

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

OCONTO FALLS EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION

and

OCONTO FALLS SCHOOL DISTRICT

Case 24
No. 62370
MA-12255

(Posting Grievance)

Appearances:

Stephen Pieroni, Legal Counsel, Wisconsin Education Association Council and **James Blank**, Executive Director, United Northeast Educators, appearing on behalf of the Association.

Dennis Rader, Attorney, Davis & Kuelthau, appearing on behalf of the District.

ARBITRATION AWARD

The Oconto Falls Educational Support Personnel Association and the Oconto Falls 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. Hearing on the matter was held on August 4, 2003 in Oconto Falls, 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 December 11, 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 stipulated to the following issue:

Did the Employer violate the collective bargaining agreement by requiring a Bachelor's degree as a qualification for the special education position in dispute?

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, control, and management that it has by law, and retains the right to exercise these functions except to the precise extent such functions and rights are restricted by the express terms of this Agreement. These rights include, but are not limited by enumeration to, the following rights:

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

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6. To maintain efficiency of school system operations;

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9. To select employees, establish quality standards, and evaluate employee performance;

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

...

13. To determine the educational policies of the school district;

...

Section 3.02: The District agrees that it will exercise the rights enumerated above in a fair and reasonable manner, and further agrees that the rights contained herein shall not be used for the purpose of undermining the Association or discriminating against its members. The exercise of the foregoing powers by the Board, the adoption of the policies, rules, regulations, and practices in furtherance thereof, and the use of judgment and discretion in connection therewith, shall be limited only to the specific and express terms of this Agreement and applicable law.

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ARTICLE VIII – JOB POSTING

Section 8.01: Vacancies – Whenever a vacancy occurs within one of the job classifications found in Section 9.01 of this Agreement and the District desires to fill that vacancy, or when the District creates a new position, or a position is increased by two (2) or more hours per day within a contract year, the job vacancy shall be made known to all employees through job posting.

Section 8.02: Posting – Job vacancies shall be posted on bulletin boards in convenient locations in each school for ten (1) working days. . .The position shall not be advertised outside the unit if a unit person who posts for it is determined to be qualified for the position by the Board . . .

Section 8.03: Notice – The job posting shall set forth the job title, pay range, work location, and the name of the person to whom the application is to be returned.

Section 8.04: Applicants – Any employee interested in such vacancy may submit his/her name in writing to the person indicated on the posting. . .

Section 8.05: Selection – Vacancies shall be filled 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. When a test is used to determine qualifications, a fair and uniform test will be given,

either administered internally or by an external agency. Applicants will be informed, prior to taking any tests, what is required for a passing score. All internal applicants will be tested before external applicants. The most senior internal applicant passing the test receives the position. Seniority computations are specified in Section 9.09 – 9.1.2. The employee receiving the position shall have a trial period of up to thirty (30) calendar days in which to prove his/her qualifications for the job. If at any time during the trial period the employee fails to make satisfactory progress to qualify for the new position, he/she shall be returned to his/her former position and selection shall be made from among the remaining applicants. In the event the employee does not desire the position within the thirty (30) day trial period, the employee may return to his/her former position at his/her former rate of pay. Unless by mutual agreement, no employee will have the right to transfer to another position unless he/she has held his/her current position for six (6) working months.

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FACTS

The District operates a public school system in Oconto Falls, Wisconsin. The Association is the exclusive collective bargaining representative for the District's support staff employees. One category of employee included in the bargaining unit is the aide category.

There are several types of aides in the aide category. The type of aide pertinent to this case is special education instructional aide. All the special education instructional aides share a common job description. That job description provides in pertinent part:

TITLE:	INSTRUCTIONAL AIDE – SPECIAL EDUCATION
REPORTS TO:	Director of Special Education, Building Principal, and Special Education Teacher
JOB GOAL:	To assist teacher(s) in implementing the Individualized Educational Plans (IEP) of each student. To assist the teacher(s) in any preparation needed to help implement the IEPs of each student. To help provide a well-organized, smoothly functioning class environment in which students can take full advantage of the instructional program and available resource materials.

PERFORMANCE RESPONSIBILITIES:

...

4. To assist in the supervision and tutoring of students anywhere a school activity is occurring within the normal workday as assigned by the special education teacher.
5. To act as an extension of the special education teacher when carrying out prescribed techniques, lesson plans, and assertive discipline as assigned by the special education teacher.

...

17. Administer, score, and record such achievement and diagnostic tests as assigned by special education teacher (i.e. reading tests to LD students, spelling tests, etc.).

...

20. Alert the special education teacher to any problem or special information about an individual student.
21. Meet with the special education teacher on a regular basis for progress reports and questions.

...

