

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**SHAWANO EDUCATIONAL SUPPORT
PERSONNEL ASSOCIATION**

and

SHAWANO SCHOOL DISTRICT

Case 2

No. 69339

MA-14572

(Thorson/Reyes Layoff Grievances)

Appearances:

Mr. David Campshure, UniServ Director, United Northeast Educators, 1136 North Military Avenue, Green Bay, Wisconsin 54303-4414, appearing on behalf of the Association.

Mr. Robert W. Burns, Davis & Kuelthau, S.C., Attorneys at Law, 318 South Washington Street, Suite 300, Green Bay, Wisconsin 54301, appearing on behalf of the District.

ARBITRATION AWARD

At all pertinent times, the Shawano School District (herein the District) and the Shawano Educational Support Personnel Association (herein the Association) were parties to a collective bargaining agreement covering the period July 1, 2007 through June 30, 2009, which provided for final and binding arbitration of disputes arising thereunder. On November 13, 2009, the Association made a request, in which the District concurred, for arbitration of two grievances filed by Cheryl Thorson and Mary Reyes concerning their contract rights in the event of layoff, and requested that the Wisconsin Employment Relations Commission provide a panel of five staff members from which they could designate an impartial arbitrator to hear and decide the grievances. The parties selected WERC staff member Steven Morrison. A hearing in the matter was held on March 18, 2010, in Shawano, Wisconsin and the proceedings were transcribed. The transcript was filed on April 6. The parties filed written briefs and replies, the last of which was received June 29, 2010. Subsequently, due to the incapacity of Arbitrator Morrison, the parties requested that the matter be referred to WERC staff member John Emery for decision.

ISSUE

The parties did not agree on a statement of the issues. The Association would state the issue, as follows:

Did the District violate Articles 10 and 11 of the collective bargaining agreement when they eliminated the instructional aide positions held by Cheryl Thorson and Mary Reyes resulting in their layoff and bumping into newly created positions?

If so, what is the appropriate remedy?

The District would state the issues, as follows:

Did the District violate Sections 10.03 and/or 12.05 of the collective bargaining agreement with respect to the grievants' layoffs?

If so, what is the appropriate remedy?

The Arbitrator states the issues, as follows:

Did the District violate Sections 10.03 and/or 12.05 of the collective bargaining agreement when it eliminated the instructional aide positions held by Cheryl Thorson and Mary Reyes resulting in their layoff and transfer into newly created positions?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE III – MANAGEMENT RIGHTS

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

1. To direct all operations of the school system;

• • •

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

...

5. To fully or partially lay-off employees from their duties because of lack of work or any other legitimate reason;

...

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

...

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

...

ARTICLE IX – GRIEVANCE PROCEDURE

...

- 9.02 Definition: For the purpose of this agreement a grievance is defined as any complaint regarding the interpretation or application of a specific provision of this agreement.

...

- 9.05 Written Grievance. The written grievance shall give a clear and concise statement of the alleged grievance including the facts upon which the grievance is based, the issue involved, the specific section(s) of the agreement alleged to have been violated and the relief sought.

...

- 9.08 Binding Arbitration

- 9.08.1 Procedure. In order to process a grievance to Binding Arbitration, the following must be complied with:

1. Written notice of a request for such arbitration shall be given to the Board within ten (10) days of receipt of the Board's last answer.
2. The matter must have been processed through the grievance procedure within the prescribed time limits.
3. The issue must involve the interpretation or application of a specific provision of this agreement.

...

9.08.3 Arbitrator Selection. Any grievance, which cannot be settled through the above procedures, may be submitted to an arbitrator selected as follows: The Board and the Union shall endeavor to select an arbitrator by mutual agreement. If the parties are not able to agree on an arbitrator within thirty (30) days, either party may request the WERC to submit the names of five (5) qualified arbitrators for consideration. The arbitrator shall be chosen by alternate striking of names with the grieving party striking first. The remaining person shall serve as the arbitrator.

...

9.08.5 Decision of the Arbitrator. The decision of the arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to the interpretation of the contract in the area where the alleged breach occurred. The arbitrator shall not modify, add to or delete from the express terms of the Agreement.

