

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
DeSOTO SUPPORT PERSONNEL ASSOCIATION
and
DeSOTO SCHOOL DISTRICT

Case 34
No. 62972
MA-12457

(Posting Grievance)

Appearances:

Steve Glandt, Executive Director, Coulee Region United Educators, appearing on behalf of the Association.

Shana Lewis and **Richard Verstegen**, Attorneys, Lathrop & Clark, appearing on behalf of the District.

ARBITRATION AWARD

The DeSoto Support Personnel Association and the DeSoto School District were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance. Hearing on the matter was held on April 14, 2004 in DeSoto, 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 July 1, 2004, 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 Employer violate the terms of the collective bargaining agreement (Article VII) when it failed to post the vacancy of a 2/5 Health Aide position and unilaterally assigned the position to another employee outside the Health Aide classification?

The District frames the issue as follows:

Did the DeSoto Area School District violate the 2002-2004 Labor Agreement when it did not post an Aide position when Stacy Rice relinquished her Health Care Provider position, but instead, assigned some of the duties associated with the position to Deb Groves?

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' 2002-2004 collective bargaining agreement contained the following pertinent provisions:

ARTICLE IV. Management Rights.

A. The Board hereby retains and reserves unto itself, without limitation, all power, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and Constitution of the State of Wisconsin, and of the United States, including, but without limiting the generality of the foregoing, the right to:

...

9. The direction, supervision, evaluation, arrangement, assignment and allocation of all the working forces in the system, including the hiring of all employees, determination of their qualifications and the conditions for their continued employment, the right to discipline or discharge, and transfer employees.

...

11. The determination of the size of the working force and the determination of policies affecting the selection of employees.

...

ARTICLE VII. Seniority, Vacancies, Transfer and Layoff.

A. Seniority

...

2. The employer shall compile and deliver to the Association a list of employees covered by this Agreement and their respective dates of employment. This list shall be revised yearly or more often if requested by the Association. Any dispute over seniority shall be settled between the Employer and the Association through the grievance procedure.

For purposes of this Article, the job classifications are:

- a. Teacher Aides
- b. Secretarial and Clerical
- c. Food Service
- d. Custodial
- e. Health Aide

...

B. Vacancies

Posting Procedure

1. When a vacancy(s) occurs or new jobs are created within the bargaining unit, such vacancies or new jobs shall be posted on a district-wide basis for five (5) working days. Of the employees applying who are qualified and able to perform the work, the applicant with the best relevant qualifications shall fill the vacancy(s). Should there be a tie in qualifications, the person with the most District seniority shall fill the vacancy(s). The posting notice shall be placed on the bulletin board as provided in Article V and a copy provided to the Association President. Postings may be concurrently advertised outside of school.

...

6. If no one within the bargaining unit bids a vacant or new position on or before five (5) calendar days after the initial posting date, they shall have waived their right to bid for the position and the District may seek applicants from outside the bargaining unit.

C. Transfer

1. Any employee who has completed his/her probationary period may request a transfer to any position that has been listed as vacant and for which applications are being taken. The employee will be required to review the job descriptions and job requirements for the position requested. Upon review, understanding and verification that the job requirements have been examined by the employee, the administrator or his designee will discuss and document with the employee the strengths and weaknesses of the employee as they relate to the new position. Documentation shall include efforts required of the employee to meet the requirements of the new position and the district's commitment to help the employee meet the new job requirements. Upon completion of this process the employee will be given the job which he/she has requested.

2. An employee who transfers to a different or higher classification or a new position shall be placed at an hourly pay rate and benefits for that position.

3. If two or more employees, who have completed the probationary period, apply for any given position, the employee with the most seniority will be given the job after the process described in #1 above has been completed.

4. When the District determines that an involuntary transfer must be made, the Superintendent or his designee shall give written and personal notification to the affected employee and the Association of the reasons for such transfer within three (3) days of said transfer.

5. Involuntary transfers shall occur on the basis of least seniority.

...

APPENDIX A

Wage Scale and Classification (July 1, 2003)

Classification	Step 1	Step 2
	...	
Secretary	10.32	10.57
	...	
Teacher Aide	9.50	9.75

FACTS

The District operates a public school system in DeSoto, Wisconsin. The Association is the exclusive collective bargaining representative for the District's support staff employees.

The District employs staff to care for the educational and personal needs of disabled students. Although these employees primarily focus on one student, they often work with more than just that one particular student. These employees provide varying degrees of health care and classroom assistance for the student(s). Over the years, these employees have been known as Special Education Aides, Special Education Health Aides, Exceptional Education Needs (EEN) Health Aides and Health Care Providers. These positions have never had job descriptions.

There are just two job descriptions that have been used to govern the duties of support staff employees whose responsibilities included caring for the academic and personal needs of students, disabled and otherwise. One is the job description for a Teacher's Assistant (also

called Teacher's Aides). Those employees provide assistance to teachers in the classroom with regard to all students in the teacher's class. Their duties are not specifically directed at assisting one particular student. The other relevant job description is the job description for the Special Education Assistant position. Special Education Assistants are responsible for assisting in the personal care, hygiene, and record keeping for disabled students.