This dispute involves a posting for an instructional aide, and the following background information is pertinent to this particular posting. In early 2003, in the middle of the 2002-03 school year, Danielle Wranosky, a teacher of 4-year-old kindergarten at Abrams School and an Army reservist was called to active duty to serve in Iraq. After Wranosky was called to active military duty for an indefinite period of time, the District shuffled its staff at two schools to fill Wranosky's teaching position at Abrams Elementary for the remainder of the 2002-03 school year. What it did was reassign a teacher from Oconto Falls Elementary School (where District officials felt they were overstaffed) to Abrams. Specifically, the District reassigned Marcie Waeghe, an early childhood teacher with special education certification, to replace Wranosky at Abrams School as the 4-year-old kindergarten teacher for the remainder of the 2002-03 school year. District officials also decided to replace Waeghe at the Oconto Falls Elementary School with a part-time (two days a week) special education instructional aide. In doing so,

District officials knew that this special education instructional aide would be working with the same students that Waeghe had previously worked with. District officials also knew that this special education instructional aide would not be working with a special education teacher, because the special education teacher (Waeghe) was no longer at Oconto Falls Elementary School, but rather was at Abrams Elementary. District officials also decided that this special education instructional aide at Oconto Falls Elementary School would have to have a Bachelor's degree.

On January 30, 2003, the District posted a notice for a Special Education Instructional Aide at Oconto Falls Elementary School. The posting stated that the candidates applying for the position "must" have the following qualifications: 1) "a Bachelor's degree and appropriate experience with children in Early Childhood Programming"; 2) "a special education aide license and CPR and First Aid certification"; and 3) "be able to work with physically and/or cognitively disabled children."

The qualifications listed in this posting differed from previous instructional aide postings in that this one required a Bachelor's degree. Previous instructional aide postings had not required a Bachelor's degree. While some previous instructional aide job postings had stated that education beyond high school was "preferred", this was the first time an instructional aide job posting indicated that a Bachelor's degree was a required qualification. Aside from this educational difference, the posting did not say that the employee would perform any job duties that were different from those performed by existing special education instructional aides.

Two bargaining unit members applied for the position: Mary Shomin and Mary Coppens. Shomin was the more senior employee of the two. At the time of the posting, Shomin was employed as an instructional aide working ten hours a week. The posting for the position in dispute specified that the person selected would work two days per week at seven hours per day. Had Shomin filled the position in dispute, she would have gained an additional four hours of work per week. Neither Shomin nor Coppens possessed a Bachelor's degree. After Shomin and Coppens applied for the position, the District's Special Education Administrator, Judy Johannes, told both they were not qualified for the position because they did not have a Bachelor's degree.

On February 10, 2003, the Association filed a grievance concerning the posting. While the exact scope of the grievance is disputed (and will be addressed in the **DISCUSSION**), it suffices to say here that the grievance challenged the District's right to require a Bachelor's degree for the special education instructional aide position.

After the grievance was filed, the District decided to not fill the position permanently while the grievance was pending. Instead, an existing substitute aide, Sandy Pardy, was placed in the position on a temporary basis. Substitute aides are not in the bargaining unit. Pardy did not apply for the posted position. Pardy has a Bachelor's degree. The parties stipulated at the hearing that the District's choice to fill the position with a substitute aide pending resolution of the grievance is not an issue in this case.

The following information deals with the grievance which was filed herein and the Employer's responses to same. The grievance was drafted and filed by Association President Jolene Smaney. It was four single-spaced pages long. The first management response to the grievance came from Special Education Director Johannes. Her response to the grievance was two single-spaced pages long. Smaney then responded to Johannes' response. Smaney's response to Johannes was two single-spaced pages long. District Administrator Dave Polashek then responded to the grievance. His response to the grievance was one single-spaced page. Smaney then responded to Polashek's response. Her response to Polashek was three single-spaced pages long. The grievance was processed through the contractual grievance procedure and was ultimately appealed to arbitration.

POSITIONS OF THE PARTIES

Association

The Association contends that the District violated the collective bargaining agreement when it required a Bachelor's degree as a qualification for the special education instructional aide position in dispute.

The Association's argument in this case is based upon the following two-part analysis. First, the Arbitrator must decide whether the District possesses unfettered discretion to determine the qualifications for an existing bargaining unit position. The Association answers that question in the negative (i.e. that the District does not possess unfettered discretion to establish the criteria for the position in question). The Association asserts that this part of the analysis requires the Arbitrator to define for the parties the relationship between Section 3.02 (in the Management Rights clause) and Section 8.05 (in the Job Posting provision) in the context of this case. The Association asserts that Section 3.02 sets the standard by which the Arbitrator decides whether the exercise of management rights is upheld or reversed. The Association avers that the Management Rights clause must be read in conjunction with the Job Posting provision. Second, assuming that the Arbitrator accepts the argument that Section 3.02 establishes the standards by which management rights will be judged in this case, then the Arbitrator must determine whether the facts of this case establish that the District violated the standards set forth in Section 3.02. As the Association sees it, the District's

imposition of a Bachelor's degree for this position violated Section 3.02 because it was not fair and reasonable and therefore, the criteria of a Bachelor's degree must be set aside. It elaborates further on these contentions as follows.