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ARTICLE X – SENIORITY

10.01 Seniority shall be defined as the continuous and uninterrupted length of service within the District as measured from the last date of hire. Accumulation of seniority shall begin from the employee's first working day since the last date of hire. A paid holiday shall be counted as the first working day in applicable situations. In the event that more than

one individual employee has the same starting day of work, position on the seniority list shall be determined by drawing lots.

...

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

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

...

10.05 The Employer shall prepare, maintain, and post the seniority list. The seniority list shall be posted conspicuously in all buildings of the District semi-annually on October 1 and March 1. A copy of the seniority list and subsequent revisions shall be furnished to the President of the Union. Any grievance regarding the accuracy of the seniority list must be filed within fifteen (15) days of the posting.

...

ARTICLE XI – REDUCTION IN PERSONNEL, LAYOFF AND RECALL

Section 11.01: When the District eliminates a job or reduces hours of employment because of reduced workloads, budgetary or financial limitations, or for reasons other than performance or conduct of the employee, the following procedure shall be used within each classification:

- (1) To the extent feasible, a reduction in staff shall be accomplished through normal attrition.
- (2) If the necessary reduction cannot be achieved through normal attribution then probationary employees shall be laid off or have hours reduced provided the remaining employees are qualified to perform the available work.

Section 11.02: In the event of a reduction in work force, the Employer shall identify the specific position(s) to be eliminated or reduced, and shall notify those employees in those positions. Employees whose positions have been eliminated or reduced due to the reduction in work force, or have

been affected by a layoff/elimination of position, shall have the right to bump into a position equal to or closest in number of hours in their classification(s) for which they are qualified which is held by the least senior employee in the employee's classification. A vacancy of equal or similar hours shall continue to be considered the least senior position. An employee who has received notice that their position is being reduced may decline the right to bump and remain in the reduced position. In no case shall a new employee be employed by the Employer while there are laid off employees who are qualified for vacant or newly created position(s).

Section 11.03: A laid-off employee shall, upon application, and at his/her option, be granted priority status on the substitute list according to his/her seniority. Laid off employees may have their health, dental and life insurance benefits continued by paying the regular monthly prescriber group-rate premium for such benefits to the Employer. Such employee shall also have the right of first refusal for temporary positions as outlined in Section 2.02 above, but acceptance of a temporary position shall not break the layoff status. Refusal to accept such position shall not avoid the laid off employee's recall rights. A recalled employee shall be given five (5) calendar days from receipt of notice, excluding Saturdays, Sundays, and holidays.

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ARTICLE XII – JOB POSTING

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

...

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

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

classification, as if he/she started in the new position at the time he/she receives his/her letter of appointment to the new position.

BACKGROUND

The Shawano School District operates two elementary schools, a middle school and a high school. Pursuant to the collective bargaining agreement between it and the Shawano Educational Support Personnel Association, the classification of Aide encompasses both Instructional and Non-instructional Aides. The Grievants are Instructional Aides, with the following position description, approved March 16, 1998:

QUALIFICATIONS

1. Enthusiasm and experience in working with students.
2. Ability to communicate certified staff instructions and directions clearly and effectively to students.
3. Graduation from high school.
4. Ability to use word processing/computer equipment.
5. Ability to use a variety of machines and equipment.
6. Has appropriate certification from the Department of Public Instruction (Exceptional Education Aides only).
7. Such alternatives to the above qualifications as the Board of Education finds appropriate and acceptable.

REPORTS TO:

Building Administrator or Designee

POSITION GOAL:

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

PERFORMANCE RESPONSIBILITIES

1. Works with individual students or small groups of students to reinforce learning of material or skills initially introduced by the teacher.
2. Assists the teacher in devising special strategies for reinforcing skills based on a sympathetic understanding of individual students, their needs, interests and abilities.
3. Operates and cares for equipment used in the classroom for instructional purposes.
4. Helps students master equipment or instructional materials assigned by the teacher.

