

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**PORTAGE PARAPROFESSIONAL ORGANIZATION**

and

**PORTAGE COMMUNITY SCHOOL DISTRICT**

Case 54  
No. 70430  
MA-14962

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**Appearances:**

**Mary Pitassi**, Legal Counsel, Wisconsin Education Union Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin 53708-8003, for the labor organization.

**Shana Lewis**, Lathrop & Clark, Attorneys at Law, 740 Regent Street, Suite 400, Madison, Wisconsin 53715, for the municipal employer.

**ARBITRATION AWARD**

The Portage Paraprofessional Organization (“the union”) and the Portage Community School District (“the district”) are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising there under. On December 20, 2010, the union made a request, in which the district concurred, for the Wisconsin Employment Relations Commission to provide a panel of staff members and Commissioners from which they could choose an arbitrator to hear and decide a grievance over the interpretation and application of the terms of the agreement relating to job postings and transfers. The Commission provided such a list on December 23, 2010; on January 13, 2011, the undersigned was informed that he had been selected to serve as the impartial arbitrator. Hearing in the matter was held in Portage, Wisconsin, on March 23, 2011, with a transcript being made available to the parties by April 6. The parties filed written arguments and replies, the last of which was received on May 23, 2011.

**ISSUE**

The parties stipulated to the following issue: “Did the District violate Article 14.4 of the 2010-2011 Negotiated Agreement between the parties when it did not grant the pre-Kindergarten Teacher Aide position to Mary Jo Revels, a bargaining unit member? If so, what is the appropriate remedy?”

**RELEVANT CONTRACTUAL PROVISIONS**

**Article 4: MANAGEMENT RIGHTS**

4.1 GENERAL

The Board on its own behalf and on behalf of the electors of the District hereby retains and reserves unto itself, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and constitution of the state of Wisconsin and the United States.

4.2 BOARD RIGHTS

Without limiting the generality of the foregoing, the Board's rights shall include:

A. The management and operation of the Board and the direction and arrangements of all the working forces and equipment in the system, including the right to discipline and discharge.

...

H. The supervision, evaluation, classification, assignment, transfer and allocation of all workforce in the system, including the hiring of all Employees, determination of their qualifications, and the conditions for their continued employment.

...

4.3 The Board possesses the right the operate District and all management and administrative rights inherent in it, and such rights or functions (including those in Sections 1 and 2, above) are limited or superseded only as otherwise specifically provided herein this Agreement.

...

**ARTICLE 14: JOB POSTINGS AND TRANSFERS**

14.1 For purposes of this Agreement, a vacancy is a new position or an opening in an existing position. The addition/reduction of job responsibilities, the change in location of a position, the addition/reduction in hours of a position, and the change in scheduled hours is not a vacancy. Upon determination that a vacancy exists, notice of the vacancy shall be posted on a designated bulleting board in each school building. The notice shall include the

posting date, classification, location, hours, rate of pay, starting date, location(s) of job description, and any job requirements and/or qualifications outside of the job description. A copy of the posted notice will be sent to the Union President and Secretary.

14.2 Interested Employees shall make application within five (5) workdays (as defined in Sec. 5.3 of this Agreement) of the posting date. In the event that an Employee anticipates the posting of a vacancy during his/her absence, the Employee may submit an indication of interest in the posting to the Business Administrator. If posting of the vacancy does occur during his/her absence, this indication of interest will be considered an application.

14.3 Qualified Employees on layoff status with recall rights shall be given preference in accordance with the provisions of Article 12.

Qualified Employees who apply for the position shall be given a preference over non-bargaining unit persons who apply for the position.

14.4 The position shall be awarded to the most qualified bargaining unit applicant. If qualifications of bargaining unit applicants are relatively equivalent, then the position shall be awarded to the most senior bargaining unit applicant. If no qualified Employees apply for the vacancy, the District may involuntarily transfer an Employee into the position for good reasons and following a conference on the matter. Upon request, the Employee involuntarily transferred into the position will be given written notice stating the reason(s) for the transfer. If no Employees assume the position, the District may hire from applicants outside the bargaining unit. Notwithstanding any other provisions, the Board shall not be required to transfer or hire Employees who are not qualified for the position.

14.5 A transferred Employee will be on an orientation period in the new position for up to fifty (50) workdays (as defined in Sec. 5.3 of this Agreement). Prior to the expiration of this orientation period, the District may declare the orientation period unsatisfactory and return the Employee to his/her former position. The orientation period is not a training period.

14.6 The District may temporarily assign Employees or may use non-bargaining unit personnel to fill existing positions during the process encompassed by this Article, including the orientation period.

14.7 Nothing herein shall be construed as restricting the District's ability to post a position outside of the bargaining unit, to recruit from outside of the bargaining unit, or to hire from outside of the bargaining unit so long as the

procedures set forth herein are followed. Any posting of a position outside of the bargaining unit shall occur after the posting required by sec. 14.1

...

### **BACKGROUND**

The Portage Community School District is a school district in the county seat of Columbia County, Wisconsin. This grievance concerns the decision by the district not to appoint a current employee and member of the Portage Paraprofessionals Organization, Mary Jo Revels, to a vacant pre-Kindergarten teacher aide position at the Rusch Elementary School.

Robin Kvalo is the district's principal of three elementary schools, Rusch, Caledonia and Fort Winnebago. <sup>1</sup>As principal, she makes hiring decisions for teachers and teaching assistants within her schools, but is not involved in the hiring of cooks or custodians. Three weeks before the start of the 2010-2011 school year, the secretary who had worked for Kvalo throughout her 13-year tenure as a principal retired to spend more time with her family. The district undertook an interview process and Kvalo selected the preschool teaching assistant at Rusch Elementary as her new secretary.

On September 13, 2010, the District posted the following notice for a Paraprofessional at the Rusch Elementary School:

Position	Preschool Paraprofessional +30 per day front of building duty
Date:	September 13, 2010
Classification:	Teacher Assistant
Location:	Rusch Elementary
Hours:	18.5 hours per week (7:30-11:30 M-Th; Friday 7:30-10)
Rate of Pay:	Per PPO Agreement
State Date:	ASAP

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<sup>1</sup> For eight of the 13 years she has been a principal for the district, Kvalo was principal of five elementary schools.

Location of Description: District Policy Book – Available in each building

Interested parties must apply, via the District online application system, with 5 days of the posting date.

Copy: Margaret Rudolph  
Each Building Bulletin Board  
PPO President and Secretary

The District Policy Book contained the following Job Description:

SECTION 390          REGULAR EDUCATION CLASSROOM ASSISTANT

POSITION TITLE:          Classroom Assistant

REPORTS TO:              Building Principal

QUALIFICATIONS

1.     Must maintain the confidentiality of student information.
2.     High School diploma and additional training preferred.
3.     General secretarial and clerical skills.
4.     Above average interpersonal communication skills.
5.     Certified or certifiable for first aid, CPR and other related certification and/or training.
6.     Word processing, typing, and copying skills.
7.     Previous experience and general knowledge in working with children.
8.     Ability to properly handle emergency situations.
9.     Work in a positive manner with students, staff and the community.
10.    Ability to assume responsibility, display initiative, and exercise good judgment.

GENERAL RESPONSIBILITIES

Provides appropriate supervision for the safety of students on the school grounds. Assists the immediate supervisor to help provide a well-organized, smoothly functioning classroom environment in which students can take full advantage of the instructional program. The job demands the ability to stand for extended periods of time, ability to move quickly and freely, and to spend time outside in inclement weather. Properly handle confidential matters relating to students, student records, parents, staff and any other school-related issues.