The Association begins by addressing the two contract provisions involved in this case, namely the Management Rights clause and the Job Posting provision. The Association acknowledges that the District has broad discretion to exercise its management rights under Section 3.02. However, the Association avers that this discretion is not completely unfettered. Instead, the District's right to establish qualifications for a position is governed by Section 3.02 which requires the Employer to exercise its right in a fair and reasonable manner, and further requires that the exercise of these rights does not undermine the Association or discriminate against bargaining unit employees. With regard to the Job Posting provision, the Association acknowledges that that provision gives the Employer sole discretion to determine if an applicant is qualified. That said, the Association maintains that this right (to determine who is qualified) assumes that the qualifications (for a position) are fair and reasonable. The Association argues that requiring a Bachelor's degree for this job was not a fair and reasonable job criteria and thus violates the standards contained in Section 3.02. It elaborates thus.

First, the Association asserts that the Employer's decision to require a Bachelor's degree as a pivotal qualification to fill the instructional aide position should be viewed with skepticism. The Association notes in this regard that the position did not require any different or additional duties than currently employed instructional aides have traditionally performed.

Second, the Association contends that the District did not explain why it insisted on the Bachelor's degree as a "requirement" rather than a "preferred" qualification. It notes that in other instances, the Employer stated that education beyond high school was preferred, not required.

Third, the Association avers that the District did not offer any intelligible explanation or meaningful reason for not giving the grievant a 30-day trial period pursuant to Section 8.05. It notes that when District official Johannes addressed this issue at the hearing, she (Johannes) said that the 30-day trial period could not be invoked because a grievance had been filed. The Association believes this explanation is erroneous because the grievance was filed after Johannes rejected the grievant's application because she did not possess a Bachelor's degree. It notes that Johannes could have invoked the 30-day trial period before the grievance was filed. Additionally, the Association avers that the District's brief misconstrues the Association's position with respect to allowing an internal applicant a reasonable time to obtain a Bachelor's degree. The Association characterizes this as a "straw man" argument.

Fourth, the Association argues that the District's discussion regarding permissive subjects of bargaining is irrelevant here because the parties are seeking the Arbitrator's interpretation of an existing collective bargaining agreement. The Association maintains that whether or not the language is a permissive subject of bargaining is of no consequence to the stipulated issue before the arbitrator.

Fifth, the Association asserts that the District wanted to appoint Sandy Pardy to this position. According to the Association, the District was aware that Pardy had a Bachelor's degree and established the Bachelor's qualification to assure her appointment.

Sixth, the Association disputes the District's contention that when the Association filed the instant grievance, the grievance prevented others from applying for this position. According to the Association, there is no record evidence to support this assertion, nor is there any practical or legal reason to support the Employer's claim. As the Association sees it, the Employer was free to follow the normal posting procedures if it so chose. Instead, it suited the Employer's purpose to cut off the application deadline once it decided to fill the vacancy with Pardy as a "substitute" aide. The Association claims that since the Employer knew that Pardy had a Bachelor's degree, hiring her as a substitute fulfilled the Employer's objective.

Seventh, the Association disputes the District's assertion that this was a crisis situation. As the Association sees it, this situation involved the mundane and not infrequent occurrence of a teacher leaving employment unexpectedly, which required a shuffling of staff. The Association does not view that as a crisis situation. The Association also maintains that the District's assertion that this was a special situation which required the assignment of a special education aide to a regular education classroom when the special education teacher was not in that classroom was overblown as well. To support that assertion, it notes that in the 1998-99 school year, Jolene Smaney served as a special education aide in a regular education classroom when there was no special education teacher in that classroom. It also notes that other aides performed in that same situation at Jefferson School in the following two years and last year at Spruce School. In sum, the Association characterizes the District's assertion of the existence of a legitimate crisis as overblown, exaggerated and pretextual.

Eighth, the Association disputes the District's assertion that the Association's grievance is designed to undermine the District's efforts to provide a Great School for early childhood students. As the Association sees it, the District was unable to show any tangible benefit to the students by requiring a Bachelor's degree. It asserts that sustaining the grievance will not undermine the effectiveness of the early childhood program.