5. Distributes and collects workbooks, papers, and other materials for instruction.
6. Guides independent study, enrichment and remedial work set up and assigned by the teacher.
7. Assists with the supervision of students during emergency drills, assemblies, play periods, and field trips.
8. Assists with large group activities (such) as drill work, reading aloud and storytelling.
9. Reads to students, listens to students read, and participates in other forms of oral communication with students.
10. Under the direction of the teacher, check notebooks, correct papers, and supervises testing and make-up work.
11. Types and prepares related classroom materials, work sheets, study guides, etc.
12. Alerts the classroom teacher to any problem or special information about an individual student.
13. Maintains the same high level of ethical behavior and confidentiality of information about students as is expected of certified staff.
14. Participates in inservice training program, as assigned.
15. Performs such other duties as assigned.

Instructional aides are either “One-on-one” or “Program” aides. Program aides have the following assigned areas: Autistic/Speech & Language; Title VII tutor; Computer Aide; Home School Coordinator; Speech/Adaptive PE; Autistic/Smurawa; Library; Speech; Study Hall; At Risk; Alternative School; Learning Disability; Cognitive Disability; Emotionally Disabled.

In 2009, after a \$1 million reduction in state aid required the District to cut its overall budget, the District pursued additional funding opportunities. It identified money made available in the federal American Recovery and Revitalization Act (the “stimulus” bill), set aside for IDEA and Title 1 programs. Because of what it identified as a reduced need for Instructional Aides in the Learning Disability program area, the District determined to reduce the LD positions at the Middle School from four to two and create two new positions which would be eligible for stimulus funding. On August 3, 2009, District Superintendent Todd Carlson and Business Manager Gail Moesch met with Association representatives David Campshure and Emmy Pennycook to convey the details of their plan, including which aides would have their positions eliminated, what their proposed new assignments would be, and other related matters. On August 6, 2009, Carlson wrote to Campshure and local Association president Teri Bohm as follows:

I wanted to provide you with information on several “displaced” support staff employees we will have due to recent State Aid reductions, lowered revenue limits and changes in student needs.

As we discussed at our August 3, 2009 negotiations meeting, we plan on using IDEA and Title I stimulus money to help create several new support staff positions that will help us meet student needs in the stimulus area. I have included a copy of the information sheet that was given to you at our negotiations meeting. The information sheet includes the displaced employees and the anticipated open positions for the coming school year.

In order to help accelerate the placement process we plan on making sure each of the displaced employees has taken our qualification test to determine their qualifications and if they would meet the minimum qualifications prior to any placement opportunities. Three of the six displaced employees listed on the included sheet have not tested and will be contacted as soon as possible to begin the process.

Again, our intent is to provide you with the information and to be open with our process in working toward position placement of our displaced employees.

Thank you for working with us through the placement process, please contact me if you have any questions or concerns.

The Grievants, Cheryl Thorson and Mary Reyes were two of the six “displaced employees” listed on the accompanying sheet.

Thorson and Reyes, are Instructional Aides at the Shawano Community Middle School. Prior to this controversy, the District had prepared a spread sheet entitled Shawano School District Aide Listing, which it had not shared with the Association. That document identifies four aides at the Shawano Community Middle School assigned to Learning Disabled duties. The four, with their respective seniority dates, were as follows:

Kathy Zais	11/30/1994
Kathy McKay	8/25/1995
Cheryl Thorson	11/11/1996
Mary Reyes	10/22/1997

The Grievants testified the District never informed them they were considered LD aides, that they did not perform LD duties exclusively, but in fact were more properly understood to be cross-categorical.

On August 7, 2009, district Business Manager Gail Moesch wrote Thorson as follows:

Dear Cheryl,

Your position as a learning disability aide at the Shawano Community Middle School will be eliminated for the 2009-2010 school year.

Pursuant to the contract agreement between Shawano School District (SSD) and the Shawano Educational Support Personnel Association (SESPA), Article XI, Section 11.02, Shawano School District will be offering you a position. We want to be sure that you are offered a position that you are qualified to perform and will be confident in the position. Therefore, we are requesting that you arrange to be tested on August 10 or 11. Please call Mr. Cumberland at ##### to arrange a time for testing.

If you have any questions, please feel free to contact me at #####.

