Rader that the management rights clause was an important part of the parties' initial collective bargaining agreement. According to the District, it demanded, and got, a strong reservation of management rights. The District maintains that this strong management rights clause imposes a strong burden on the Association to show, via the contract language or practice, that the management rights clause should be overridden in

this particular case. The District's position is that the Association did not produce such contract language or practice.

The District asserts that another contract provision, namely Sec. 10.03, also supports the notion that management reserved to itself the right to assign duties within classifications. In support thereof, it cites the language contained therein which references "current assignments". As the District sees it, the reference to "current assignments" recognizes that assignments may vary within a classification. The District asserts that the bargaining history evidence supports that interpretation. To support that premise, it again cites the testimony of District negotiator Rader that when the parties negotiated the language that became Section 10.03, the Association never referenced that language as limiting the District's right to assign duties within classifications. Applying that interpretation here, the District avers that there was no change in classification for Burris. According to the District, Burris was an instructional aide both before she was assigned to work with Jeremiah and after she was assigned to work with him. The District argues that since there was no promotion or movement into a new classification, there is no contract provision which limits the District's reserved authority to assign duties or positions within classifications.

The District also avers that the conclusion just noted (i.e. that the contract leaves to management the right to assign duties within classifications), is supported by a past practice. According to the District, the practice is that management has reassigned positions within classifications on many occasions. To support that premise, it relies on Ligocki's testimony that he: 1) reassigned a library aide; 2) reassigned the hall monitor to be a door monitor; 3) reassigned a non-instructional aide to be a suspension room supervisor; 4) shifted job duties between secretaries; and 5) switched two lab aides. The District asserts that all these reassignments occurred without any posting. Building on that premise, the District submits it did not need to post the reassignment involved here either.

Next, the District responds as follows to the Association's contention that Article XII applies herein. First, it contends that Article XII only requires the posting of vacancies when they occur. The District avers it complied with that contract requirement because the "vacancy" in this matter was, in fact, posted. By that, what the District is referring to is the fact that it posted for an instructional aide in the high school after Reyes transferred out of the high school. It calls attention to the fact that the posting included the "type of work" involved (i.e. the ED program). Second, the District argues that Article XII neither addresses nor prohibits the assignment of duties or the posting of duties. That being so, it is the District's position that Article XII does not modify the right management has been given to assign duties within classifications. Third, it contends that the Association distorted the evidence concerning the posting of the vacancy created when Reyes left. What the District is referring to is this: in their brief, the Association asserts that the District posted Reyes' position first, and then transferred Burris into it after no one bid for it. The District asserts that is factually incorrect.

The District maintains that what really happened was just the opposite, namely that Principal Ligocki first reassigned the duties Reyes had been performing to Burriss, and then Ligocki posted the vacancy for an instructional aide at the high school.

The District maintains that the parties' bargaining history also demonstrates that Article XII's requirement that a posting is to contain the "type of work" was not intended to require the District to post particular duties within classifications. To support that premise, it again cites the testimony of District negotiator Rader. According to the District, his testimony establishes that when the parties negotiated the language that ultimately became Article XII, they did not intend it to require posting of specific job duties or inhibit management's right to assign duties. Building on that premise, the District maintains that any notion that a specific vacancy specific to job duties must be posted is contrary to the bargaining history and the Association's position in bargaining.

Next, the District responds to the Association's argument that the "type of work" being performed by Burriss has changed. The District disputes that assertion. The District acknowledges that Burriss now primarily works with one student (Jeremiah), while she previously normally worked with two students at a time. As the District sees it, that does not seem like a significant change. Aside from that, the District emphasizes that no evidence was offered that Burriss is now performing work outside her classification as an instructional aide. Said another way, the duties she is currently performing are within the scope of those normally performed by ED aides. Finally, the District maintains that there is a difference between working with a student one-on-one as a job duty and the expectations of a one-on-one instructional aide as a type of work under the contract.