Ninth, the Association argues that the District failed to offer objective administrative reasons for requiring a Bachelor's degree for the instructional aide position. In its view, the

four written reasons provided by Superintendent Polashek (for adopting the Bachelor's degree requirement) were without substance. With regard to Polashek's assertion that a Bachelor's degree is a "predictor of advanced skills and knowledge since that person undertook a program that led to a degree," the Association contends that Polashek was unable to link the "advanced skills and knowledge" to the position in question. The Association once again notes that the position in question did not require the employee to perform any duties which are not currently required of other special education instructional aides who do not have a Bachelor's degree. With regard to Polashek's assertion that he felt that a person with a Bachelor's degree "would more likely have a stronger background in child development, which could be used in serving students in the early childhood program", the Association notes that Polashek admitted that his belief in this regard involved speculation on his part; not objective, verifiable facts. The Association characterizes it as a broad, unfounded generalization that people with Bachelor's degrees generally know more about child development than bargaining unit special education aides. The Association avers that the instructional aides in the bargaining unit are more likely to know more about child development than the general population who possess Bachelor's degrees, because the aides have specific, relevant training and experience with children in the classroom. The Association argues that it is unfair and unreasonable to assume, without more data, that a person with a Bachelor's degree, including Pardy, knows more about child development than grievant Shomin. The Association also contends that qualifications that are based upon mere speculation, without more, are not reasonable. The Association also argues that it is unfair to use mere speculation to deny the grievant a contractual right (in this case, economic advancement). With regard to Polashek's assertion that a Bachelor's degree would "be a good indicator that the individual hired would be able to quickly learn data collection and documentation necessary to help meet the goals and objectives within the Individual Educational Plans," the Association notes that on cross-examination, Polashek admitted that he wasn't concerned about data collection when he established the qualifications. The Association also calls attention to the fact that Johannes admitted she never saw the data collected by Pardy and thus had no knowledge of how extensive that documentation was. According to the Association, this establishes that data collection has no relationship to the requirement of a Bachelor's degree. With regard to Polashek's assertion that hiring a person with a Bachelor's degree "would be consistent with the emphasis on 'high quality paraprofessionals' that comes in the Federal No Child Left Behind legislation", the Association calls that reasoning a stretch because that law does not apply to this position. The Association avers that while that law will eventually require that paraprofessionals have an Associate's degree or the equivalent, that requirement has not gone into effect. Additionally under that law, only Title 1 funded aides are required to have an Associate's degree or the equivalent, and the District does not employ any Title 1 funded aides. The Association also notes that that law does not require a Bachelor's degree. The Association characterizes Polashek's explanation that the District was trying to "jump in front of the increasing requirements" as a superficial, if not bogus, excuse for requiring a Bachelor's degree for the special education instructional aide position. Finally,

with regard to Polashek's assertion that a Bachelor's degree would "prepare a person for the inevitable transfers that might occur over the career of an individual with the District", the Association characterizes that as a "throw away" reason, that is without basis in fact.

Next, the Association asserts that at the hearing, the District eventually abandoned Polashek's written reasons for its decision and adopted new rationale. First, the Association addresses Polashek's concern about allaying the fears of parents and providing the best service to the children. According to the Association, this significant change in the Employer's reasoning (for requiring a Bachelor's degree) illuminates the untrustworthy nature of the Employer's decision. The Association asserts that at no time during the grievance process did Polashek offer this rationale for requiring a Bachelor's degree. Additionally, the Association asserts that Polashek admitted that no parents conveyed any fears to which he was responding. The Association characterizes Polashek's claim that he was trying to be "proactive" as lame. According to the Association, this rationale is akin to getting ahead of the future legislation that will eventually require additional training for paraprofessionals. The Association also submits that the District did not even establish that parents were aware that Pardy possessed a Bachelor's degree, much less that said information allayed their fears. Second, the Association addresses Polashek's assertion that he wanted someone who was good at communicating with parents. The Association responds to this by noting that Polashek did not offer any testimony in support of this alleged need, other than his own speculation in defense of his decision, nor did the District offer any evidence that a Bachelor's degree would better satisfy this undefined "need." The Association also asserts that there is no evidence in the record that the grievant did not have good communication skills. Additionally, the Association maintains that Pardy was not asked to engage in communication with parents that was any different than what other special education instructional aides were asked to do as part of their routine duties, so contacting parents was not required of the position, nor is it listed in the position's job description. In sum then, the Association characterizes all of the District's reasons for requiring a Bachelor's degree as superficial, unfounded and without merit. According to the Association, such superficial and flimsy reasoning for requiring a Bachelor's degree for the position in dispute violates the terms of Section 3.02 because said reasons amount to an unfair and unreasonable exercise of management rights.

Finally, the Association claims that the Employer's conduct herein denigrates the representative status of the Association by making it (i.e. the Association) appear impotent to defend the negotiated posting provision. It avers that if the Employer is allowed to create artificial reasons to avoid its contractual obligations, then the posting provision as well as other substantive contractual provisions could be rendered meaningless. In its view, no internal candidate will ever be found qualified if the Employer is allowed to add a requirement which it knows the internal candidates do not possess.

The Association therefore asks that the grievance be sustained. The remedy sought by the Association is twofold. First, it asks that the Bachelor's degree requirement be set aside. Second, it asks that grievant Shomin be awarded back pay in the amount of four hours per week from January 30, 2003 through the end of the school year.

District

The District contends it did not violate any contractual provision in the collective bargaining agreement when it required a Bachelor's degree as a qualification for the special education instructional aide position in dispute. It elaborates on that contention as follows.