Sincerely,
Gail

On August 10, 2009, Thorson filed the following grievance:

Statement of Grievance (briefly, what happened): My position was eliminated at the Middle School for reasons other than performance or conduct. I was hired as an Instructional Aide not specifically an L.D. aid(e). Seniority within building classification should have been followed. I was assured during my job (illegible) on 6-3-09 with Dave Cullen I would remain within the M.S. building as an Instructional Aide. I consider this a verbal agreement. I should not be required to test for a position which I am not applying for and which I have been performing for 13 years.

Article or Section of contract which was violated, if any (what did management do wrong): Management did not follow the seniority classification assignment list. Article X Section 10.03. There are no classifications for L.D., ED, etc.

The Request for Settlement (corrective action desired): I expect management to follow Article X Sect 10.03 regarding seniority and classifications. I should be allowed to remain at SCMS due to seniority and classification. I should not have to test for any position. Article 12 Section 12.05

On August 18, Director of Pupil Services Dave Cullen wrote Thorson denying the grievance. Also on August 18, Business Manager Gail Moesch wrote Thorson as follows:

Dear Cheryl

Your position as an LD aide at the Shawano Community Middle School will be eliminated for the 2009-2010 school year.

Pursuant to the contract agreement between Shawano School District (SSD) and the Shawano Educational Support Personnel Association (SESPA), Article XI, Section 11.02, SSD is offering you the following position:

Lincoln School Title I Aide	7 hours/day
Or	
Brenner School Title I Aide	7 hours/day

Please complete and return the bottom portion of this letter by Tuesday, August 25, 2009. If you have any questions, please contact Gary Cumberland at ##### or Gail Moesch at #####.

Thorson returned the form on August 20, circling “accept” for the Lincoln School position and “reject” for the Brenner School position. She added, “I am accepting the position at Lincoln School but I still plan to follow thru with my grievance.”

On August 28, Carlson wrote Thorson and Campshure inviting them to discuss the grievance at a meeting on September 1. On September 2, Carlson wrote Thorson, Campshure and local stewards as follows:

Cheryl

Thank you for meeting with me on Tuesday afternoon at the District Office, this meeting was very helpful in understanding issues that were presented in your grievances. Hopefully our meeting also provided you with information on how these unfortunate but necessary staff reductions and new placements were made.

In going through your grievance issues and understanding the Support Staff contract, I have failed to identify any violations in sections 10.03 or 12.05 that you have listed as part of your grievances. With this finding I therefore will need to deny your grievances at this level.

If there are any new or open positions that become available i(n) areas that may interest you I would encourage you to apply as an internal candidate.

Thank you again for your time and shared honesty during our meeting and I truly hope all works out for our students, yourself and the school district. I am very happy that there are positions for our employees that were displaced from last year’s position.

The Union thereafter sought a meeting with the full school board. On September 22, Robert W. Burns, the District’s counsel, wrote Campshure as follows:

Thank you for your presentation on behalf of the Association to the Board of Education last evening. After deliberations, the Board took action to deny the grievance on the basis that it found no violation of the provisions of the Collective Bargaining Agreement cited by the Association. Please contact me if you have any questions with respect to the Board's position in this matter.

On August 11, 2009, Mary Reyes filed the following grievance:

Statement of Grievance (briefly, what happened): My position was eliminated at the Middle School for reasons other than performance or conduct. I should have been allowed to bump into a position equal to the number of hours in my classification for which I am qualified held by the least senior employee in my classification. Seniority w/in building classification should have been followed. I should not be requested to retest for a position for which I am not applying and which I have been performing for 12 years.

Article or Section of contract which was violated, if any (what did management do wrong): Management did not follow the seniority classification assignment list. Article X - Section 10.03 There are not classification for LD, ED, etc.

The Request for Settlement (corrective action desired): I expect management to follow Article X Section 10.03 regarding seniority and classifications. I should be allowed to remain in this building due to my seniority and classification. I should not have to be tested for any position according to Article XII Section 12.05.

On August 18, 2009, Director of Pupil Services Dave Cullen wrote Reyes as follows:

Dear Mary

I have reviewed your grievance and the SESPAs agreement with the Shawano School District. I do not feel I have sufficient knowledge to determine the outcome of your grievance and; therefore, am unable to act on your grievance at this level.