### ESSENTIAL FUNCTIONS

1. Maintain confidentiality.
2. Assist in the preparation of instructional materials.
3. Assist in the student behavior management, according to District policy.
4. Assist in the correction of student work and tests.
5. Prepare bulletin boards and other displays.
6. Type various documents; perform copying and collating tasks; make overhead transparencies; laminate.
7. Work with students in individual or small group review; drill and practice according to teacher prepared plans.
8. Assist with the inventory of classroom equipment and materials.
9. Perform monitoring and supervisory duties as assigned. (playground, hall, cafeteria, detentions, bathroom field trips, programs, bus duty, ISS, vision and hearing screenings, etc.)
10. Post daily assignments; collect handouts.
11. Organize, copy, and send out progress reports.
12. Maintain student records such as missing assignments and permission slips.
13. Collect various student fees.
14. Provide assistance to injured children following prescribed measures.
15. Write up classroom reports and office referrals from playground.
16. Assist in administering and correcting classroom assessment instruments, classroom tests, etc.
17. Promote a positive image of the District at all times.
18. Lunchroom duties include supervise students, wipe tables, clean up spills, etc.
19. Operate scanner in lunch room, collect and record money, run reports, deal personally with parents by phone or mail concerning balances on breakfast/lunch accounts, balance cash box, etc.
20. Other duties as assigned by administration, supervisor or principal.

### WORKING CONDITIONS

Primarily classroom environment; exposed to noise and contact with injured/ill or disruptive students; may involve exposure to various outdoor environments.

Kavlo considered the qualifications listed above to have varying priorities, depending on precisely what position was being filled. For a preschool assistant position such as the vacancy at Rusch Elementary, Kvalo considered qualifications 4, 7, 9 and 10 to be the most important. Kvalo interpreted “above average interpersonal communication skills” and “work in a positive manner” to mean “exuding love and care and warmth.”

Prior to this hiring process, district superintendent Charles Poches had directed that there should be a minimum of four candidates interviewed when filing vacancies. At the close of the five-day posting period, one member of the PPO bargaining unit, Mary Jo Revels, had submitted a timely application, one of 24 total applications. Kvalo consulted with Director of Business Operations Margaret Rudolph, who advised her to interview four candidates, but to consider Revels separately and first to determine if she were qualified, before considering the external applicants.

Kvalo testified that were it not for sec. 14.4 of the agreement and Revels' status as a member of the PPO, she would not have given Revels an interview, because Kvalo did not consider her qualified for the position on the basis of her on-line application. Based on her review of the 24 on-line applications, Kvalo felt there were at least seven external candidates she would seriously consider for the position.

On her on-line application, Revels noted she was a graduate of DeForest High School. For "Post High School Education," she noted she had a Child Care service degree from Madison Area Technical College (1982), which Kvalo circled because she thought it relevant for the qualification regarding additional training. Kvalo also underlined the date, because she had a concern about how long ago Revels' training was.

The only item Revels listed under "Employment History" was her service as a cook for the district, 9/1/2003 – present. She wrote "looking for a change" as the "reason for leaving."

In the sections provided for applicants to make "Comments to Include With Your Resume Submission," Revels wrote:

I have been working in the kitchen at Rusch the past 7 years. I wanted a job that allowed me to work and yet be home for my children when they were home. After high school I went to MATC and got my degree in Child Care Service Program. I worked a few jobs in that field but because the wages were always so low I ended up working in food service positions. I then married and I became a stay home mother of two boys. Over the years I have also taught preschool Sunday school classes. I taught for 9 years. I am not looking for a full time position, just something to get me out of the house and earn a little cash. This position sounds interesting to me and would get me back with kids as well as letting me use the gifts and talents that I enjoy. (underlinings added by Kvalo upon her review of Revels' application).

Revels began working for the as a cook at Rusch Elementary on September 1, 2003. She is a 1981 graduate of DeForest High School and in 1982 received a one-year certificate in Child Care Services from Madison Area Technical College. Revels testified she worked part-time in the nursery school at St. Olaf's Church in DeForest for a few weeks in 1982, leaving for a full-time position at a day care center called Play Haven West in Madison. She said was dissatisfied with several aspects of the program administration there, and left after four weeks.

She testified that she later worked, for about six to eight months, taking care of her sister's two children (a newborn and a 2-year-old) three days a week. She also testified she volunteered as a preschool religious education teacher at St. Olaf's Church from 1982-1988 and from 2001-2004 in that same capacity for St. Mary's Church in Portage. As a Sunday School teacher, she worked as the only teacher in the room, with children about four and five years-old, performing many tasks similar to those performed by preschool teaching assistants in the Portage school system. Revels testified she worked as the "tower supervisor" in a nursing home, supervising high school students who worked there. She testified she worked for about a year, around 1984, as the "party person" at Confection Connection in Sun Prairie, interacting for two-to-three hours with children at about a dozen birthday parties during her tenure. Revels also interacts with children in her job as cook.

On May 24, 1982, Revels had received a One Year Vocational Diploma from in the field of Child Care Services. As described in a pamphlet published by the Madison Area Technical College MATC Home Economics Division, :

The Child Care Services Graduate:

- Works in Child Care programs such a day care centers; head start centers; nursery schools, family day care homes and kindergartens;
- Plans activities and field trips;
- Provides safe and healthy environments;
- Is responsible for fostering cognitive, social, emotional and physical growth and development;
- Usually assists in caring for groups of children in the 0-6 age range;
- Is often a resource to the families of children for which care is provided.

Revels received a grade of "A" in every course, including introduction to early childhood, basic care, activity planning, special services, communications, environments, interactional setting, activity planning, principles of administration, applied human relations, play, supervised student participation, child growth and development, orientation to employment, and more. Kvalo testified that Revels did not share the details of her MATC education – either the specific courses or her grades -- with her during the application or interview process.

As part of the hiring process, Kvalo prepared a series of interview questions, with suggested points for levels of responses, as follows:

**Share with us your recent educational background and training. Please include experiences related to this position.**

- 10 Has recent experience working with young children. May have education/training related to job.



- 5 Has some experience but not recent; has education but no work experience
- 0 Has no experience working with younger students

**Why are you interested in this position?**

- 10 Passion to work with students; love of this age group; desire to make a difference; support learning.
- 5 Some of the above
- 0 None of above mentioned

**What are the responsibilities a paraprofessional (teacher's assistant) who helps with the needs of students?**

- 10 Understands that the paraprofessional is under the direction of the teaching staff, that the paraprofessional implements programs designed by teachers; May have some non-student responsibilities; Team player; Effective communication skills; Ability to carry out instructional programs with a variety of students in a variety of different environments. Listen for an ability to meet the objectives of students' IEPs or Title I programs.
- 5 Mentions some of the characteristics above.
- 0 Does not mention any of the above characteristics.