The District begins by referencing the two contract provisions it believes are applicable here, namely the Management Rights clause and the Job Posting provision. With regard to the Management Rights clause, the District avers that that clause gives it the right to direct operations, establish quality standards, exercise management functions, transfer and assign employees, maintain efficiency in the district and determine educational policies. As the District sees it, those contractual provisions allowed it to reassign personnel after Wranosky was called up for military duty and to put together an educational delivery program which involved using a special education instructional aide (rather than a teacher). The District emphasizes that it did not schedule a special education aide into a regular teacher's classroom at the beginning of the school year as part of a planned program of service delivery. Instead, it emphasizes that what happened here was that a teacher was taken out of the classroom in mid-year on short notice. With regard to the Job Posting provision, the District avers that that provision gives it the right to determine qualifications for positions. According to the District, its decision to require a Bachelor's degree for this special education instructional aide position was a legitimate response to an unplanned vacancy on staff. It maintains it was one part of a thoughtfully planned out "fix" to a situation created by a teacher being called up for military service.

Elaborating further on the last point just referenced (i.e. that the Employer has the right to determine job qualifications), the District argues next that under WERC caselaw, the right to determine job duties and qualifications is a permissive subject of bargaining (and thus within the province of management). Building on that premise, the District asserts that this sets a higher standard of contract scrutiny for the Association to prevail.

Next, the District contends that when it established the Bachelor's degree requirement for the special education instructional aide position involved here, it did so in a fair and reasonable manner and did not undermine the Association or discriminate against its members. It expounds on this contention as follows. First, it notes that the Association has the burden to show that the District did not exercise its rights in a fair and reasonable manner and that the

addition of a Bachelor's requirement undermined the Association and discriminated against its members. The District asserts the Association did not prove that. Second, the District believes that its decision must stand so long as it is not found to be arbitrary, capricious, discriminatory or made in bad faith. The District maintains that the Association's nitpicking of the District's decision, including the claim that the District was being "pro-active", did not meet this criteria. Third, the District asserts that the job description (for the special education instructional aide) does not restrict the District from assigning duties to the special education instructional aide. Fourth, the District claims that the expectation of its management officials that the Bachelor's degree would be a predictor of a higher level of performance is supported by arbitral precedent.

Next, as part of its argument herein, the District goes through the original grievance point by point and responds to the nine assertions/arguments contained therein. First, the District avers that although the original grievance contains a reference to past practice, that reason was jettisoned by the Association at the hearing. That being so, it makes no comments regarding same. Second, the District asserts that while the original grievance also claimed that adding a Bachelor's degree prevented the majority of bargaining unit members from eligibility for posting for the position, that reason was also disavowed at the hearing. Aside from that, the District calls the Arbitrator's attention to the fact that the Association filed the grievance on February 10, 2003 – four days before the end of the contractual posting period. The District avers that by filing the grievance when it did (i.e. before the posting period had ended), the Association obstructed the posting process and deprived the three Association members with Bachelor's degrees of their opportunity to apply for the posting. As the District sees it, the Association discriminated against its own members by obstructing the posting procedure. The District maintains that the Association should not have "hijacked" the posting process as it did, and since it did, it should be estopped from advancing this position. Third, the District responds to the contention in the original grievance that if a Bachelor's degree is required as a qualification, then the District should allow any internal applicant applying for the position a reasonable amount of time to obtain the Bachelor's degree. It characterizes that request as ridiculous. Additionally, the District avers that it has no duty to provide a trial period to an applicant who does not possess a Bachelor's degree. Fourth, the District avers that although the original grievance contains a claim that the Bachelor's requirement was unfair because no test was administered in this case, that reason was jettisoned by the Association at the hearing too. Fifth, the District responds to the assertion in the original grievance that several special education instructional aides were offended by the District's Bachelor's degree requirement. The District characterizes that view as unwarranted and baseless. Sixth, it reads the original grievance to say that since the federal No Child Left Behind law does not require a Bachelor's degree for special education instructional aides, the District cannot require that a special ed instructional aide have a Bachelor's degree in the situation being grieved. It responds to that by asserting that while the District's decision (to require a Bachelor's degree) was not based on