On September 2, 2009, Carlson wrote Reyes, with copies to Bohm, Campshure and Westfahl, an email identical to the one he wrote Thorson on August 28. On September 22, outside legal counsel Burns wrote Campshure a letter identical to the one noted above of that same date, informing him that the Board of Education had denied this grievance as well. On September 24, Campshure wrote Burns to propose consolidating the two grievances and proceeding to arbitration, which was done. Additional facts will be referenced, as necessary, in the DISCUSSION section of this award.

POSITIONS OF THE PARTIES

The Association

The Association contends the District has asserted a theory that is directly opposite the theory it held in a 2003 grievance. SHAWANO-GRESHAM SCHOOL DISTRICT, MA-12099 (Jones, 9/18/03) In that case, the District argued that employees within the Instructional Aide classification were interchangeable, and that since there was only one Instructional Aide position, it could assign any employee to perform any duties within the Instructional Aide classification. Now, however, it is attempting to slot individuals into narrowly defined positions so it can eliminate their positions without regard to seniority. Treating Instructional Aides first as a broad group, but then pigeonholing the employees into narrow units, is arbitrary and capricious. The District improperly displaced the Grievants, in that the parties have never recognized the position of Learning Disability Aide, and in fact the Grievants worked cross-categorically as Program Aides. A label does not define an item, and just because the District created a document that identified employees as being assigned to LD duties does not create an LD Aide position. The employer cannot compartmentalize Instructional Aides into narrow assignments merely by adding another column in a personnel spread sheet. Further, the Grievants were not the least senior Program Aides at their school, and their duties are still being performed by less senior aides; given the District's need to reduce two Program Aide positions there, two other less senior aides should have been displaced. Eliminating the Instructional Aide positions held by the Grievants violated the seniority and layoff provisions of the collective bargaining agreement, and the District should be ordered to offer the Grievants the Middle School Instructional Program Aide positions they held during the 2008-2009 school year.

The District

The District asserts at the outset that the collective bargaining agreement explicitly requires the arbitrator to examine only those provisions of the agreement that are identified in the grievance as having been allegedly violated, and that I thus have no authority to consider alleged violations of any provisions other than sections 10.03 and 12.05 of the agreement. The District also states that it did not violate section 10.03 of the agreement, in that both Grievants were indeed offered positions within the Instructional Aide classification, and that it did not violate Section 12.05, in that it has a contractual right to test for positions. The District further states that the Grievants are indeed Instructional Aides, and that the District has the unfettered right to reassign employees within their job classifications. The District also reiterates its position that the arbitrator can only evaluate whether it violated sections 10.03 or 12.05, and that I am specifically and explicitly barred from considering alleged violations of other sections, namely 11.02. Finally, the District asserts it worked to preserve jobs and followed the collective bargaining agreement when offering alternate positions to the Grievants with the Instructional Aide classification for the 2009-2010 school year. Accordingly, the District asks that the grievance be denied in its entirety.

Association Reply

The Association challenges the District's jurisdictional argument, noting that the Association representative who assisted in the submission of the grievance is a building secretary, and not an experienced labor relations professional. Noting that the narrative portion of the grievance provides enough detail to clarify that the issue was whether the District acted properly in eliminating their positions, the Association cites arbitral authority that arbitrators do not require technical precision in the writing of grievances. As to the underlying merits, the Association describes the District position on testing as illogical and confusing, and, in light of SHAWANO-GRESHAM SCHOOL DISTRICT, irrational in requiring two Instructional Aides to pass a test before they could work in another position as Instructional Aides. The Association further finds the District position confusing, in that it agrees the Grievants are Instructional Aides; the point of contention is the District's further assertion that the Grievants were "Learning Disability Aides," which the Association notes is not a position identified in the collective bargaining agreement, nor one which the Grievants had ever heard applied to them. The record evidence is clear that the Instructional Aides at the Middle School were used cross-categorically; it is unreasonable that the District can consider Instructional Aides as one broad general category for the purpose of assigning duties, then turn around and slot them into narrow discrete jobs for the purpose of layoffs and reassignments. The Association understands that District has the management right to reduce the number of Instructional Aides at the Middle School; however, it must do so by displacing the two least senior Instructional Program Aides within the special education program. Article 10 of the collective bargaining agreement only recognizes seniority by classification, not by position, duty, job or assignment. The position of Learning Disability Aide did not exist; all Special Education Program Aides were cross-categorical. The Grievants were not the least senior Program Aides at the Middle School. Accordingly, the District violated the collective bargaining agreement when it eliminated their positions. The grievance should be sustained and the District ordered to offer the Grievants the Middle School Instructional Program Aide positions they held during the 2008-2009 school year.