**What personal qualities do you possess that would especially qualify you for this position?**

- 10 Patience, flexible, independent, positive, enjoy all ages, take direction easily.
- 5 Some of above
- 0 None of above mentioned

**What would be the most rewarding with this type of position at Rusch?**

- 10 Working with young minds; helping students grow; working with other staff at Rusch; seeing where they begin and where they end in June.
- 5 Some of above
- 0 None of above mentioned

**What part of this job do you believe will be the most difficult?**

- 10 Not worried about anything being difficult
- 5 Some concerns but not vital to job performance
- 0 Managing students; understanding 4 year olds; working outside

**You will be in a position that requires you to maintain Confidentiality. Why is that an important part of your job?**

- 10 We hear information that shouldn't be shared with others; every child deserves to have their issues remain private.
- 5 Some of above
- 0 None of above

**Do you feel comfortable overseeing, giving directions and assisting with art projects? What are you most comfortable with?**

- 10 Yes and any
- 5 yes and some
- 0 no

**How do you feel about taking kids to the bathroom, monitoring and assisting if necessary, tending to a sick child, etc....?**

- 10 No problem, I am ok with that type of care
- 5 Okay with bathroom but sick might make me sick
- 0 Not comfortable with either

**You are doing playground duty and a student gets hit in the head and has a bloody nose. What precautions should you take to maintain personal safety?**

- 10 knowledge of universal precautions, use of gloves for personal safety, knowledge of first aid and when to get additional help.
- 5 Some of above
- 0 None of above

**Can you give us some examples of experiences you have had working independently with minimal direction?**

- 10 Sites more than 2 examples
- 5 1-2 examples
- 0 no examples

### **Scenarios**

**How would you handle the following three children who come up to you all at once outside? Mary is dancing and has to go to the bathroom, Ben says Maggie just hit him, and Matt says he's going to be sick.**

- 10 Sick – trash bin, dancing to bathroom then deal with hitting.
- 5 dance, sick hit
- 0 hit, dance, sick

**The teacher has stepped out of the classroom for a minute and left you in charge, how do you maintain order?**

- 10 Continue lesson as it was going; remind children of expectations
- 5 Read to them or do something else
- 0 I don't know if I could maintain order

**A student in (sic) you are supervising exhibits inappropriate behavior, being out of his seat, talking, and is in general consistently distracting to others. How do you attempt to alleviate the problem?**

- 10 Try to redirect them to the task they were doing; encourage them to make the right choice; get them back on task by modeling what they should do
- 5 Some of above
- 0 Don't know

On a scale of 1-10 please rate yourself (verbally)

- |    |                             |    |                       |
|----|-----------------------------|----|-----------------------|
| -- | Unional skills              | -- | Efficiency            |
| -- | Time management             | -- | Initiative            |
| -- | Dealing with the unexpected | -- | Managing paperwork    |
| -- | People skills               | -- | Dealing with conflict |

**Do you have impairments, physical or mental, which would prevent you or interfere with your ability to perform the job for which you have applied? Please explain if there are any duties you cannot perform because of an impairment.**

Yes  
No

**What has been your work attendance in past jobs (new hire)?**

**Have you ever been convicted of a crime? If so, please explain (new hire)**

**Why do you think I should hire you?**

- 10 Reiterates all the positives of working with preschoolers
- 5 Mentions some of the reasons related to students
- 0 I need the money and something to do

Despite including the noted suggested point totals for levels of answers, the District did not establish a minimum score that would indicate a candidate was qualified for the position. A candidate could get up to 150 points per interviewer.

In conducting the interviews, Kvalo was joined by current preschool teacher and a former preschool assistant who is now a regular classroom assistant at Rusch Elementary. Kvalo had her secretary schedule the four interviews all on one day, with Revels being the third or fourth to be interviewed, following her full workday in the kitchen.<sup>2</sup> The interviews were conducted in the guidance counselor's meeting area near her office. Kvalo allotted 45 minutes for each interview. The panel did not discuss the candidates between the interviews, but rather at the end of the day.

Revels' interview did not last the full 45 minutes. Revels testified that she felt comfortable during the interview, which she thought had gone very well. She testified that she had discussed her volunteer Sunday School experiences, that she talked about her MATC certificate, that she mentioned she had done lots of babysitting, and that she had lots of organizational and filing skills by virtue of her work at Demco. Revels testified she told the interviewers that she was not sure how long she would be able to stay as a cook because the hours had expanded beyond her expectation, but that she did not remember ever saying in the interview that she felt stale in the kitchen. Revels testified she said at the interview she would prefer a part-time position, which would allow her more time with her own family while also giving her the chance to work with children. Kvalo testified that Revels noted that she had a certificate in child care service from MATC, but did not provide any details about the coursework or her grades, nor any details of her work as a babysitter, her employment at Confection Connection, her responsibilities taking care of her family, or working at Demco. Kvalo testified that the information Revels provided at the arbitration hearing differed "tremendously" from that provided at the hiring interview, and that she "heard (at the hearing) quite a few things that would have been relevant to the questions I asked her," especially about her interactions with students. Kvalo also felt Revels displayed a level of warmth at the hearing that she did not see in the interview. Kvalo testified that Revels did state she was "stale in the kitchen," and that she missed working with kids. Revels did not testify in rebuttal following Kvalo's testimony.

The three other applicants Kvalo interviewed were:

- M.D.A., who had a 1988 vocational trainer degree from MATC, one year as a special education aide, nine years as a vocational trainer of

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<sup>2</sup> Kvalo testified that Revels was the third interviewee, Revels testified that she had been told that there had been three interviews before her.

disabled adults, and eight years as the co-owner/manager of residential rental property, and some time subbing and volunteering at Rusch;

- C.L.D., holding a 3-year K-12 certification from the Wisconsin Department of Public Instruction, a BA and MA in fine art, with brief experience as a substitute aide, day care provider, service provider support staff and clerk;
- H.S.R., with a B.S. in biology, and over ten years' experience in conservation program administration and education, and brief experience in AmeriCorps and as a teacher's aide;

On the basis of her application and interview, Kvalo determined that Revels was not qualified because she did not have above-average interpersonal skills; that while she had a general knowledge of working with students, her knowledge base was not current; that she did not display the warmth and desire to interact with students and staff nor the initiative that Kvalo thought necessary for the position.

Having determined that Revels was not qualified, and that the three other applicants she interviewed were, Kvalo offered the position to M.D.A., who accepted. On or about September 30, 2010, Kvalo called Revels to inform her she had not gotten the job. Revels did not answer her phone, so Kvalo left the following message:

Hi Mary Jo, this is Robin calling in regards to the per-school position. I did want you to know that I did pick Michelle Aldridge for that position. She has a lot of experience and has been in the position since it was opened but you did a terrific job in the interview and I would like to talk to you more about some opportunities to do other things here at Rusch like we talked about yesterday. Possibly getting on the sub list for teachers assistants. I really think that I would love to see you get some of those experiences. I believe that that will raise you above other candidates. If we can get you in the classroom and get you some current experience with all sort of ages. So feel free to come in and talk to me at any time next week and we can talk about those opportunities. If you want to get on the sub list I will certainly recommend you over with Lisa Mildenburger. Give me a call or stop by. I would love to talk to you more. Thanks. Good bye.

Shortly after leaving the message, Kvalo encountered Revels in the school building. She brought her into her office, and related essentially the same message she had left on the answering machine.

Kvalo testified that Revels did not really do “a terrific job” in her interview, but that she wanted to give her a positive message. Kvalo testified that she was sincere in hoping Revels would seek to get on the substitute list.

As of the date of hearing, Revels had not talked to Kvalo about the teacher assistant position or taken any steps to get placed on the sub list. Revels testified that her mother had come to stay with her for health reasons in October, and that her mother-in-law passed away shortly before the hearing, and that she was busy taking care of important family matters.

On October 12, 2010, the PPO filed the following grievance with Kvalo:

**STATEMENT OF GRIEVANCE:** On Friday, October 1, 2010, the Portage Paraprofessional Union learned that a non-bargaining unit applicant was awarded the position of a Preschool Paraprofessional at Rusch Elementary School when there was at least one qualified bargaining unit applicant for this Teacher Assistant position.

To award a position to a non-bargaining unit applicant when there is at least one qualified bargaining unit applicant is in violation of the Negotiated Agreement, including but not limited to Article 14 (Job Postings and Transfers), sec. 14.4.