...

The following facts pertain to certain individuals who have worked or currently work for the District providing assistance to disabled students. Their job titles have varied. Some bargaining history is also interspersed.

In August 1991, the District hired Marvel Smith for a part-time (two day per week) Health Care Provider position. In that capacity, Smith was responsible for many of the duties enumerated in the Special Education Assistant job description, including providing personal care and hygiene for disabled students. At the same time, the District also hired Smith for the part-time (three days per week) School Nurse position. As a School Nurse, Smith provided various health-related services to students and staff in the District, including medical consultation, training, and first aid. Both positions held by Smith were non-bargaining unit positions. Thus, Smith was not a member of the support staff bargaining unit or the teacher/professional bargaining unit.

In 1994, the District hired Ellen Procalamos for a part-time Teacher Aide position. She performed various duties associated with disabled students in the District, which included administering medication, providing bathroom assistance, conducting physical therapy, and performing other minor first aid duties for them. Her Teacher Aide position was covered under the labor agreement between the District and the Association, so Procalamos was a member of the support staff bargaining unit.

In September 1999, Procalamos asked that the District change her job title from Teacher Aide to Health Care Provider. She argued that because of her nursing background, training, and job duties, she should have the title Health Care Provider, rather than the title Teacher Aide.

During the negotiations for the 2000-02 collective bargaining agreement, the parties agreed to add a Health Aide classification to the Seniority provision. This happened as a result of the Association proposing that a Health Aide classification be added to the Seniority provision. At the time, the Seniority provision included four job classifications: 1) Secretarial and Clerical, 2) Teacher Aides, 3) Food Service, and 4) Custodial. The parties agreed to add a fifth classification, that of Health Aide. In reaching this agreement, there was no discussion

between the parties about job descriptions for positions within this new classification or the duties associated with any applicable positions. When the parties added the Health Aide classification to the Seniority provision, they did not make any change to the salary schedule (such as adding a separate classification on the Wage Scale for Health Aide), or agree on a different wage rate for the Health Aide. Since the Health Aide classification was added to the Seniority provision in the 2000-02 collective bargaining agreement, the parties have not negotiated or adopted any job description related to the Health Aide classification, and have not included the Health Aide as a separate classification on the Wage Scale section of the collective bargaining agreement.

In 2000, Smith ended her employment as Health Care Provider and School Nurse for the District. She was replaced by Stacy Rice. Rice worked part-time (two days per week) as a Health Care Provider and part-time (three days per week) as School Nurse. Her two part-time positions together totaled a full-time job. Her duties in those two jobs are reviewed below.

As a Health Care Provider, Rice mainly worked with two disabled students: T.G. and K.G. She provided tube feedings, administered medication, performed physical therapy including range of motion activities, provided bathroom assistance, provided classroom assistance, and performed suctioning chest therapy for the disabled students. These job duties just referenced were consistent with the job duties listed in the Special Education Assistant job description. Rice did not provide personal care during transportation for these disabled students; instead, another Aide employed by the District supervised the disabled students during transportation. In 2001, one of the students Rice served in her capacity as Health Care Provider for the District, K.G., died. K.G.'s death did not affect the hours and duties of Rice's Health Care Provider position with the District. Her job duties essentially remained the same from 2000 to October 2003, when she relinquished her Health Care Provider duties.

As School Nurse, Rice was required to be registered as a nurse by the State. Her job duties included providing first aid to students, presenting health and dental education programs (human growth, development, and protective behaviors) for students, parents, and staff, administering hepatitis shots, and maintaining immunization health records for students. Like her predecessor as School Nurse (Smith), Rice was not a member of the support staff bargaining unit or the teacher/professional bargaining unit. Thus, both positions held by Rice were non-bargaining unit positions.

In February 2001, the District hired April Rasmussen for a part-time (three days per week) Special Education EEN Health Aide position. Rasmussen worked with various disabled students. She mainly worked with T.G. and K.G. She provided tube feedings, administered medication, attended classes with the students and provided them with classroom assistance, provided personal care and hygiene for the students and performed physical therapy for the

students, including range of motion exercises and stimulation activities. She also did vacuuming, cleaning, preparing bulletin boards, clerical tasks and performing light first aid for other students. On one occasion, she transported disabled students using a District-owned vehicle. The duties just referenced are consistent with the job duties listed in the Special Education Assistant job description. Rasmussen is paid at the rate identified in the Wage Scale for the Teacher Aide classification. She is licensed by the Wisconsin Department of Public Instruction (DPI) as a Special Education Aide and attended Paraeducator training during the 2001-02 school year.