District Reply

The District declares that the Association failed to address the fatal flaw in the grievances, namely the jurisdictional issue. The parties' collective bargaining agreement is clear and unambiguous in requiring the grievance to include the specific sections of the agreement allegedly violated, and preventing the arbitrator from modifying the agreement in any way. Accordingly, the grievance must be denied, the District asserts, because the record does not contain any evidence of a violation of sections 10.03 or 12.05. But even if Section 11.01 were considered, the District continues, it still abided by the terms of the agreement, which requires it to identify the specific positions to be eliminated or reduced. As Thorson and Reyes were the two least senior Instructional Aides holding LD positions, they were the ones whose positions were eliminated. The Grievants were displaced from their current position for they were the lowest in seniority of the four aides holding LD positions, then offered other positions within the Instructional Aide classification. Citing SHAWANO-

GRESHAM SCHOOL DISTRICT, the District also asserts the Association is wrong in contending that the “one-on-one” aide and the Program Aide are the only two distinctions within the Instructional Aide classification, when in fact there are numerous types of Instructional Aides. The District also maintains it has the right to identify positions within the job classifications, and is not required to provide any comprehensive assignment listing to the association. Finally, the Association’s claim that the Grievants’ positions still exist, with the work being done by someone with less seniority, is simply untrue; two of the four LD aide positions were eliminated, and are no longer available. Accordingly, the grievance should be denied.

DISCUSSION

The written grievances alleged violations of two sections of the collective bargaining agreement.

Section 10.03 provides as follows:

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

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

The District’s internal documents, prepared independent of and prior to the grievances, clearly tracks this provision. Joint Exhibit 7 lists all the aides, classified as Instructional or Non-Instructional Aides, with their current “Assigned Area.” Reyes and Thorson are both included in the classification of Instructional Aide (Program), with “LD” listed as their “Assigned Area.” Other than Reyes’ testimony that the District’s Business Manager referred to her as being the least senior person in “the LD classification” – a statement the Business Manager denied making – there is no evidence or testimony that the District failed to honor the terms of Section 10.03.

Section 12.05 provides as follows:

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

It is understandable that veteran employees such as the Grievants would resent being forced to take a test to retain a job in a classification they had held for many years. However, the language of the collective bargaining agreement does not give the District the discretion to

waive qualification tests in certain circumstances. It clearly mandates that tests, if used at all, “shall be uniformly administered to *all* internal and external applicants.” By requiring Thorson and Reyes to take their tests prior to getting their new assignments, the District did not violate this provision of the agreement. By omitting any discussion of this section from its written arguments, the Association implicitly acknowledges that this element of the grievance was without merit.

At hearing and in its written arguments, the Association made clear that, rather than sections 10.03 and 12.05, the substantive heart of the grievance is that the District violated provisions of Article 11, “Reduction in Personnel, Layoff and Recall.” That article contains six sections; although the Association’s theory of what the District *should* have done is generally clear, at no time at hearing or in its written arguments did it identify the specific sections of the collective bargaining agreement it alleges the District violated.

The Association contends the District violated unspecified sections of Article 11 by identifying the Grievants as LD aides, a position it maintains does not exist, when in fact they were Instructional Program Aides. The specific positions that should have been eliminated, the Association asserts, were those held by the two least senior Instructional Program Aides (whose identified assigned areas were At Risk and Cognitive Disability).

In administering the collective bargaining agreement, the parties and I have the benefit of a recent award by Arbitrator Raleigh Jones, which both parties agree is relevant.