The District also disputes the Association's assertion that Burriss is now a "one-on-one aide". The District contends that Burriss is not a one-on-one aide for the following reasons: 1) Jeremiah has no special needs requiring a one-on-one aide; 2) Burriss received no special training as is the procedure for one-on-one aides; 3) Burriss has not been treated as a one-on-one aide under the contract; 4) Burriss is not sent home if Jeremiah is not in school; 5) Reyes transferred from these duties during the school year without special agreement; and 6) Burriss is not performing any duties not in her job description.

The District therefore asks that the grievance be denied. The District notes that should the arbitrator find otherwise, and allow the grievant to post into the vacancy in the ED program at the high school and take back the specific duties that she used to perform, there is no express contractual language that would prohibit the District from immediately reassigning her back to the duties Reyes was performing.

DISCUSSION

It is noted at the outset that the parties have approached this contract interpretation case from different perspectives. The District sees this as an assignment of duties case which is governed by the management rights clause. In contrast, the Association sees this as a posting case which is governed by the job posting provision. Their differing views of the case explain why the parties were unable to stipulate to an issue and left it to the arbitrator to decide. Based on the rationale which follows, I find that the job posting provision does not address what happened when Principal Ligocki assigned Burris to perform the work previously performed by Reyes (namely, working with Jeremiah), so the management rights clause controls – not the job posting provision.

I begin with a description of how this discussion is structured. The discussion is essentially divided into two parts. In the first part, I address the contract language and the evidence related thereto. Specifically, I will address Sec. 10.03, Article III and Article XII, the parties' bargaining history and an alleged past practice. In the second part of the discussion, I address the Association's contention that the District's conduct herein violated the job posting language in several different ways.

My discussion on the contract language begins with a look at Sec. 10.03. I decided to address that provision first because it gives some context to a word that will be used later in this discussion. The word is classification. Section 10.03 identifies the various classifications that bargaining unit employees are placed in. Subsection b specifies that there are two classifications for the aides: instructional aides and non-instructional aides. There are numerous types of instructional aides. To name a few, there are library aides, ED aides and one-on-one aides. These different types of instructional aides do not have their own classifications though. As a result, there is no classification for library aides, or for ED aides, or for one-on-one aides. Instead, they are all officially part of the instructional aide classification. To prove this point, one need look no further than the applicable job description. All the different types of instructional aides share the same job description, namely the instructional aide job description. Thus, there is not one job description for library aides, another for ED aides, etc.

The focus now turns to Article III, the management rights clause. Section 3.01 paragraph 1 reserves to management the overall authority to direct the operation of the school system. Paragraph 3 gives management the right to transfer and assign employees in positions within the school system for the purpose of operating the system. Paragraph 11 reserves to management the authority to determine how and by whom these operations are to be conducted. The first sentence of Section 3.01 says that the District's right to exercise these functions are not to be limited "except to the precise extent such functions are restricted by the express terms of this Agreement." The phrases "precise extent" and "restricted by the

express terms of this Agreement” make it clear that the reserved management rights are to be protected unless they are specifically and clearly restricted by terms expressed in the agreement. The question in this case is whether there is another contract provision that either limits or overrides management’s right to transfer and assign employees in positions. The Association argues that there is while the District disputes that contention.

The Association contends that Article XII, the job posting provision, limits management’s right to assign duties. The problem with this contention is that the job posting provision does not address, much less modify, the assignment of duties within classifications. What it addresses, and requires, is that vacant positions be posted when the District decides to fill them. After employees bid on the posting, the vacancy is filled with “the most senior qualified internal applicant.” The District determines the qualifications of those posting for the vacancy. Nothing in Article XII restricts or prohibits management from assigning duties within classifications. Additionally, there is nothing in Article XII that requires a vacancy to exist before the District can adjust workloads or work assignments within a classification. Finally, there is nothing in Article XII that provides that the job duties performed by an individual vacating a position must be posted or that specific job duties must be posted. While these statements were limited to just Article XII, a review of the collective bargaining agreement reveals they also apply to the agreement as a whole. Given the foregoing, it is concluded that neither the job posting provision nor any other provision in the agreement limits management’s right to assign duties within classifications.