In August 2001, the District hired Deb Groves for a full-time Special Education Aide position. Groves primarily worked with one disabled student, R.H., a student who suffered from muscle disorders and a disease causing muscle deterioration. Groves provided feedings, administered medication, performed physical therapy, provided care during seizures, provided bathroom assistance, tutored, and provided classroom assistance for R.H. She also performed clerical tasks, assisted in teaching content to selected students, assisted in classroom management and student control, and attended classes with students. The job duties just referenced were consistent with the job duties listed in the Special Education Assistant job description. Like Rasmussen, Groves is paid at the rate identified in the Wage Scale for the Teacher Aide classification. Like Rasmussen, Groves is licensed by DPI as a Special Education Aide and attended Paraeducator training during the 2001-2002 school year. Prior to being hired by the District, Groves had experience working with disabled students. Specifically, for over eight years, Groves provided in-home care for K.G., a disabled student in the District. In addition, Groves has provided personal care to disabled students while working as an aide and driver for a District transportation subcontractor.

In the 2002-03 school year, Groves continued in her position as a Special Education Aide. She continued to work directly with R.H. in the classroom. Additionally, she transported various disabled students, including R.H. Disabled students require the same close supervision while being transported that they do in the classroom. Because of Groves' experience working with disabled students and transporting them, the District had her transport disabled students that year by herself. This saved the District money.

During the course of that school year (2002-03), R.H. apparently had different needs at different times, so the amount of time Groves spent with R.H. fluctuated. R.H. graduated from high school at the end of the school year. R.H.'s graduation did not end Groves' position as a Special Education Aide.

That same school year (2002-03), the District hired Groves for a part-time Special Education Secretary position. Groves was able to assume the duties associated with the Special Education Secretary position in addition to her existing Special Education Aide duties. Groves

worked full-time for the District during the 2002-03 school year and divided her time between those positions. She was paid under the Teacher Aide classification for her Special Education Aide duties, which included the transportation duties, and under the Secretary classification for her Special Education Secretary position. Groves is the least senior secretary in the District.

In June 2003, Rice notified District Administrator Michael Davis that she wanted to reduce her hours for the 2003-04 school year to just her School Nurse duties. In other words, she wanted to vacate her Health Care Provider position and relinquish her duties which involved caring for disabled students. Later that month, Rice sent a letter to Davis and the School Board which stated in pertinent part:

I am officially requesting to cut my hours down to strictly Nursing starting October 1, 2003. I will work 3 days a week, spending 2-1/2 days at the MS/HS and Prairie View, and 1 full day at Stoddard. I have tentatively planned on working Mondays, Thursdays, and Fridays.

On July 2, 2003, Davis responded to that letter, stating:

The De Soto School Board at their meeting July 1, 2003 formally accepted your request to go to a 3-day work week as school nurse. The 2 days of aide time is being removed from your contract.

After Rice gave notice of her intent to relinquish her Health Care Provider position, Davis discussed the matter with the Board. After assessing its needs, the Board decided not to declare a vacancy as a result of Rice vacating her Health Care Provider position. The Board decided that Groves could absorb the duties previously performed by Rice (i.e. assisting student T.G.) because the student Groves had assisted the previous year (R.H.) had graduated and because Groves' Aide position was flexible enough to accommodate the extra duties.

In August 2003, Davis contacted Groves (who was still working as a Special Education Aide and Special Education Secretary), and informed her that effective October 1, 2003, she would be assisting student T.G.

After Davis informed Groves that she would be assigned those duties (i.e. assisting T.G.), no formal action was taken by the Board regarding same. For example, no letter or document was sent to Groves informing her that she was in a new position. The record indicates that when the Board fills a vacancy, it takes formal action on same.

Rice stayed employed with the District as a Health Care Provider and assisted student T.G. until October 1, 2003. As a result, during September 2003, Groves worked in her secretarial capacity and provided personal care and transportation services for disabled students, as described above.

Effective October 1, 2003, Groves' job duties were as follows: she provided transportation and personal care for disabled students Monday through Friday in the morning and in the afternoon, provided personal care in the school for student T.G. on Thursday and Friday, and performed secretarial duties on Monday, Tuesday and Wednesday. Groves testified that she was not overburdened by her multiple job duties with the District. While working with T.G., Groves' duties include administering medication, providing tube feedings, conducting physical therapy, and providing general personal care. These duties were substantially similar to the duties Groves performed the year before when she provided personal care for R.H. Her duties with T.G. are more extensive than her duties with R.H. though, because T.G.'s medical condition is more severe than R.H.'s medical condition. The duties Groves was assigned were consistent with those duties she performed in her capacity as a Special Education Aide and consistent with the responsibilities listed in the Special Education Assistant job description.

During the 2003-04 school year, the District continued to pay Groves at the rate identified for the Teacher Aide classification for her transportation and personal care duties with T.G., and at the rate identified for the Secretary classification for her clerical duties.

During the 2003-04 school year, Rasmussen continued to work as a part-time Special Education Health Aide providing personal care for T.G. three days per week. For these duties, the District paid Rasmussen at the rate identified for the Teacher Aide classification.

In August 2003, the Association filed a grievance which contended that after Rice gave up her Health Care Provider position, the District should have posted a Health Aide position pursuant to Article VII of the labor agreement. The grievance contended that April Rasmussen was entitled to this Aide position. After the District denied the grievance, it 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 failed to post a 2/5 Health Aide position in accordance with the contractual

posting language and instead unilaterally assigned that position to another employee outside the Health Aide classification. It elaborates on this contention as follows.