that federal law, its decision is nevertheless consistent with that law's emphasis on higher quality teachers and paraprofessionals. According to the District, it hardly seems possible that increasing the educational standards of one's employees would be deemed "unfair and unreasonable." The District notes that it isn't forcing any current employees to become educated, it isn't forcing them to go to school to improve their skills, nor is it forcing them to invest in their own self worth or forcing themselves to be more competitive in obtaining better paying jobs. Seventh, the District responds to the claim in the grievance that District officials knew that Sandy Pardy (a substitute aide not in the bargaining unit) had a Bachelor's degree and established that as a qualification to assure her appointment (because the posting would only fit her). The District disputes that assertion. It notes that the Association cited no record evidence to support that assertion. In contrast, the District notes that two District witnesses, Johannes and Polashek, testified that 1) Sandy Pardy's name was never mentioned as a possible person to fill the posted position; and 2) that when the job was created, there was no anticipation on their part that Pardy would get the job. The District contends that there is no record evidence which contradicts their testimony. The District also notes that after the grievance was filed, it did not hire anyone for the position; rather, management officials decided to fill it with a substitute pending the resolution of the grievance. The District maintains that only then did Sandy Pardy's name come up as a substitute. Eighth, the District reads the original grievance to say that a special education instructional aide only observes and documents. The District asserts that is not the case, and that many aides go beyond that myopic model (i.e. only observing students and documenting their conduct). Finally, the District responds to the claim in the grievance that if the District requires that an instructional aide have a Bachelor's degree, the District must pay for the most senior applicant to get a college education. The District characterizes that as a silly and bizarre interpretation of the contract language.

Having so responded to the nine assertions/arguments contained in the grievance, the District also argues that its actions herein (i.e. adding a Bachelor's degree requirement as a qualification for this special education instructional aide position) should pass contractual muster for the following reasons. First, it notes that the DPI recognizes a Bachelor's degree as an acceptable criterion for granting teacher permits or substitute teacher permits. The District opines that while more education doesn't automatically make somebody more competent, "our system of recognizing competence in many walks of life is based on practical assumptions that educational degrees mean something and not nothing." According to the District, there is a presumption that a higher education degree prepares a person better for the educational workforce. Second, the District avers that the management officials involved herein relied on their experience with support staff persons who have Bachelor's degrees to support their conclusions that persons with Bachelor's degrees are better qualified, perform well, provide a better quality of service, have a better understanding of child development and are better communicators. Third, the District asks rhetorically where the Association's research is which

supports the argument that a person with a Bachelor's degree is less qualified than a person without a degree. The District asks that question tongue in cheek, knowing that such research does not exist. The District puts it this way in their brief: "It will be a cold day in hell before any teacher's association will ever publicly advocate a position that non-degreed people can do a better job than degreed people."

Finally, the District contends that it has the right to set higher qualifications than it has in the past (i.e. to raise the bar on qualifications). The District disputes the Association's assertion that the District's attempt to raise educational standards is a "bogus" issue. According to the District, just because it has not done so before (i.e. required a Bachelor's degree) does not preclude it from doing so here. As the District sees it, all it did here was something its been trying to do over the years, namely upgrade (i.e. raise the qualifications of) its staff. The District asserts that its attempt to hire the best should not be impeded by the Arbitrator. The District argues that if it is impeded by the Arbitrator, the interests of children will be sacrificed to maintain the status quo. The District therefore asks that the grievance be denied.

DISCUSSION

I have decided to begin my discussion by addressing the scope of the grievance, and thus, the scope of this decision. Oftentimes, written grievances are drafted in a short, almost terse, fashion. Take, for example, a grievance challenging employee discipline. Such grievances often simply say that the employer lacked just cause for the discipline imposed. That's it. The grievance usually does not expound further. Here, though, the grievance drafted by the local Association president was neither short nor terse. To the contrary, it was four single-spaced pages long. That grievance not only put the Employer on notice that the Association was grieving the District's right to require a Bachelor's degree for the special education instructional aide position in question, but it also elaborated at length on why it (allegedly) was a contract violation. Specifically, it raised nine different theories/arguments why the Bachelor's degree requirement violated the collective bargaining agreement. In that sense, it was more like a post-hearing brief than a grievance. Since it was so long, it gave the District a lot of material to work with, so to speak. What I'm referring to is that on pages 12 through 18 of their original brief, the District goes through the grievance document point by point and responds to all nine theories/arguments. The undersigned is not going to do that. While I will address some of the theories/arguments which were raised in the grievance, I am not going to address all nine. Here's why. First, at the hearing, the Association discarded some of those theories/arguments. Specifically, it discarded the past practice contention, the contention that adding a Bachelor's degree prevented the majority of bargaining unit members for posting for the position, and the claim that a Bachelor's degree was unfair because no test was administered here. Since those claims have gone by the wayside, so to speak, no further

comment will be made concerning them. Second, at the hearing, the parties stipulated to a very narrow and specific issue for the Arbitrator to decide. That issue is whether the District violated the collective bargaining agreement by requiring a Bachelor's degree as a qualification for the special education instructional aide position in dispute. In my view, that issue can be answered without expounding on all of the theories/arguments which were raised in the grievance.

Having made those preliminary comments, the focus now turns to the contract language involved in this case, namely portions of the Job Posting provision and the Management Rights clause. They will be addressed in the order just listed.

The part of the Job Posting provision pertinent here is found in Sec. 8.05. The first two sentences of that section provide thus:

Selection – Vacancies shall be filled 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.

In the context of this case, there is no dispute about what this language means. The parties agree that the second sentence gives the Employer sole discretion to determine if an applicant is qualified.