This interpretation of the contract (i.e. that the contract leaves to management the right to assign duties within classifications) is supported by the parties’ bargaining history. What I am referring to is this: First, District negotiator Rader, who negotiated the parties’ initial collective bargaining agreement, testified without contradiction that when the language was negotiated that ultimately became Sec. 10.03 of the collective bargaining agreement, the Association never told the District that the language proposed by the Association limited the District’s ability to assign duties within classifications. Second, Rader’s testimony also established that when the parties negotiated and agreed on the job posting language found in Article XII, the Association never proposed, and the District never agreed, that Article XII’s requirement that a posting contain the “type of work” required the District to post particular duties within classifications. When this testimony is considered collectively, it establishes that the notion that specific job duties must be posted is contrary to the parties’ bargaining history.

This interpretation of the contract (i.e. that the contract leaves to management the right to assign duties within classifications) is also consistent with the way it has been applied in the past. The following shows this. First, the record indicates that the District has changed or shifted duty assignments within classifications on several occasions. While the Association asserts it has happened just twice, the record indicates it has happened more than that. Specifically, there are five examples noted in the testimony: 1) computer lab aide assignments

were switched; 2) a library aide was reassigned to do computer work; 3) a hall monitor was reassigned to door security; 4) job duties have been shifted between secretaries; and 5) a non-instructional aide was reassigned to an in-school suspension room supervisor. At a minimum, these instances show that management has previously changed duty assignments within classifications. Second, none of the changed duty assignments just noted were posted or grieved. Third, insofar as the record shows, job duties have not been posted in the past, or been guaranteed through the posting process. For example, there are no job postings in the record that included specific job duties.

The focus now shifts to the Association's contention that the District's conduct violated the job posting language in the following ways.

First, the Association contends that when there were no internal applicants for Reyes' position working with Jeremiah, the District involuntarily transferred Burris into that position. This contention is premised, of course, on the notion that Reyes' position was posted first, and then, after no one applied for it, Burris was transferred into Reyes' old position and was assigned her old duties. The problem with this contention is that it is not factually accurate. Here's why. Burris' own testimony indicates that immediately after Reyes left the high school, Ligocki assigned her (Burris) to work with Jeremiah; then later, the District posted a vacancy for an instructional aide. This testimony, as well as a review of the grievance itself, establishes that Burris was assigned to work with Jeremiah before the posting went up.

Second, the Association argues that the job posting provision required a posting in this case. As was just noted, a posting was made. What was posted, of course, was a vacant instructional aide position. That is what the District obligated itself to post in Article XII (i.e. vacant positions). As was noted earlier in this discussion, Article XII does not require the District to post work assignments or specific job duties. The posting which was made here complied with all the requirements of Article XII. Specifically, it included the "type of work" involved (namely, working in the ED program at the high school). The question of whether Burris could post for that vacancy will be dealt with later.

Third, the Association contends that Burris' type of work changed after she was assigned to work with Jeremiah. As the Association sees it, Burris went from being an ED aide to being a one-on-one aide. In addressing this contention, I have decided to emphasize at the outset that neither ED aides nor one-on-one aides are classifications. As was noted in my discussion of Sec. 10.03, the classification involved here is instructional aide. ED aides and one-on-one aides are simply two jobs within the instructional aide classification. Said another way, they are simply two types of work within the instructional aide classification. In this case, there is no question that Burris' classification has not changed. By that, I mean that she was an instructional aide before she started working with Jeremiah and she remains an instructional aide. She is still covered by the instructional aide job description and is part of

that classification. Insofar as the record shows, she is not performing any job duties that are outside the instructional aide job description.

That said, the focus now shifts to the Association's contention that Burris' type of work changed from an ED aide to a one-on-one aide. The Association's contention is based on the premise that Reyes was a one-on-one aide when she worked with Jeremiah. Building on that premise, the Association argues that if Reyes was a one-on-one aide, then Burris must be too because she (Burris) is now doing the same work Reyes did (i.e. working exclusively with Jeremiah).