In 2002, the association filed a grievance over the assignment of certain ED duties to aide Mary Burris. The duties involved working one-on-one with a particular student. The District later posted a vacancy for an ED Instructional Aide position at the high school, which Burris sought and which she considered to be her old job. Burris insisted she was not cut out for the one-on-one work, and that she wanted to go back to her old job; the principal said she could not do that, and that if she did not want to perform the one-on-one work, she should quit. When no member of the bargaining work posted for the ED vacancy, the District hired from outside. The new employee lasted only a short time, forcing the District to post the position again. Burris again sought to post for the position, and again the principal did not allow her to do so. As stated by Arbitrator Jones:

The Association grieved the District’s actions involving Burris. The grievance alleged that the District violated the collective bargaining agreement when it “transferred” Burris from her position as an ED aide into a “one-on-one aide” position and then denied her the right to post for her former position. The requested remedy was that Burris be “reinstated” to her “posted position.” The District denied the grievance.

Arbitrator Jones summarized the case as follows:

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

Throughout the award, Jones made clear the distinction between positions and classifications, and the District's management rights regarding each:

Section 10.03 identifies the various classifications that bargaining unit employees are placed in. Section b specifies that there are two classifications for the aides: instructional aides and non-instructional aides. There are numerous types of instructional aides. To name a few, there are library aides, ED aides and one-on-one aides. These different types of instructional aides do not have their own classifications though. As a result, there is no classification for library aides, or for ED aides, or for one-on-one aides. Instead, they are all officially part of the instructional aide classification... neither ED aides nor one-on-one aides are classifications....the classification here is instructional aide. ED aides and one-on-one aides are simply two jobs within the instructional aide classification...the management rights clause gives management the right to assign duties within a classification.

In the absence of contractual language to the contrary, the right to assign duties is tantamount to the right to create positions. Thus, pursuant to its management rights, and the language of Section 11.02, the District decided to reduce the number of LD Aides in the Middle School from four to two and to reassign the two least senior LD Aides to other duties. Of the employees in the Instructional Aide classification, Thorson and Reyes were the two least senior in the LD position. Section 11.02 makes a clear distinction between positions and classifications, permitting elimination of positions, but then permitting the displaced employees to bump other less senior employees within the same classification in the event they are qualified to perform the work. In the case of the Grievants, the District eliminated their positions in accordance with Section 11.02, created two new positions with the stimulus funds, and permitting the Grievants to transfer into those positions upon successfully passing the qualifications tests provided for in Section 12.05. In my view, to do so did not violate the collective bargaining agreement. Indeed, to find otherwise would deprive the District of its specific contractual rights to "assign employees in positions with the school system," and to

“determine the methods, means and personnel by which school system operations are to be conducted,” by requiring it to retain certain positions and to eliminate others within the same classification based, not on the determined needs of the District, but on the relative seniority of the incumbents. That is neither the intent nor the effect of the language in issue here.

Notwithstanding the foregoing discourse, however, before I can rule on the alleged violation of Article 11, I must first address the District’s argument that I have no authority to do so, and can only address the alleged violations of sections 10.03 and 12.05.

The collective bargaining agreement is explicit in defining critical elements of the grievance procedure: In section 9.02, a grievance is defined as “any complaint regarding the interpretation or application of *a specific provision of this agreement*. (*emphasis added*). In Section 9.05, it is mandated that the written grievance “shall give a clear and concise statement of the alleged grievance including the facts upon which the grievance is based, the issue involved, *the specific section(s) of the agreement alleged to have been violated* and the relief sought. (*emphasis added*). In section 9.08.1, it is mandated that, in order to be processed to arbitration, “the issue must involve the interpretation or application of *a specific provision of this agreement*.” (*emphasis added*). In section 9.08.5, the decision of the arbitrator is “restricted solely to the interpretation of the contract in the area where the alleged breach occurred.”

As noted above, the written grievances claimed that the employer violated Sections 10.03 and 12.05. Neither grievance referred to any provision of Article 11. Due to the explicit, limiting terms of Article 9, the District therefore asserts I have no jurisdiction to consider alleged violations of Article 11.