The Employer avers that this provision also gives it the right to determine job qualifications for positions. Elaborating further, the District argues that under WERC caselaw involving the Municipal Employment Relations Act, the right to determine job duties and qualifications is a permissive subject of bargaining (and thus within the province of management). I find this argument misses the mark for the following reason. In this case, I am not acting as an examiner interpreting Wisconsin's Municipal Employment Relations Act. Instead, I am acting as an arbitrator interpreting language in an existing collective bargaining agreement. Whether that contract language is permissive or mandatory under MERA is, at least in the context of this case, irrelevant to the stipulated contract interpretation issue which the parties asked me to decide.

The focus now turns to the Management Rights clause. Section 3.01 gives the Employer numerous management rights, some of which will be referenced later. Section 3.02 then goes on to specify that the Employer has to exercise its management rights in a fair and reasonable manner. This reasonableness requirement means that the Employer's discretion is not completely unfettered. Additionally, Sec. 3.02 specifies that the Employer's management rights shall not be used to undermine the Association or discriminate against bargaining unit members.

Section 3.02 therefore establishes a standard of review for the arbitrator to use in deciding whether the Employer's exercise of its management rights is upheld or reversed. The standard, of course, is a reasonableness standard. Applying that standard here means that I have to decide whether the qualifications which the District set for the position in question were fair and reasonable. If I find that they were fair and reasonable, then the Employer's decision will pass contractual muster. However, if I find that they were not fair and reasonable, then the Employer's decision will not pass contractual muster.

While the word "qualifications" used above was in the plural, just a single qualification is in issue herein. It is the requirement that the applicant have a Bachelor's degree. Since the parties limited their discussion to just that one qualification, I will do likewise. The focus now turns to deciding whether that particular qualification was fair and reasonable.

My discussion on same begins with the following initial comments. First, the Association is correct that prior to this instance, the Employer had never required a Bachelor's degree for an instructional aide position. While in other instances the Employer had stated on the job posting that education beyond high school was preferred, this was the first time that the Employer had required a Bachelor's degree. Second, the Association is also correct that this position did not contain any new, different or additional duties. By that, I mean that this position did not have a job description that differed in any way from the one that currently employed instructional aides operate under. Aside from that, the posted position did not impose any different or additional duties than currently employed instructional aides have traditionally performed.

Given the foregoing, the Association asks me to be skeptical from the outset of the Employer's decision to require a Bachelor's degree as a qualification. I decline to do so. Here's why. While the Employer had never previously required a Bachelor's degree for an instructional aide position before, what happened previously was not the result of bargaining with the Association. Instead, it was the District's unilateral act. The District had previously decided that instructional aides did not need to have a Bachelor's degree. That was the District's call to make. The District had the right to make that call because it had reserved to itself, via both the Management Rights clause and the Job Posting provision, the right to make that decision. It would be one thing if this contract contained a provision that limited what qualifications the Employer could require for a position. However, no such language exists herein. All the language pertinent to this case has already been cited and referenced, and nothing therein precludes the District from setting higher qualifications for jobs than it has in the past. Since there is no contract language herein which limits the qualifications the Employer can require for a position, I am not going to start my discussion, as the Association urges, by being skeptical from the get-go of the Employer's decision to require a Bachelor's degree as a qualification for the job in question. That said, even without that skepticism, it is

noted once again that the Employer's decision still has to be found fair and reasonable in order to pass muster.

In this next part of my discussion, the focus turns to the facts. In the middle of the 2002-03 school year, the kindergarten teacher at Abrams School, an Army reservist, was called to active military duty for an indefinite period of time. The District decided to "fix" this problem as follows. First, it shuffled existing staff. Specifically, it reassigned a teacher from another elementary school (where District officials felt they were overstaffed) to Abrams for the remainder of the school year. The teacher who was reassigned to Abrams (Waeghe) was an early childhood teacher with special education certification. After Waeghe moved to Abrams, someone had to work with the students she had previously worked with. Second, the District decided to not replace Waeghe with another teacher. Instead, they decided to replace her with a special education instructional aide.

My recitation of the facts stops here so that I can address the District decisions mentioned thus far. The District was empowered to do the things just mentioned because of Section 3.01 of the Management Rights clause. That clause specifically gives the District the right to direct operations, establish quality standards, exercise management functions, transfer and assign employees, maintain efficiency in the district and determine educational policies. In the context of this case, the provisions in the Management Rights clause just noted allowed it to reassign personnel in the middle of the school year after Wranosky was called up for military duty and to put together an educational delivery program which involved using a special education instructional aide (rather than a teacher).

The Association characterizes the above-noted factual situation as one involving the mundane situation where a teacher left employment unexpectedly which then required a shuffling of staff. While it may be common in other school districts for teachers to leave in the middle of a school year, it does not appear from this record that it was common and routine in this district. Insofar as the record shows, it was unusual for a teacher to be taken out of the classroom in midyear on short notice, especially an elementary teacher. Additionally, insofar as the record shows, it was unusual for a teacher to be replaced mid-year with an instructional aide.