While the District disputes the notion that Reyes was a one-on-one aide, there certainly is evidence in the record that supports the conclusion that she was a one-on-one aide. Specifically, I am referring to the following evidence: 1) that Reyes worked exclusively with one student (Jeremiah); 2) that an internal District memo referred to Reyes as a one-on-one aide; 3) that Reyes' District e-mail signature referred to her as a one-on-one aide; and 4) that during his testimony, Ligocki at one point said that Reyes did one-on-one work.

However, even if Reyes was a one-on-one aide, it does not automatically follow that Burris was too. Here's why. The record indicates that in this district, an instructional aide who works primarily with one student is not automatically a one-on-one aide; it depends on whether the aide has received special training. As was noted in the **BACKGROUND** section, one-on-one aides receive special training to work with students who are medically fragile. While it is unclear from the record if Reyes received this special training, it is crystal clear that Burris has not. The reason Burris has not received this special training is because the District does not consider Jeremiah to be medically fragile. That is the District's call to make. Since Burris has not received this special training, this means that she is not a one-on-one aide as that term is used in Sec. 12.06. In so finding, I am well aware that this conclusion seems incongruent with the facts, since Burris now works exclusively with Jeremiah one-on-one. However, there is a distinction between providing one-on-one service as a job duty, and being a one-on-one aide as a type of work. In this district, the former does not require special training while the latter does. As was just noted, Burris does not have that special training, so she is not a one-on-one aide as that term is used in Sec. 12.06. Instead, she remains what she was prior to working with Jeremiah – an ED aide. That being so, her type of work has not changed.

Finally, the Association argues that the District violated the job posting article when it refused to let Burris post for the posted position. What the Association is referring to is this: after Burris learned of the posting, she told Principal Ligocki that she was interested in getting out of working with Jeremiah and going back to her old duties, but that he (Ligocki) would not let her post for the vacancy. The Association asserts that Ligocki had no right to do that (i.e. deny Burris her contractual right to post for that vacancy). Legally speaking, the Association

is correct. Management officials are not supposed to preclude employees from exercising their legal rights. However, in this case, I am not enforcing Wisconsin's public sector labor law. Instead, I am interpreting and enforcing the parties' collective bargaining agreement. Contractually speaking, the District could preclude Burris from posting in this particular instance for the following reason: the vacancy was for an instructional aide working in the ED program at the high school, and that's the very same job Burris already held. The reason Burris wanted to post for the vacancy was because she viewed the posted job as her old job, and she wanted to go back to her old job duties. In other words, she wanted to use the posting as a way to select/change her job duties within her classification. However, under the contract, employees do not get to do that. Since the management rights clause gives management the right to assign duties within a classification, it would have served no purpose in this particular instance to allow Burris to post for a job she already held. Consequently, it is held that the District did not violate the job posting article when Ligocki refused to let Burris post for the posted position.

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My summary of this case follows. The Association reads the job posting language to cover the transfer or assignment of duties within classifications. However, the job posting language does not explicitly or implicitly cover the transfer or assignment of job duties within classifications. Instead, the management rights clause does. That clause explicitly gives management the right to assign duties. In this case, the principal decided to take an experienced instructional aide (i.e. the grievant) and assign her the duty of working with Jeremiah. There is no language in this contract which limits the District's right to do that, so the District acted consistent with its reserved management rights. In so finding, it is noted that the notion that specific job duties must be posted is contrary to the parties' bargaining history. Additionally, the record indicates that management has reassigned duties within classifications before. Finally, the District's actions herein did not violate the job posting provision. Accordingly, no contract violation has been found.

In light of the above, it is my

AWARD

That the District's actions involved herein did not violate the collective bargaining agreement. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 18th day of September, 2003.

Raleigh Jones /s/

Raleigh Jones, Arbitrator