First, the Association avers that when School Nurse/Health Aide Stacy Rice resigned her 2/5 Health Aide position in November, 2003, her resignation created a vacancy in that position. According to the Association, after the District decided that it wanted to continue to provide the (health aide) services which Rice previously performed, it (the District) was contractually obligated by the posting language contained in Article VII, Section 1 to post that vacancy to give employees the opportunity to apply for it. The Association notes that that did not happen. Instead, the District unilaterally reassigned that 2/5 Health Aide position to Deb Groves. The Association argues that by doing this, the District rendered the posting language meaningless.

Second, building on the premise that the District should have posted the 2/5 position, the Association argues that the District exceeded its managerial rights when it reassigned the 2/5 Health Aide position to Deb Groves because in doing so, the District failed to respect the existing job classifications. Here's why. The Association maintains at the outset that the 2/5 position involved herein is a Health Aide position. According to the Association, the District has historically treated the Health Aide as being different in title and description from that of a Teacher Aide because the parties intended to have a separate classification for those employees who care for the District's students with severe physical and mental disabilities. The Association notes in that regard that Rasmussen's predecessor, Ellen Procalamos, requested in 1999 that the District change her job title from Teacher Aide to Health Care Provider, and that in the parties' 2000-02 collective bargaining agreement, "Health Aide" was added as a new and separate classification in Article VII. The Association avers that this history establishes that the parties intended to distinguish the Health Aide from the other classifications. The Association contends that when the District reassigned Groves to the 2/5 Health Aide position, she (Groves) was not working in a Health Aide position; instead, she was working full-time as a Secretary and Van Driver. As the Association sees it, Groves' job duties in those two capacities (i.e. Secretary and Van Driver) never approached those of a Health Aide. That being so, the Association believes the District overstepped its managerial authority by assigning the 2/5 Health Aide position to someone who was then working outside the Health Aide classification (i.e. Groves).

Third, the Association argues that the District's interpretation of its managerial right to reassign work across classifications, and not post positions, creates disharmony among other sections of the agreement. The Association acknowledges that the District can assign work within a classification. As an example, the Association admits that the District is empowered to reassign a secretary from one secretarial position to another. However, as the Association sees it, that did not happen here. Instead, as already noted, the District took someone who was

in one classification (i.e. the Secretary classification) and reassigned them to work in another classification (i.e. the Health Aide classification). The Association contends that by doing this (i.e. assigning an employee who worked in the Secretary classification to work in a different classification), the District exercised its managerial right to assign work in a way which conflicted with Article VII.

Fourth, the Association asserts that by circumventing the posting language in Article VII, the District has also been able to avoid the monetary impact that the Insurance provision would have if Rasmussen's employment status were to change from part-time to full-time. Here's why. The Association notes that under Article XIV (the Insurance Provision), the District pays 90% of the family premium for full-time employees or a pro-rated portion for part-time employees. It further notes that Rasmussen is currently a part-time employee who does not take District-provided family health insurance because she cannot afford the personal pro-rated amount. The Association cites Rasmussen's testimony that if the District were to post the 2/5 Health Aide position, and she were awarded the job, she would choose to take family insurance because the District would be paying 90% of the premium. The Association contends that the District is aware of the monetary savings that resulted from keeping Rasmussen at part-time (rather than changing her status to full-time), and that is why the District chose, in the Association's words, "the path of least resistance".

Finally, the Association interprets the CHIPPEWA COUNTY arbitration award cited by the District differently than the District does. According to the Association, that award, as well as the award in DOUGLAS COUNTY, supports the Association's position herein, not the District's.

The Association therefore asks that the grievance be sustained and the contract language in Article VII enforced. As a remedy, the Association asks that the District be directed to post the 2/5 Health Aide position in accordance with the language contained in Article VII.

District

The District's position is that it did not violate the collective bargaining agreement when it did not post a Health Aide position after Stacy Rice relinquished her Health Care Provider position, and instead assigned some of the duties relinquished by Rice to Deb Groves. According to the District, the Association has not shown a contract violation, so the grievance should be denied. It elaborates on this contention as follows.

First, the District addresses the question of whether Rice's departure as a Health Care Provider created a vacancy. It contends Rice's departure did not create a vacancy which the District was obligated to post. Here's why. The District avers at the outset that the management rights clause gives it the right to determine the size of the workforce and the right

to allocate and assign work among the existing staff. Building on the foregoing point, the District avers that there is no contract language herein which limits or restricts the District's right to determine whether a vacancy exists. As the District sees it, the Association failed to recognize that basic fact. The District also notes that the collective bargaining agreement does not contain any requirement that the District maintain a certain number of positions overall, nor does it contain a requirement that the District maintain a certain number of positions in each classification, nor does it contain a requirement that the District post a vacancy in every instance in which an employee resigns a position or relinquishes duties. The District submits that given the absence of such limiting contract language, it had the right, upon learning that Rice intended to relinquish her Health Care Provider duties, to absorb those duties into the existing workforce. The District believes it therefore had the right to decide that a vacancy was not created by Rice's departure. It maintains that the vacancy provision in Article VII, B, Sec. 1 only requires the District to post a vacancy if the District determines that a vacancy exists. Here, though, the District decided there was no vacancy, so it was not required to post a vacant position. The District also calls attention to the fact that the vacancy language just referenced talks about a vacancy "within the bargaining unit." The District emphasizes that the Health Care Provider position formerly held by Rice was never "within the bargaining unit." Building on the foregoing, the District reasons that any "vacancy" created by Rice relinquishing her position would not have been within the bargaining unit and thus would not have to be posted by the vacancy provision.