Having thus commented on two of the decisions the District took to "fix" this unusual situation (i.e. transferring a teacher from one school to another and filling the vacant teacher's position with a special education instructional aide, instead of with another certified teacher), the focus now turns to the third decision which was part of this "fix". It was this: District officials decided that the instructional aide it would hire for this position would have to have a Bachelor's degree. The remainder of this discussion will focus on that Employer decision.

The District proffered a variety of reasons to justify its decision to require a Bachelor's degree for the instructional aide position involved here. As the Association sees it, all those reasons were superficial, unfounded and without merit.

I conclude that several of the reasons proffered by the District were unfounded and have therefore discounted them. In particular, the following reasons have been discounted: 1) that a person with a Bachelor's degree would be more able to learn data collection than someone without a Bachelor's degree; and 2) that having a Bachelor's degree prepares an employee for transfers within the District. These reasons were discounted because the District did not show a work-related nexus between these opinions and the basis for these opinions.

While the reasons just noted have been discounted, the following reasons have not. First, while more education does not automatically make somebody more competent, it is generally accepted in our society that higher education degrees mean something. At a minimum, a college degree shows a prospective employer that the person with the degree had the gumption to finish four years of college. Beyond that, there is a presumption in our society that a higher education degree prepares a person better for the educational workforce. Second, the two District officials who decided to include the Bachelor's degree requirement involved herein testified that they did so because they felt that persons with Bachelor's degrees perform well, provide a better quality of service, have a better understanding of child development and are better communicators than persons without Bachelor's degrees. The Association correctly notes that there are no studies or data in the record which substantiates or validates those views. That means, of course, that the views just stated are their subjective opinions. However, while those views are subjective, they nonetheless have a work-related nexus. It is this: both testified that their opinions were based on their work experience with existing support staff employees who have Bachelor's degrees. This testimony established a work-related nexus between the opinions and the basis for the opinions. Third, I am not persuaded that the District's attempt to raise the bar, so to speak, on educational qualifications is, as characterized by the Association, a bogus issue. District Exhibit 3 shows that over the last several years, the District has been increasing the educational requirements for various bargaining unit jobs. Its goal, in doing so, is to improve the overall quality and educational standards of its workforce. The decision in this instance to require a Bachelor's degree for this particular job is certainly consistent with that goal. Fourth, another reason the District required a Bachelor's degree in this particular instance was because the instructional aide was replacing a teacher in mid-year. Insofar as the record shows, this was an unusual situation. Fifth, the District emphasized that while it required a Bachelor's degree in this particular instance, it is not saying that henceforth all instructional aides will have to have a Bachelor's degree. Thus, the District is not forcing any current employees to get a Bachelor's degree to keep their job, nor is it forcing them to go to school to improve their skills. Overall, these reasons persuade me that the Bachelor's degree qualification which the District set for this particular instructional aide position was fair and reasonable under the circumstances.

Having so found, the focus now turns to the following remaining Association contentions.

First, the trial period argument. The Association contends that grievant Shomin should have been given a 30-day trial period pursuant to Sec. 8.05. I disagree. A prerequisite for getting a trial period is to first be found qualified. None of the applicants who applied for the posting had Bachelor's degrees or were within 30 days of getting their Bachelor's degrees. Thus, they were not qualified for the posted position. As a result, the District was not contractually obligated to provide any of the applicants with a trial period.

Second, the Sandy Pardy argument. The Association asserts that District officials knew that Sandy Pardy (a substitute aide not in the bargaining unit) had a Bachelor's degree and established that as a qualification to assure her appointment (because the posting would only fit her). It would be one thing if the record evidence substantiated that assertion. However, it does not. Two District witnesses, Johannes and Polashek, testified that 1) Sandy Pardy's name was never mentioned as a possible person to fill the posted position; and 2) that when the job was created, there was no anticipation on their part that Pardy would get the job. There is no record evidence which contradicts their testimony. After the grievance was filed, the District put Pardy in the position as a substitute, pending the resolution of the grievance. The parties stipulated at the hearing that the District's choice to fill the position with a substitute aide (as opposed to a permanent employee) is not an issue here.

Finally, the discrimination argument. The Association argues that the District's actions (in requiring a Bachelor's degree) undermined the Association and/or discriminated against bargaining unit employees. In my view, it suffices to say that the Association did not prove that.

In sum then, I have found that the Association did not prove that the District's imposition of a Bachelor's degree requirement for this position was unfair and unreasonable. The Bachelor's degree qualification for the position involved herein therefore passes contractual muster. Hence, no contract violation has been found.

Any matter which has not been addressed in this decision has been deemed to lack sufficient merit to warrant additional attention.

In light of the above, it is my

AWARD

That the Employer did not violate the collective bargaining agreement by requiring a Bachelor's degree as a qualification for the special education position in dispute. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 12th day of April, 2004.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