**RESOLUTION REQUESTED:** Rescind the hiring of the non-bargaining unit applicant and award the Preschool Paraprofessional Teacher Assistant position at Rusch Elementary School to the most qualified bargaining unit applicant.

On October 18, Kvalo replied, as follows:

JoAnne Genrish handed me the Grievance, dated October 12, 2010, on October 13, 2010. The statement of the grievance was that “the Portage Paraprofessional Union learned that a non-bargaining unit applicant was awarded the position of a Preschool Paraprofessional at Rusch Elementary School when there was at least one qualified bargaining unit applicant for this teacher assistant position.”

As the immediate supervisor, it is my responsibility to respond under Step One of the grievance procedure in writing within five work days following receipt of the written grievance. This response is in compliance with the grievance procedure and timelines.

After reviewing the Grievance and investigating the allegations contained therein, I have concluded that no contract violation occurred. Therefore, I am denying the grievance on the merits.

In deciding whether to appeal this decision to Step Two, it is important for the Portage Paraprofessional Union to understand the following facts related to this Grievance:

1. Following the approval by the School Board to post the position on September 13, 2010, a posting was emailed out in regards to the vacancy for a "Preschool Position" at Rusch according to Article 4.1. The posting references the Description of the Job in the District Policy Book, which can be found at *Section 390: Regular Education Classroom Assistant*. A copy of the job description is attached with this letter.
2. In order to comply with current hiring procedures and in accordance with Article 14.7, I also posted the vacancy externally.
3. At the closing of the posting, the District received 24 applications for the position. One of the applicants was a PPO Food Service member, Mary Jo Revels. In order to determine whether Mary Jo Revels was qualified for the position, she was included in the four candidates interviewed for the position.
4. After interviewing Mary Jo Revels on September 30, 2010, it was clear she was not qualified for the position.

The interview committee members rated the candidates on the criteria/qualifications using the rubric and expected answers. The following is a chart of the four candidates composite rubric interview scores in order of top to bottom:

Interviewee #1	415
Interviewee #2	409
Interviewee #3	408
Interviewee #4 *PPO member	319

Mary Jo Revels was determined not qualified for some of the reasons highlighted below:

Mary Jo Revels total composite score of 319 was fourth in rank order of the candidates in the interview portion of the hiring process.

Mary Jo's interpersonal communication skills were lacking.

Mary Jo's general knowledge of working with children is limited. It has been 27 years since she completed a one-year "child care service" program and working in a "school" classroom.

Comments such as, “I am not looking for a full time position, just something to get me out of the house and earn a little cash.” (from the application), to responses in the interview to “Why do you think I should hire you?” and “Why are you interested in the position?” ... she desired fewer hours than her current position and she was stale in the kitchen. Both responses lacked positives of working with preschoolers, showing a lack of initiative and a positive manner working with students.

5. As per Article 14.3 *Qualified Employees who apply for the position shall be given a preference over non-bargaining unit persons who apply for the position.* Mary Jo Revels was not a qualified employee who applied for the position. As such, pursuant to Article 14.4, the District was able to hire an applicant from outside the bargaining unit for the position; *the Board shall not be required to transfer or hire Employees who are not qualified for the position.*

Kvalo testified at hearing that she did not tabulate the scores for the various candidates at the time the hiring decision was made, but that she did so only in preparing the Step One Grievance Response.

In October, 2010, the district posted for three Teacher Assistant positions in the Special Education Department. A PPO member, J.H., applied for two of the vacancies, but was not hired. The PPO grieved, and on January 31, 2011, Director of Special Education Tammy Cummings, replied as follows:

As the director of special education and supervisors of these positions, I am responding to the inquiry of why J. was determined not qualified.

At the closing of the positions, the District received 1 PPO member application for both positions. J. was the applicant. In order to determine whether she was qualified for either position, she was interviewed for the positions. She was the only one interviewed, at that time, for both positions at the closing of the position.

After the hiring process with J. was completed, she was determined not qualified for the positions, because, as stated in the job posting qualifications, “Applicant must have experience working with students with autism (Woodbridge position) or emotional/behavioral disabilities (Rusch position)” and J. did not met that qualification.

On October 20, 2010, the Union submitted Revels grievance to Margaret Rudolph, Director of Business Operations, for Step Two consideration:



**STATEMENT OF GRIEVANCE:** On Friday, October 1, 2010, the Portage Paraprofessional Union learned that a non-bargaining unit applicant was awarded the position of a Preschool Paraprofessional at Rusch Elementary School when there was at least one qualified bargaining unit applicant for this Teacher Assistant position.

On October 13, 2010, the PPO filed a written grievance with the immediate supervisor Robin Kvalo. By letter dated October 18, 2010, Ms. Kvalo denied the grievance. Her response did not bring a satisfactory resolution to the grievance.

To award a position to a non-bargaining unit applicant when there is at least one qualified bargaining unit applicant is in violation of the Negotiated Agreement, including but not limited to Article 14 (Job Postings and Transfers), sec. 14.4.

**RESOLUTION REQUESTED:** Rescind the hiring of the non-bargaining unit applicant and award the Preschool Paraprofessional Teacher Assistant position at Rusch Elementary School to the most qualified bargaining unit applicant.

On November 3, 2010, Rudolph responded to PPO President Deb Steiner and UniServ Director John Horn as follows:

On October 27, 2010, I met with John Horn and Deb Steiner, as part of the Step 2 grievance procedure. I listened to the arguments presented concerning the grievance filed by the Portage Paraprofessional Union alleging that the District violated the collective bargaining agreement when a “non-bargaining unit applicant was awarded the position of a Preschool Paraprofessional at Rusch Elementary School when there was at least one qualified bargaining unit applicant for the teaching assistant position.”

After reviewing the Grievance and investigating the allegations contained therein, I have concluded that no contract violation occurred. Therefore, I am denying the grievance on the merits.

It is true that Ms. Revels applied for the vacancy for a “Preschool Position” at Rusch. It is also true that Ms. Revels was the only PPO bargaining unit member to apply for the position. However, based on the Description of the Job in the District Policy Book, which has been provided to you, and my understanding of the needs for the position, the District concluded that Ms. Revels was not qualified for the position. While not the only qualification Ms. Revels was lacking, the primary qualification deficiency noted by Ms. Kvalo was the fact that Ms. Revels has no previous experience and general knowledge in working

with children. Based on Ms. Revels' answers to the questions posed in the application and during the interview process, Ms. Revels last worked with children almost thirty years ago and demonstrated no real interest in doing so now, (i.e., her stated reason for wanting the position is to "get out of the house more"). Therefore, because Ms. Revels was not qualified for the position, she was not eligible to be hired for the position.

During our meeting, you suggested that Ms. Kvalo's assertions that Ms. Revels did a fine job in the interview and was qualified to serve as a substitute in this position was evidence to demonstrate that a contract violation occurred. Please understand that this is simply not the case. Ms. Kvalo's statements to Ms. Revels in the voice mail message and during the in-person conversation later in the day, were intended to be kind to Ms. Revels and to encourage her to seek out opportunities that might allow her to become qualified for a position like the "Preschool Position" at Rusch. In no way was Ms. Kvalo intending to suggest to Ms. Revels that she was qualified for the position. In many situations, an individual may be qualified to fill-in for an absent employee on a temporary basis, but not hold the requisite qualifications to fill the position on a regular basis. Unfortunately, that is the case with Ms. Revels and the "Preschool Position" at Rusch. As Ms. Kvalo attempted to explain to her after the interview process, if Ms. Revels obtained some experience working with children, which Ms. Kvalo is willing to assist her in obtaining by allowing her to serve as a substitute, perhaps, in the future, Ms. Revels may be qualified for a subsequent vacancy in this job classification.