Second, the District addresses the Association's assertion that it essentially filled a vacancy when it assigned some of the duties previously performed by Rice in her capacity as Health Care Provider to Groves in her capacity as a Special Education Aide, thereby avoiding the posting procedures in the collective bargaining agreement. According to the District, the Association's assertion is not supported by the record evidence. Here's why. First, the District contends that Groves did not simply take over all of the duties previously performed by Rice. The District notes in that regard that for two days per week and eight hours per day, Rice had focused solely on providing assistance to T.G. in the school. The District acknowledges that Groves now works with T.G. in the school, but emphasizes that it is just for six hours a day. For the remaining two hours each day, she transports disabled students, including T.G., in the morning and the afternoon. That was something Rice never did. Thus, the District asserts that Groves' Special Education Aide position is not the same as Rice's former Health Care Provider position. Building on that point, the District maintains that Groves only assumed certain duties previously performed by Rice. Second, the District submits that the Health Care Provider position could be considered a job title or position in flux. What it means is this. The Health Care Provider position did not have a job description, and the duties associated with the position depended on the number of disabled students needing assistance in the District. Third, the District asserts that there was significant overlap between Rice's Health Care Provider position and Groves' Special Education Aide position

because both involved providing feedings, administering medication, conducting physical therapy, administering care during seizures, providing bathroom assistance, and providing classroom assistance for disabled students. Under these circumstances, the District believes it was reasonable for Groves, in her capacity as Special Education Aide, to take on duties formerly performed by Rice in her capacity as Health Care Provider. Building on the foregoing, the District asks the Arbitrator to conclude that the District did not fill the vacant Health Care Provider position when it assigned Groves some of the duties previously performed by Rice. Instead, he should conclude that the District decided not to fill the position and simply absorb some of the duties previously performed by Rice by assigning them to Groves.

Third, the District interprets the DOUGLAS COUNTY arbitration award cited by the Association differently than the Association does. According to the District, that case is distinguishable on its facts because in that case, a position was eliminated and a transfer occurred. The District argues that here, though, no position was eliminated and no transfer occurred. Instead, Groves assumed a portion of the duties Rice relinquished when she vacated the Health Care Provider position. The District submits that Groves did not transfer into the Health Care Provider position and her position as Special Education Aide still exists; Groves is still a Special Education Aide who simply took over approximately six hours per day for two days of the position Rice had performed eight hours per day for two days.

Fourth, the District argues that the evidence does not support the Association's argument that the District intentionally avoided following any contractually-required vacancy procedures. According to the District, it did not assign Groves to a position; instead, it assigned her duties. It avers that the reasons it assigned Groves those duties were as follows: 1) there was a significant overlap between Rice's position and Groves' position, 2) it was faced with declining student enrollment, and 3) one disabled student had just graduated. As the District sees it, under these circumstances, it did not need to hire another person to provide assistance to disabled students. It believed that Groves could absorb the duties into the Special Education Aide position she was already performing for the District. The District notes that after it assigned those duties to Groves, her position did not increase in terms of Full Time Equivalency (FTE). Instead, she simply absorbed the duties within her existing assignment with the District. As the District sees it, it is unreasonable for the Association to assert that the District was required to increase the FTE of Rasmussen's position to full-time when the District could absorb the duties within Groves' position and maintain her full-time status with the District. In sum then, the District emphasizes that the assignment was from a position (Health Care Provider) that was in flux; the District itself was undergoing change as a result of declining enrollment; the assignment did not result in the Special Education Aide position being unduly burdened; and the Special Education Aide position is different than the former Health Care Provider position.

Fifth, the District argues that the assignment of duties that it made to Groves complied with the collective bargaining agreement because the duties assigned to her were compatible and consistent with her Special Education Aide position and substantially similar to the special education duties that she had been performing since 2001. In support thereof, it notes once again that the management rights clause gives it the right to create, combine or modify any position deemed advisable; to determine the size of the working force and the policies affecting the selection of employees; and to schedule and assign all work activities and workloads. The District avers that no other provision within the collective bargaining agreement restricts the District's right to make work assignments or modify positions. Building on the foregoing, it is the District's view that it has the unfettered right to determine the daily activities of its workforce, as long as the assignment decisions are not arbitrary or capricious (i.e., as long as the District had a rational or reasonable basis for making the assignment). The District argues that it did not act arbitrarily, capriciously or in bad faith when it assigned the duties to Groves because those duties were consistent with her Special Education Aide position, the duties she performed in that capacity, and the job description for the Special Education Assistant position. The District notes that while there is no job description for a Health Care Provider, Rice testified about the duties she performed while in this position, which included providing tube feedings, administering medication, conducting physical therapy including range of motion activities, providing bathroom assistance, and providing classroom assistance for disabled students. According to the District, those duties are consistent and substantially similar to the duties that Groves performed in her capacity as Special Education Aide from 2002 to the present (i.e. assisting with feedings, administering medication, conducting physical therapy, providing care during seizures, providing bathroom assistance, tutoring, and providing classroom assistance). Thus, it is the District's view that Groves was already performing duties associated with disabled students as a Special Education Aide when she began performing duties associated with the Health Care Provider position.