In support of its argument, the District cites SANTA ANA UNIFIED SCHOOL DISTRICT 127 LA 760, 764 (Bordone 2010), in which the collective bargaining agreement echoed the instant contract by mandating that, “the grievance shall set forth specifically the item contained within this Agreement upon which the grievance is based.” In that case, while the grievance claimed a violation of section 16.4.1 of the collective bargaining agreement relating to reemployment rights, the union argument centered on the employer transferring certain duties outside the bargaining unit. In limiting her analysis to the contractual section cited in the grievance, the arbitrator declared that, “...the issue here is limited to the question of whether the Employer violated Section 16.4.1 of the Agreement. The issue is not whether the employer violated some other identified or unidentified provision of the Agreement, whether the Employer negotiated in bad faith, whether the Employer transgressed any other right of the Grievants or the Union, or whether the Employer has implemented inefficient changes.”

The Association has cited two arbitration awards which it contends counter the District’s jurisdictional argument. I do not find them as persuasive as the precedent the District cites.

In *ARMOUR & CO.*, 39 LA 1226 (Beatty, 1963), the arbitrator allowed the Union to assert that the company had violated a contractual provision which it had not cited in the grievance. “All that should be necessary” to proceed, the arbitrator opined, “is that (the grievant) state the facts sufficiently and the Company action about which he complains, state that he believes this to be a violation of the working agreement and ask for the relief to which he thinks he is entitled.” He added, “employees or their Union officers cannot be expected to draw their grievances artfully. If they have sufficiently apprized the Company of the nature of their complaint and if it is found that the Company has violated any portion of the contract, the employees ... are entitled to relief.”¹

However, the award is silent on the actual language in the collective bargaining agreement establishing the grievance procedure. While the arbitrator’s attitude is certainly clearly stated, without knowing the language under which he was proceeding, it is not possible to consider this as persuasive precedent.

The other case the Association cites is *AMERICAN NATIONAL CAN CO.*, 95 LA 873, 876 (1990). In that case, the Union did not raise until the arbitration hearing an allegation that the company had violated Article 41 (4). While the arbitrator admittedly waived the need for the parties to “be technically precise in the writing of grievances or responses,” and allowed the Union to pursue the *argument* contained in its 41(4) claim, the arbitrator explicitly *rejected* relying on 41(4) as a basis for concluding that a contractual violation had occurred: “... a contractual violation of Article 41(4) cannot be accepted or applied here....” It is hard to see how this supports the Association in the instant matter, where the Association is explicitly claiming a violation of a contractual provision (Article 11) which it did not cite in its grievance.

As a general rule, most arbitrators favor a liberal approach to jurisdictional issues, especially where neither party is taken by surprise and a dispute is ripe for adjudication. Here, there is no question that the District knew perfectly well from the earliest discussions what the Association was arguing. It cannot claim it was taken by surprise by the Association’s attempt to incorporate Article 11 in its argument. Further, given the likelihood of further personnel reductions, clarification of the relevant and pertinent terms of the agreement is in the interest of both the District and the Association. That is, I believe that broad policy and due process considerations would ordinarily allow me to consider whether the District violated Article 11, even though not cited in the written grievances. However, the explicit terms of the grievance procedure are clear and unambiguous and provide no such latitude. The Arbitrator is specifically “restricted solely to the interpretation of the contract *in the area where the alleged breach occurred*,” that is, Sections 10.03 and 12.05. Given the specificity of that language, I find that a consideration of possible violations of Article 11 and a decision based thereon would exceed my authority.

¹ Beatty expressed a similarly permissive approach to civil litigation, stating that “even in a court of law,” a plaintiff is entitled to whatever relief the law provides “whether he knows the law or cites any portion of it.”

For the reasons set forth above, therefore, and based upon the record as a whole I hereby enter the following

AWARD

The District did not violate Sections 10.03 and/or 12.05 of the collective bargaining agreement when it eliminated the Instructional Aide positions held by Cheryl Thorson and Mary Reyes resulting in their layoff and transfer into newly created positions. The grievances are denied.

Dated at Fond du Lac, Wisconsin, this 19th day of October, 2010.

John R. Emery /s/

John R. Emery, Arbitrator