Thus, given that Ms. Revels was not qualified for the position, Article 14.3 does not apply. Therefore, pursuant to Article 14.4, the District was able to hire an applicant from outside the bargaining unit for the position.

The matter was advanced to the arbitration stage, as noted in the jurisdictional paragraph above.

### **POSITIONS OF THE PARTIES**

In support of its position that the grievance should be sustained, the Portage Professional Organization asserts and avers as follows:

The clear and unambiguous language of the collective bargaining agreement mandates that any vacant position covered by the recognition clause must necessarily be awarded to the most qualified member of the bargaining unit who applies. Revels was the only unit member who applied; assuming she was qualified, the position had to be awarded to her.

The District erred in consistently applying a “most qualified applicant” analysis to judge Revels’ qualifications rather than the correct “minimally qualified” analysis that the labor agreement required. The language of the agreement provides maximum assistance to senior unit members, and also places the burden of production on the employer, not the employee, with regard to establishing the employee’s qualifications.

Since Revels was the only bargaining unit member applying for the position, she was at once the most qualified and the most senior. The District has the burden of producing evidence that Revels was *not* qualified, which it has failed to do.

Revels’ qualifications met or exceeded those required by the position description. She was a high school graduate with a certificate in an area directly related to the job. Between her volunteer experience teaching Sunday school, her current employment (seven years of daily interaction with children) and other jobs she had held, Revels met the majority of the qualifications in the description. No evidence was presented that Revels did not meet the qualifications.

The only way the District could have avoided awarding Revels the job was by treating the contractual language as though it required the selection of the applicant who was the most qualified of the entire applicant pool. Although the District denies that it did this, claiming it made an initial evaluation that Revels was not qualified before looking at other applicants, this claim does not survive scrutiny.

In its response at Step One, the District explicitly referenced Revels’ interview score being significantly below the scores of the other candidates, and did not state that the District first evaluated her qualifications independently of the other candidates (as it claimed at hearing that it did). It is hard to conclude anything other than the fact that the District, at least in its grievance response, applied a “most qualified,” not “minimally qualified” analysis.

The District virtually guaranteed that this would happen by erroneously interviewing Revels on the same day as the three other applicants. Kvalo’s careful claim that she was able to interview four candidates on the same day, and make an independent evaluation of Revels’ qualifications, flies in the face of human nature and common sense. It is immaterial whether Kvalo actually totaled Revels’ scores at the time of the interview or not until the grievance response, since it is indisputable that she did compare Revels to the other candidates when she made that response. So it is hard to fathom how she could have made her initial decision after the interview without making the comparison then as well.

Moreover, Kvalo applied standards to Revels that were not contained in the relevant position description. She considered four qualifications more important than any of the others, which was not communicated to the applicants. And the way she interpreted the qualifications varied significantly from the words as contained in the position description. Kvalo testified she wanted a candidate who “exuded love and warmth and care,” which were not attributes reflected in any of the skills identified in the position materials. The District’s sole concern should have been whether Revels was minimally qualified for the position, not a personality contest among several applicants, which is what the process became.

Kvalo also ignored the obvious evidence of Revels’ initiative, which she was aware of, while taking into account traits she thought were negative, so that Revels was actually penalized for being a District employee.

As the dominant person in the interview process, Kvalo should have made a greater effort to follow up on statements Revels made and elicit elaborations on her responses. It is not asking too much for the District to give the only bargaining unit member who applied the benefit of the doubt, and, at a minimum, give a gentle prompt and ask questions about any experience it knew about from either Revels’ employment or application that it believed to be relevant to the job.

Further, the District could have used the contractual orientation period as an ultimate test of whether Revels was minimally qualified for the job. The collective bargaining agreement has a mandatory fifty-day orientation period for an employee transferred to a new job; the District, if it had any doubts as to Revels’ personality or credentials, could have tested its theory by awarding her the job and evaluating her performance, returning her to the kitchen if it were not satisfied. This would have given Revels the chance she deserved while preserving flexibility to the District, but the District chose not to take this option.

Revels more than met the minimal qualifications, and under the collective bargaining agreement was entitled to the position. The District applied the wrong standard regarding qualification, and used flawed procedures, and thus did not award Revels the position that was rightfully hers. She should now be placed in the Preschool Paraprofessional position as soon as possible, and made whole for any wages and benefits she lost since fall, 2010.

In support of its position that the grievance should be denied, the Portage Community School District asserts and avers as follows:

It is well-settled that the union bears the burden of proving, by a preponderance of the evidence, that the employer violated the collective bargaining agreement. The union has failed to meet its burden of proving that the District's determination that Revels was not qualified was arbitrary, capricious, discriminatory, or unreasonable. The District presented ample evidence that Revels was not qualified based on the information she presented (or failed to present) in her application and interview.

The District properly determined that Revels was not qualified for the position. Kvalo complied with the agreement by first determining whether Revels was qualified before she hired an external candidate. Because Revels did not present information that satisfied the essential qualifications as determined by the District, Kvalo determined Revels was not qualified for the position. Revels did not demonstrate above average communication skills, which the District determined was the first essential qualification, as evidenced by the fact that her interview did not last the full allotted 45 minutes. She did not elaborate on any answers, providing only simple answers to the questions. Someone with above average communication skills would have been more engaged.

Kvalo also determined that Revels' experience and knowledge working with students was not current. She completed her child care service training almost 30 years ago; the only employment she listed was as a cook; she provided no additional details about teaching Sunday School classes. It was Revels' responsibility as the applicant to provide all the relevant information the District needed to make a decision, and Revels did not offer additional relevant information until the arbitration hearing. But Kvalo is not omniscient, and was not able to consider information presented for the first time at hearing when determining whether Revels was qualified for the position. Based on the information Revels provided in her application and at the interview, Kvalo was justified in concluding that her experience and knowledge of working with students was not current.

Revels also did not demonstrate an ability to work in a positive manner, and actually gave evidence to the contrary when she wrote on her application that she was looking for something to "get me out of the house and earn a little cash." Revels could have, but did not, discuss her interactions with students through her current position in the kitchen, where Kvalo has noticed she does her job but does not show warmth or an obvious desire to interact with students or staff.

Nor did Revels demonstrate initiative, either in the interview or in submitting an incomplete application. She did not showcase her experiences and failed to include years of experiences she now feels relevant.

The question before the arbitrator is whether the employer acted in an arbitrary, capricious, or unreasonable manner in determining Revels failed to satisfy the qualifications listed in the job description. The District did not act in that manner, but complied with the agreement when it determined Revels was not qualified and therefore hired an external candidate.

In response, the Organization posits further as follows:

The District errs in asserting that the Union bears the burden of proof. In a matter such as this, where the question is whether the grievant was minimally qualified for the position, it is the employer's burden to produce evidence that she was not qualified. Because any objective reading of the standards indicates that Revels was indeed qualified, the District has failed to do so.

The District also errs in ignoring that an applicant's contemporaneous statements can be made, or elicited by the employer, at the interview. When the employer knows of certain experiences, as it did here, it needs to ask about them. If the District had any questions about whether Revels met the qualifications, it could have and should have asked her. Yet it consistently failed to do so.

The District has never once identified any objective criterion that Revels failed to meet, because it cannot do so. Revels was consistently and erroneously judged by standards which were not part of the position description, and which she did not know about. Further, Kvalo offered no evidence at all to support her statement that preschool has changed so much that Revels' 1982 certificate failed to satisfy the preference for additional training. The District had to do more than simply make unsubstantiated generalized statements, and its claim that Revels' additional training was inadequate must be rejected.