Sixth, the District understands the Association to assert that the duties which the District assigned to Groves were in her capacity as a Special Education Secretary – not in her capacity as a Special Education Aide. The District believes there are two problems with this argument. First, the District notes that throughout September, 2003, Groves continued performing duties as a Special Education Aide. In particular, she worked in this capacity while transporting disabled students, which also necessitated personal care for these disabled students. As the District sees it, those transportation and supervision duties were well within her capacity as a Special Education Aide. Building on that premise, the District maintains that the Association's assertion that Groves was a full-time secretary for the District during September, 2003 is just plain wrong. Second, the District asserts that all the parties herein knew, before school started, that Rice was relinquishing her duties as Health Care Provider in October 2003 and that these duties would be assigned to Groves. As the District understands the Association's argument, the District would have acted appropriately only if it had forced

Rice to relinquish her duties before the school year started and required Groves to begin in this capacity before the school year. If that is so, the District believes that the Association is trying to penalize the District for permitting Rice to serve in this capacity for an extra month. The District maintains this argument places form over substance and should be disregarded.

Finally, the District argues that the addition of a Health Aide classification to the Seniority provision in 2002 should not affect the outcome of this case for several reasons. First, it avers that the Seniority section (wherein the Health Aide classification appears), is only triggered if there is a vacancy. As previously noted, it is the District's position that no vacancy was ever declared. Building on that premise, the District maintains that since the Seniority section was never triggered, the Health Aide classification need not be examined or applied here. Second, even if the addition of a Health Aide classification created a separate classification for purposes of work assignments, that classification cannot be said to apply only to Rasmussen. The District submits that at least three other employees, including Groves, also care for disabled students (just as Rasmussen does). Third, the District asserts that even in cases where an employer assigns duties across job classifications, arbitrators have concluded that such assignments are permitted, particularly where duties may fall within more than one job classification. According to the District, the key factors are (1) whether the duties are compatible with the classification to which they are assigned and (2) whether the agreement or job classification somehow does not restrict the assignment of such duties. With regard to factor (1), the District argues again that the duties it assigned to Groves were consistent with her duties as a Special Education Aide and consistent with the job description of a Special Education Assistant. Building on that premise, the District contends that the duties which it assigned to Groves were compatible with her position, regardless of whether the Health Care Provider duties fell within a Health Aide classification and the Special Education Aide position fell within a Teacher Aide classification. With regard to factor (2), the District asserts that neither the collective bargaining agreement nor the job classification of Teacher Aide restrict it from assigning duties to Groves that she has been performing for the District since 2001.

In sum, the District asks that the grievance be denied.

DISCUSSION

It is noted at the outset that the parties have approached this contract interpretation case from different perspectives. Broadly speaking, the Association sees it as a posting case which is governed by the job posting provision. In contrast, the District sees it as an assignment of duties case which is governed by the management rights clause. 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 this case is not ultimately governed

by the job posting provision because no vacancy was created and no position was filled. Instead, this case is governed by the management rights clause.

Notwithstanding the ultimate conclusion just noted, I've decided to begin my discussion with the initial observation that the Association's position herein seems reasonable because of its simplicity. What I'm referring to is the Association's synopsis of this case: Rice resigned a 2/5 position; this created a vacancy which the District decided to fill, so the District should have followed the contractual posting procedure and posted a vacancy. However, while the Association's synopsis seems logical and reasonable, it overlooks a lot of contractual and factual details. When those contractual and factual details are examined, as they will be in the analysis which follows, the Association's claim of a contract violation collapses.

My initial focus of inquiry addresses the question of whether Rice's departure as a Health Care Provider created a vacancy. The Association contends that it did, while the District disputes that assertion.

The answer to this question obviously depends on the contract language. There are two contract provisions which need to be addressed: the management rights clause and the vacancy provision.

The management rights clause is addressed first. Among other things, that clause gives the District the right to determine the size of the workforce. It also gives the District the right to allocate and assign work among the existing staff. Putting the foregoing points together and reading them in their overall context, this language can easily be interpreted to implicitly give the District the right to determine whether a vacancy exists.

The next question, contractually speaking, is whether there is any contract provision which specifically limits or restricts these rights, in particular, the District's right to determine whether a vacancy exists. There is not. Under this contract, there is no requirement that the District maintain a certain number of support staff positions, nor is there a requirement that the District maintain a certain number of positions in each of the support staff classifications. Additionally, there is no requirement that the District has to post a vacancy every time an employee resigns or relinquishes some of their job duties. Absent such restricting language, the District has retained the right to determine whether a vacancy exists.

What happened here, of course, is that the District decided that Rice's departure as a Health Care Provider did not create a vacancy, so it did not post anything. The Association argues that by not posting a vacancy after Rice departed as a Health Care Provider, the District violated Article VII, B, 1 (the vacancy provision). As the Association sees it, this provision requires the District to declare a vacancy and post it. The problem with this contention is that

the vacancy provision does not require the District to declare a vacancy in all circumstances. Instead, that language simply states that “when a vacancy occurs”, it must be posted. All this language requires is that the District post a vacancy after it (i.e. the District) determines that a vacancy exists. As has already been noted, this contract does not contain language which requires the District to find that a vacancy exists every time an employee departs the workforce. That being so, the fact that Rice relinquished her Health Care Provider position does not automatically establish that a vacancy occurred which required a posting.

The focus now turns to the Association’s assertion that after Rice relinquished her Health Care Provider position, the District acted as if a vacancy existed. I find no factual support for this assertion. Here’s why. The record indicates that when the District fills a vacancy, it takes a formal vote on same and sends the affected employee a letter informing them of their changed position. Neither of those things occurred here. That being so, there simply is no factual basis for finding that after Rice relinquished her Health Care Provider position, the District acted as if a vacancy existed.

The next part of my discussion addresses the question of whether the District circumvented the collective bargaining agreement when it decided that a vacancy did not exist after Rice relinquished her Health Care Provider position. Quite frankly, I found this part of the case to be the most problematic. Here’s why. Sometimes after an employee leaves the workplace, the employer decides that the position can be eliminated because it no longer needs anyone to perform the work that was previously performed. Here, though, that did not happen. What happened here is that after Rice vacated her Health Care Provider position, the District decided that someone still had to assist the student that Rice had been assisting (i.e. T.G.). The District further decided that Groves would be the employee that would assist T.G. Thus, the District assigned that work to Groves. The Association asserts that by reassigning that work to Groves, the District essentially filled Rice’s (Health Care Provider) position and in doing so, intentionally avoided the contractual posting, seniority, transfer and layoff provisions. However, as was alluded to earlier, I conclude there are several key factual details that undercut this argument. Those factual details will be identified below.

It is noted at the outset that at the time that the District made this reassignment of work from Rice to Groves, Groves was serving in two positions: a Special Education Aide position and a Special Education Secretary position. Throughout its argument, the Association emphasizes the Secretary position and essentially ignores the Aide position. I can’t do that because the fact of the matter is that Groves held both positions. While the work assigned to Groves did not relate to her Special Education Secretary position, it did relate to her Special Education Aide position. Exactly how it related to her Special Education Aide position will be addressed next.

Second, the duties which management reassigned from Rice to Groves were consistent with and substantially similar to Groves' existing Special Education Aide duties. The following comparison of Rice's and Groves' duties shows this. As a Health Care Provider, Rice mainly worked with two disabled students: T.G. and K.G. Her duties included providing tube feedings, administering medication, conducting physical therapy including range of motion activities, providing bathroom assistance and providing classroom assistance for disabled students. As a Special Education Aide, Groves mainly worked with one student: R.H. Her duties included providing feedings, administering medication, performing physical therapy, providing care during seizures, providing bathroom assistance, tutoring and providing classroom assistance. While Rice and Groves had different job titles (i.e. Health Care Provider and Special Education Aide, respectively), there was great similarity in the job duties which each one performed. Both provided feedings, administered medication, conducted physical therapy, provided bathroom assistance, and provided classroom assistance for disabled students. Given this similarity in their duties, it logically follows that the duties which the District assigned to Groves were consistent with her existing (Special Education Aide) position. Said another way, the duties which the District assigned to Groves were not outside her Special Education Assistant job description. Those same duties cannot be said to be limited exclusively to the Health Care Provider position because that position does not have a job description.

Third, when Groves began assisting T.G. in October, 2003, she was still a Special Education Aide – not just a Secretary and Van Driver as the Association asserts. The following shows this. When the 2003-04 school year started, Groves was working in two jobs: Secretary and Special Education Aide. In the latter job, she performed aide services for disabled students while she transported them. This work involved personal care for these disabled students and knowledge of their health needs. The duties she performed in that capacity were well within her job as a Special Education Aide. In fact, they were identical to the duties she performed during the 2002-03 school year when her Special Education Aide position included providing aide services for disabled students during transportation. That being so, the Association's contention that Groves' job duties never approached those of a Health Aide lacks a factual basis.

Fourth, the record evidence does not support the Association's contention that when the District assigned Groves to assist T.G., this essentially transferred Groves into a different position (namely, a Health Aide position). No such transfer occurred. Here's why. As has already been noted, during the 2002-03 school year, Groves assisted one disabled student in the classroom (R.H.) and several disabled students during transportation. While R.H. graduated at the end of the 2002-03 school year, that graduation did not mean that Groves' position as a Special Education Aide ended. Instead, it simply meant that Groves needed a different student to assist in the 2003-04 school year. After Rice notified the District in June,

2003 that she wanted to relinquish her duties caring for T.G., but keep her School Nurse duties for the 2003-04 school year, the District decided that Groves would assist T.G. during the upcoming 2003-04 school year. When this change was implemented October 1, 2003, the only practical difference for Groves was that she provided aide services for a different student (T.G. as opposed to R.H.). While T.G.'s medical condition is more severe than R.H.'s medical condition, that fact does not affect the outcome herein.