The grievance should be sustained and Revels should be awarded the job, and made whole for any losses she suffered.

In response, the District posits further as follows:

The Union's assertion that the District applied a "most qualified applicant" analysis is not supported by evidence in the record. As Kvalo testified, she was instructed to first consider Revels' qualifications for the post before considering the other candidates, and she did so. The scores on the interview form had no relevance to this determination, and the composite rubric was included in the grievance response only to show the difference between the other candidates and Revels. Kvalo did not use the scores to determine if Revels was qualified.

The Union further errs in contending that the collective bargaining agreement requires the District to schedule interviews of difference applicants on different days. The agreement clearly gives the District the right to determine the process to use in interviewing and hiring.

Further, the District had the authority to set the qualifications for the position, including the right to interpret and give meaning to the qualifications listed in the position description. The qualifications as set by the District and interpreted by Kvalo are only subject to challenge if they are arbitrary, capricious, discriminatory or unreasonable, and the Union has not specifically challenged the District's determination on any of those grounds.

The collective bargaining agreement does not require the District to hire an unqualified bargaining unit member and allow her to test her abilities during the orientation period. The trial period isn't an opportunity for an employee to prove qualifications when the employer isn't sure about a promotion, it is an opportunity for the employer to evaluate the performance of someone who has already qualified and been promoted. The District did not find Revels qualified for the position, and was not required to use the orientation period to allow her to prove otherwise.

### DISCUSSION

This grievance concerns both contract interpretation and factual determination. What process does section 14.4 require? And was the grievant qualified under it?

When Rusch Elementary School principal Robin Kvalo appointed a Rusch preschool paraprofessional as her new secretary, she created a vacancy as defined by Article 14, section 4 of which provides as follows:

The position shall be awarded to the most qualified bargaining unit applicant. If qualifications of bargaining unit applicants are relatively equivalent, then the position shall be awarded to the most senior bargaining unit applicant. If no qualified Employees apply for the vacancy, the District may involuntarily transfer an Employee into the position for good reasons and following a conference on the matter. Upon request, the Employee involuntarily transferred into the position will be given written notice stating the reason(s) for the transfer. If no Employees assume the position, the District may hire from applicants outside the bargaining unit. Notwithstanding any other provisions, the Board shall not be required to transfer or hire Employees who are not qualified for the position.

This job posting process has the parties trading privileges and prerogatives throughout the procedure. The basic operating principle – the prime directive -- is that a bargaining unit

job is filled by a member of the bargaining unit. This principle is also made explicit by section 14.3. Naturally, the employer can insist that the successful applicant be qualified, and can even make the comparative evaluation and hire the *most* qualified. It is *only* when applicants are relatively equivalent that seniority even applies. Then, *if no qualified employees apply*, the district, after a conference and with good reason, can involuntarily transfer an employee into the position. Then, *if no employees assume the position*, the district may hire an outside applicant.

That is, before the district can hire an outside applicant, it must *first* evaluate all PPO members who apply and determine that they are *all* unqualified. It also has to decide not to involuntarily transfer an employee.

The language of sec. 14.7 reinforces that the internal posting takes precedence and priority:

Any posting of a position outside of the bargaining unit shall occur **after** the posting required by sec. 14.1 (**emphasis added**).

The “posting required by sec. 14.1” includes all the provisions of article 14, including section 14.4.

Revels was the only bargaining unit member who applied. If qualified, she was entitled to the position; only if she were not qualified could the district appoint an outside applicant. The district does not dispute this legal framework.

Was Revels qualified for the position? And did the district follow the right procedure in determining that she was not?

***Was the process proper?***

The collective bargaining agreement grants to the district “all powers, right, authority, duties and responsibilities .... including the hiring of all Employees, determination of their qualifications....,” management rights which are “limited or superseded only as otherwise specifically provided” by the agreement. Section 14.4 is just such a specific limitation on the district’s management rights, forbidding it from making a determination that Revels was not qualified based on comparing her to other applicants. But there are indications the district did just that.

Kvalo testified credibly that she was aware that her obligation was to consider Revels on her own, and *only* consider the other candidates if she first determined that Revels was not qualified. Kvalo testified that was she aware of that not only due to her own familiarity with the collective bargaining agreement, but that Director of Business Operations Rudolph specifically instructed her that, even though she was to interview four candidates, “I had to only consider Ms. Revels to determine qualifications.”



I believe Kvalo was aware of her obligation under the collective bargaining agreement to consider Revels prior to considering any external candidates, and that she made a good faith effort to honor that obligation. It was notable that, during cross examination at hearing, when the union attorney suggested a comparison between Revels and the successful applicant (in terms of their respective experience teaching Sunday school), Kvalo replied that she “was not comparing Ms. Revels to Ms. Aldridge.”

That commitment, however, was not enough to prevent Kvalo from inadvertently violating the provisions of section 14.4 by her actions – namely, reviewing other applications and conducting interviews with external candidates, even while she was determining that Revels was not qualified.

Kvalo testified that she initially determined that Revels was not qualified based on her on-line application. But at the time Kvalo reviewed Revels’ application, she was also reviewing more than 20 other applications – applications which boasted advanced degrees, educational licensure, and considerable experience. Even though Kvalo sincerely believed she resisted letting her knowledge of the qualifications of the external candidates effect her evaluation of Revels, that may not have been enough to comply with the contract.

In *UNIV. OF WASHINGTON*, 112 LA 556 (Erskine, 1999), the collective bargaining agreement provided that it was “the policy of the University to encourage job advancement and promote from within.” An existing employee grieved when she did not receive appointment to a vacancy. In denying the grievance, the arbitrator noted that the employer did “indeed encourage job advancement and promotion from within ... by interviewing *all* bargaining unit members who met the minimum qualifications **prior to interviewing any outside applicants**, and by offering the position to two bargaining unit employees who rejected the offer.” (*emphasis* in original; **emphasis** added). *Id.*, at 562.

In *VETERANS AFFAIRS MEDICAL CENTER*, 114 LA 1316 (Donnelly, 2000), the collective bargaining agreement provided that “(a)ll employees will have a fair and equitable opportunity to compete for selection for a posted vacancy,” and that current employees “will receive first consideration when filing position vacancies.” The employer posted an announcement of eight nursing vacancies internally from August 6 to August 20, and in a newspaper ad on August 8. All the internal candidates were interviewed between August 27 and August 31, while the list of external candidates was not forwarded for review until September 22; external candidates were only considered after a determination was made that internal candidates did not have the sufficient skills. The union grieved after the employer hired three current employees and five external candidates. The arbitrator held it was not a violation for the employer to have placed the want ad for external candidates while the internal posting was still up because all the internal candidates were interviewed before any external candidates. “Such prudent management (to advertise externally to ensure an adequate applicant pool) does not void employees’ rights ... **unless the external candidates receive prior consideration.**” (**emphasis** added) 114 LA at 1320.

In INTERNAL REVENUE SERVICE, 71 LA 1018 (Harkless, 1978), the collective bargaining agreement required the employer to give “simultaneous consideration” to internal and outside applicants. In filing vacancies for tax auditors, the employer conducted interviews with outside candidates from February 28 to March 28, and interviews with internal candidates March 11 to March 28; in filing vacancies for revenue agents, the employer interviewed outside candidates between February 22 and March 21, and internal applicants March 15 to March 21. Sustaining the grievance in part, the arbitrator ordered that the employer “consider qualified bargaining unit employees at the same time as outside applicants” in filing certain future vacancies. *Id.*, at 1021.

In ROTEK INCORPORATED, 73 LA 937 (Rybolt, 1979), the collective bargaining agreement mandated that a vacancy be awarded to the most senior qualified employee, and then the most senior employee considered trainable for the job. In filing a vacancy for an electrician, the employer posted internally and rejected all applicants before considering external applicants. In denying the grievance, the arbitrator noted that the employer had “thoroughly reviewed” all the internal candidates before determining that none were qualified or trainable, and only “**then** took the necessary steps to fill the opening from outside ....” (**emphasis added**). *Id.*, at 938.

In LOCKHEED-GEORGIA CO., 84 LA 701 (Daly, 1985), the collective bargaining agreement provided that “(p)reference shall be given to the promotion of qualified employees eligible under this section before open hire.” A statistical typist refused to take a required typing test and was not offered a promotion to Purchase Order Typist. In denying the grievance, the arbitrator explained, “(i)t should be noted that ‘the Company, **before going to outside hire,**’ came to the Grievant and asked her to take the test. The Grievant had a right to refuse to take the test, and she exercised that right. Once she had done so, however, there was no way the Company could have promoted her ....” 84 LA at 704. (**emphasis added**).

I believe these cases establish an arbitral understanding that when the collective bargaining agreement provides preference or priority for internal applicants, the employer must *complete* its evaluation of all such candidates *before* considering external applicants. This understanding, of course, is consistent with the last sentence of section 14.7.

The union correctly notes that Kvalo *did* explicitly compare Revels to the three other candidates in her step one response to the grievance. Kvalo testified, however, that she did not tally the scores at the time she was determining whether Revels was qualified, “because I couldn’t compare the candidates. I had to look at is Mary Jo Revels qualified for the job, yes or no. And once I determined no, then I had to look at the other three candidates to determine.”

But by the time she interviewed Revels, Kvalo had already interviewed at least two other candidates, with a third interviewed on the same afternoon.<sup>3</sup> I do not see how Kvalo could have interviewed external candidates in the same limited time period as she interviewed Revels without her impressions of the other candidates – all of whom were significantly more qualified than Revels -- affecting her evaluation of whether Revels was qualified at all. Human nature simply does not allow for such compartmentalization of impressions. The interview process included scoring the candidates, which scores were later tabulated. These are all inherently comparative personnel exercises; I agree with the union that Kvalo simply could not eliminate the comparative element in determining that Revels was not qualified.

Waiting until it had considered and rejected all internal applicants before it could consider outside applicants would not pose a significant operational burden on the district. Unit members have to apply within five work days of the posting date. Given its power to direct and assign employees, the district should be able to conclude the interviews of internal applicants, if any, within a day or two. Taking a week or so to see if there are any qualified unit applicants before considering non-employees is not unduly burdensome.

The district has shown itself willing and able to follow this contractual process. The month after the hiring under review, the district posted for three assistant positions in special education, and interviewed external candidates only after interviewing and rejecting all unit applicants. As the union asserts, and as the collective bargaining agreement requires, that is what it should have done for the assistant position at Rusch.

I find, therefore, that the process established by article 14, specifically sections 14.4 and 14.7, bar the district from reviewing external applications or conducting interviews with external candidates until it has properly considered all internal candidates.

The phrase “after the posting required by sec. 14.1” in sec. 14.7 is somewhat ambiguous, in that it is unclear whether “the posting” means only the discrete act of physically posting the notice on the designated bulleting boards and sending copy of same to the union officials, or whether it encompasses the full review of internal candidates. As a practical matter, I believe the best analysis is that the internal posting must precede any external recruitment, but that an external posting – but *not* a review of external candidates – may commence before the internal review is complete. That is, after making the required internal postings, the district may publicize a vacancy and receive applications, but it may not review external candidates until it has fully and properly considered all internal candidates.

### ***Was Revels qualified?***

That Kvalo violated the labor agreement by not completing her evaluation of Revels prior to considering external candidates does not automatically nullify her conclusion that

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<sup>3</sup> It is unnecessary to determine whether Revels was the third interviewee (as Kvalo testified) or the fourth (as Revels testified). The critical fact is that Revels interviewed the three external candidates before she had completed her consideration of Revels.

Revels was not qualified. It is to that decision that I now turn. In this part of the analysis, an awareness of the other applicants *is* appropriate, as the objective standard against which to measure Kvalo's action.

The union contends the burdens of proof and persuasion fall on the district; the district contends to the contrary.

I have cited above the agreement's management rights clause. I believe this grant of authority sets the floor for further consideration and establishes the respective burdens of proof and persuasion which the parties bear.

It has been said, "(m)anagement's decision with respect to the award of a posted job among competing bidders is entitled to the presumption of validity," *FECO ENGINEERED SYSTEMS*, 90 LA 1282 (Miller, 1988). "The burden is upon the Union to show that the management judgment was arbitrary." Similarly, it has been held that the determination of whether an applicant met the stated qualifications was "a factual matter to be initially determined by the Company. So long as the selection is not arbitrary, capricious, discriminatory or unreasonable, the Company's decision must stand." *MOUNTAIN STATES TEL. & TEL. CO*, 70 LA 729 (Goodman, 1978), cited in *MARATHON COUNTY*, Dec. No. 59413 (Levitan, 9/2001). I believe these decisions continue to reflect the prevailing attitude among arbitrators on this point.

The union cites a recent award by a WERC colleague, holding that under a "most senior qualified applicant" standard, the senior employee "is presumed qualified unless the employer produces evidence to establish that he or she does not meet a minimum qualification." *CLARK COUNTY*, No. 68482 (Michelstetter, 6/09). The arbitrator explained that parties negotiate such provisions "because they recognize that as to bargaining unit positions, employees tend to develop the necessary qualifications by service in the bargaining unit."

That rationale explains why the *CLARK COUNTY* holding does not apply to the case before me. In *CLARK COUNTY*, there were three employees who had worked many years in the highway department (as a mechanic/welder, center line painter and paver operator, respectively), all of whom applied for the posted position of Highway Department Crew Leader. That is, they were all highway department workers seeking a promotion within the highway department. It is not unreasonable to assume that a highway worker working for many years alongside a Crew Leader would understand the nature of that position and develop some of the skills necessary to perform it. In the instant case, however, while the positions of cook and preschool teaching assistant are both within the same bargaining unit, there is nothing within the job duties of a cook that would provide the training or experience necessary to become qualified as a preschool teaching assistant.

Accordingly, I do not endorse the holding that a bargaining unit member is presumed to be qualified for a position in an area in which she or he has not worked.

Further, the question is not whether Revels met enough terms on the published position description in the abstract; the question is whether Revels was “qualified,” under the terms of the position description, according to the standards of the day. That is, she had to meet the terms on the position description, as those terms are understood in the paraprofessional educational job market of 2010. Thus, a one-year child care services certificate issued in 1982 has little relevance under the “additional training preferred” standard for a teaching assistant position filed in 2010, especially when measured against candidates with relevant educational licensure and college (and advanced) degrees.

The full question, therefore, is, “on the basis of Revels’ application and interview, was Kvalo arbitrary, capricious, discriminatory or unreasonable in determining that Revels was not qualified under the standards of the public school system in Portage, Wisconsin in 2010?”

Kvalo testified that she did not believe Revels was qualified based on her application, and that she included her in the group of interviewees only because of sec. 14.4 and Revels’ membership in the bargaining unit. Being included in the final interviews is tantamount to being certified as eligible for hiring; an applicant who properly wasn’t, isn’t. A determination that Kvalo was justified in her assessment that Revels would not have even been included in the interviews but for the provisions of sec. 14.4 would significantly support the district’s position.