Fifth, building on the preceding paragraph, a student is not the same as a position. What I mean by that is this: in this District, neither the Special Education Assistant position nor the Health Care Provider position is dependent on a particular student. The Special Education Assistant job description does not specify a particular student – instead, it simply requires employees to provide “personal care and hygiene of assigned students.” That being so, the fact that Groves went from assisting R.H. in the 2002-03 school year to assisting T.G. in the 2003-04 school year does not mean that she changed positions.

Sixth, while Groves' (Aide) duties are certainly similar to Rice's (Health Care Provider) duties, they are not exactly the same. Here's what I mean. When Rice assisted T.G. in the classroom, she did it for eight hours a day, two days a week. While Groves now assists T.G. in the classroom two days a week, just like Rice did, it is not for eight hours a day, but rather for six hours a day. Groves spends the remaining two hours each day providing aide services to disabled students during their transportation to and from school. That task was something that Rice never did (i.e. transport students). In my view, this establishes that Groves did not assume the exact same position that Rice previously held. Said another way, Groves' existing Special Education Aide position is not the same as Rice's former Health Care Provider position.

When the facts just referenced are considered collectively, they convince me that the District did not circumvent the job posting requirements found in Article VII when it decided that a vacancy did not exist after Rice relinquished her Health Care Provider position.

The focus now turns to whether the District exceeded its managerial rights when it decided not to post a vacancy for a Health Care Provider position but rather to reassign certain duties to Groves. Based on the rationale which follows, I find that the District did not exceed its managerial right to make work assignments in this case. The Association's contention that the District took someone from the Secretarial classification (namely, Groves) and reassigned them to the Health Aide classification ignores the fact that Groves was also a Special Education Aide. As has already been noted, the District did not transfer Groves into a different classification or position; instead, it assigned her duties. The duties which the District assigned to Groves (namely assisting T.G.) were fully compatible and consistent with her existing Special Education Aide position and her existing Special Education Assistant job

description because the assigned duties were similar to the special education duties she had been performing since 2001. The District concluded that she could absorb those duties within her existing full-time workload because the student she had assisted the previous year (R.H.) had graduated. That decision had a rational basis, and thus cannot be said to be arbitrary, capricious or in bad faith. The assignment of duties involved herein therefore passes contractual muster.

The final part of my discussion addresses the question of whether the addition of a Health Aide classification to the Seniority provision in 2002 affects the outcome of this case. I find it does not for the following reasons.

First, the Health Aide classification appears in the Seniority section of the collective bargaining agreement. This specific section is only triggered if there is a vacancy. As was previously discussed, the District never declared a vacancy and none existed. Since no vacancy was ever declared and none existed, the Seniority section of the collective bargaining agreement was never triggered.

Second, even if that section was triggered and factored into this analysis so that the addition of a Health Aide classification created a separate classification for purposes of work assignments, the Health Aide classification does not have exclusive control over the work involved in this case. Here's why. While Health Aides like Rasmussen provide care to the District's disabled students, they are not the only ones who do so. The Special Education Assistants (who are included in the Teacher Aide classification) do too. Thus, employees in two (support staff) classifications provide care for the District's disabled students. Insofar as the record shows, the care which the Health Aides provide for disabled students is not distinguishable from the care which the Special Education Assistants provide for disabled students. While the employees who care for the District's disabled students can be categorized as being under either the Teacher Aide classification as Special Education Assistants or the Health Aide classification as Health Care Providers, the work they perform cannot be categorized the same way.

Third, in those cases where an employer assigns duties across job classifications, arbitrators traditionally analyze the assignment by looking at the following two factors: (1) whether the duties are compatible with the classification to which they are assigned; and (2) whether the collective bargaining agreement or job classification restrict the assignment of such duties. I will do likewise. With regard to factor (1), it is noted once again that the duties which were assigned to Groves were consistent with her duties as a Special Education Aide and consistent with her job description for a Special Education Assistant. Thus, the duties which were assigned to Groves were compatible with her position even if those duties fell within a Health Aide classification and the Special Education Aide position fell within a Teacher Aide

classification. With regard to factor (2), I find that neither the collective bargaining agreement nor the job classification of Teacher Aide restrict the District from assigning the duties at issue herein to Groves. Additionally, there is nothing in Groves' existing job description that limits the assignment either.

In reaching this conclusion, I am well aware that Rasmussen wants Rice's former Health Care Provider position posted so that she could post for it. If that were to happen, and she was awarded the job, Rasmussen's employment status would change from part-time to full-time. This, in turn, would make her eligible for District-provided family health insurance. While I am empathetic to her desire for full-time employment, the outcome of this case is controlled by the contract language, and no contract violation has been found for the reasons noted.

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

Dated at Madison, Wisconsin, this 25th day of January, 2005.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