Reviewing the on-line applications, all Kvalo knew about Revels was that she had a high school degree, a one-year certificate in child care services from 1982, that she had worked “a few jobs in that field” but became a cook because “the wages were always so low,” and that she had taught preschool Sunday school for nine years.

In contrast, the on-line applications of the other applicants who were interviewed showed extensive professional and paraprofessional experience. One candidate implemented an early childhood and family literacy program, was an elementary school teacher’s aide and had ten years’ experience administering conservation programs; another candidate had been a substitute teacher’s aide, service provider support staff, daycare provider and clerk; the successful applicant had been a special education aide, vocational trainer of adults with disabilities and a residential landlord.

Based on the respective on-line applications. Kvalo was not acting in an arbitrary, capricious, discriminatory or unreasonable manner when she made the initial determination that Revels was not qualified.

Kvalo identified four specific areas in which she felt Revels fell short of establishing she was qualified – having “above-average interpersonal communication skills,” working “in a positive manner,” displaying initiative, and experience.

Kvalo testified she understood the first cited areas of perceived shortcoming as “exud(ing) love and care and warmth.” The union cites this as another procedural impropriety,

because of the apparent difference between the text of the job qualifications and the way Kvalo applied them.

I appreciate that love and care and warmth are wonderful traits for a preschool paraprofessional to exude. But a job applicant is entitled to know precisely what the necessary qualifications are, and I agree with the union that “exuding love and care and warmth” cannot reasonably be inferred from the qualifications “above-average interpersonal communication skills” and “work in a positive manner with students, staff and community.” Certainly, as an hour listening to most talk radio makes painfully clear, having above-average interpersonal communication skills does not necessarily mean exuding love and care and warmth.

The union is therefore correct that Kvalo internalized interpretations of certain qualifications that did not track precisely with the words on paper,. But the standards themselves – “interpersonal communication skills,” “work in a positive manner” – are inherently subjective, so this textual deviation is unexceptional. For Kvalo to be looking for “love and care and warmth” under those criteria is acceptable in a way that adding an explicit 50-wpm typing test under the “general secretarial ... word processing” standards, or a five-year requirement for “previous experience” would not be.

Nor was Kvalo arbitrary or capricious in holding to that position after the interviews. The union contends that it was Kvalo’s responsibility to elicit information and comprehensive answers from Revels during her interview, even to prompt her if Kvalo felt Revels was failing to mention important and relevant experience; the district disagrees, contending that it was Revels’ responsibility to make the best presentation, to convince Kvalo she was qualified. I agree with the district. It is the employer’s responsibility to provide an interview process that includes intellectually honest panelists asking relevant questions in a non-stressful environment; it is not the employer’s responsibility to help any particular candidate by eliciting information during the interview, especially when it considers “above average interpersonal communication skills” as one of the primary qualifications.

Independent authority appears to agree with the district. According to *Roberts’ Dictionary of Industrial Relations* (Third Ed., BNA 1986, pp. 184-185), employment interviews “should serve as a final check” and are “generally used **after** ...measures of fitness have been obtained and a final decision has to be made ....” (**emphasis** added). Here, of course, the employment interview took place in the context of hiring authority believing that the applicant had *not* provided the requisite measures of fitness for promotion.

Kvalo testified that Revels answered all questions at the interview, but neglected to include important information about her relevant experience. Kvalo testified that Revels did not share any details about her MATC course work, nor did she discuss her work at the Connection Confection, her nursing home work, her work at Demco, that she had taken care of family members since she was young, or her experiences as a cook interacting with students. Kvalo testified that Revels’ interview did not fill the allotted 45 minutes, and that she did not learn about any of these aspects until Revels testified at hearing. While Revels testified

on direct examination that she *had* shared more details than Kvalo later acknowledged, she was not called in rebuttal following Kvalo's testimony.

Some of Revels' experience, while attesting to her general level of responsibility, and comfort interacting with children of various ages, does not have any bearing on the position at hand. Neither babysitting a newborn and an infant, nor supervising high school students working in a nursing home, have meaningful relevance or otherwise qualify someone for being a pre-school teaching assistant. Being the "party person" at Confection Connection may demonstrate that in 1984, Revels had a personality appropriate for engaging and supervising children for a few hours at a birthday party, but that does not necessarily equate to being qualified to be a preschool teaching assistant in 2010. Interacting with school children while serving them food may indicate that Revels is comfortable with that age group, but by itself, does not establish that she has the skills necessary to be a teaching assistant.

Kvalo testified that current experience was necessary because elementary school education had changed substantially in the 28 years since Revels had gotten her child services certificate from M.A.T.C. The union challenges this assertion, noting that it was not supported by any studies, research, or outside analysis. Given Kvalo's career in education, including 13 years as principal of several of the district's elementary schools, I believe her testimony about the nature of contemporary elementary school education is entitled to the presumption of validity.

Revels' nine years as a volunteer Sunday school teacher, over a 22-year period, certainly provided relevant experience, but by itself did not make her qualified to be a daily teacher aide in a public school system.

Along with working in a positive manner, the job posting also listed the ability to display initiative as a qualification. On her application, Revels wrote "I am not looking for a full time position, just something to get me out of the house and earn a little cash." Kvalo testified that Revels said in her interview that she was interested in the position because she was "stale in the kitchen," and that she missed kids. Although she also wrote that the position "sounds interesting to me and would get me back with kids as well as letting me use the gifts and talents that I enjoy," it was not unreasonable or arbitrary for that statement to give Kvalo doubts about Revels' initiative and positive manner.

Moreover, Kvalo's impression of how Revels compared to the other candidates was validated by the other members of the interview panel. Out of a possible 450 total points, the other three candidates' scores averaged 410, or 91% of total points; with a score of 319, Revels earned a 71.

The union also suggests that Kvalo should have appointed Revels, and used the 50-day orientation period to further assess her qualifications, returning her to her former position if she truly proved unqualified. While the district certainly *could* have done that, it did not *have* to do so; as the district rightly rejoins, an orientation period is precisely that – a period in

which to make the new employee familiar with the specific time and manner in which duties are performed, not a period during which the employer is to determine if the employee can perform those duties. As the district also rightly notes, the last sentence of section 14.5 explicitly states that the orientation period “is not a training period.”

Based on Revels’ on-line application and her interview, and those of external candidates, Kavlo was therefore not acting in an arbitrary, capricious, discriminatory or unreasonable manner when she made the initial and subsequent determinations that Revels was not qualified.

Accordingly, on the basis of the collective bargaining agreement, the record evidence, and the arguments of the parties, it is my

### **AWARD**

1. That the Portage Community School District violated sec. 14.4 of the collective bargaining agreement when it reviewed external applications and conducted interviews with external applicants for the Rusch Elementary pre-Kindergarten Teacher Aide vacancy before determining that Mary Jo Revels was not qualified for the position.

2. That the District did not violate Sec. 14.4 when it awarded the position of Rusch Elementary pre-Kindergarten Teacher Aide position to an external applicant rather than Mary Jo Revels.

### **REMEDY**

When filling vacancies under Sec. 14.4, the District must consider and evaluate all bargaining unit applicants, and determine that none are qualified, before reviewing external applications or conducting interviews with external applicants. After posting the vacancy pursuant to Sec 14.1, the District may advertise for the position, receive applications, and perform preliminary screening, but supervisory or managerial employees with hiring authority shall not be made aware of external applicants unless and until the District has properly considered and evaluated all internal applicants, and determined that none are qualified.

Dated at Madison, Wisconsin, this 26th day of August, 2011.

Stuart D. Levitan /s/

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Stuart D. Levitan, Arbitrator

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