

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

BEECHER-DUNBAR-PEMBINE SCHOOL
DISTRICT

and

WISCONSIN COUNCIL 40, AFSCME, AFL-CIO

Case 28
No. 52599
MA-9039

Appearances:

Mr. Robert W. Burns, Godfrey & Kahn, S.C., Attorneys at Law, 333 Main Street, Suite 600, P.O. Box 13067, Green Bay, Wisconsin 54307-3067, on behalf of the District.

Mr. David A. Campshure, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1566 Lynwood Lane, Green Bay, Wisconsin 54311.

ARBITRATION AWARD

According to the terms of the 1993-1995 collective bargaining agreement between the School District of Beecher-Dunbar-Pembine (hereafter District) and Wisconsin Council of County and Municipal Employees, Local 1752-E, AFSCME, AFL-CIO (hereafter Union) the parties jointly requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as impartial arbitrator of a dispute between them regarding the District's hire of two certified teachers to assist the regular classroom teachers teaching the Kindergarten and the fourth grade in the second semester of the 1994-95 school year. The Commission appointed Sharon A. Gallagher to hear and resolve the dispute. A hearing was held at Pembine, Wisconsin on August 21, 1995. A stenographic transcript of the proceedings was made and received by the undersigned on August 28, 1995. The parties submitted their initial and reply briefs to the undersigned by November 21, 1995. The undersigned received a letter from District counsel on November 29, 1995, which corrected an erroneous statement made in the District's initial brief. The record was thereupon closed.

ISSUES:

The parties were unable to stipulate to the issues to be determined in this case. However, the parties agreed that the undersigned could frame the issues based upon the relevant evidence and argument. The Union suggested the following issues for determination:

Did the Employer violate the parties' collective bargaining agreement when it failed to post the vacant Kindergarten Teacher Aide position for the second semester of the 1994-95 school year and when it hired substitute teachers as full-time aides in Kindergarten and Fourth grade for the second semester of the 1994-95 school year, rather than the Grievant? If so, what is the appropriate remedy?

The Employer suggested the following issues:

Did the Employer violate the collective bargaining agreement when it hired additional teachers for the Kindergarten and Fourth grades during the 1994-95 school year? If so, what is the appropriate remedy?

Based upon the relevant evidence and argument in this case, I conclude that the District's issues more reasonably describe the issues which should be determined herein.

RELEVANT CONTRACT PROVISIONS:

Article I - Recognition

The EMPLOYERS (sic) recognize the UNION as the exclusive collective bargaining representative for the unit consisting of all regular full-time and regular part-time custodial and maintenance employees, cooks, clerical employees and bus drivers. The UNION recognizes that all confidential, supervisory, administrative personnel are not included in the UNION.

. . .

Article VII - Job Posting

1. A vacancy shall be defined as a job opening not previously existing in the Table of Organization, or a job opening created by the termination, promotion, or transfer of existing personnel. The EMPLOYER shall notify the UNION of its intent to fill or not fill a vacancy, in writing, within ten (10) working days of the occurrence of any vacancy. The EMPLOYER will post on all UNION bulletin boards notice of the vacancy for a period of

five (5) working days before filling such vacancy. The notice shall contain the starting rate for the position, job

description and hours of work. The EMPLOYER shall consider all qualified employees who make written application for the vacancy in line with their seniority.

2. Any employee filling a job vacancy under the procedure outlined in Section 1 above, will be required to fulfill a thirty (30) day probationary period during which she/he may be returned to his/her former job if the EMPLOYER determines that she/he is unable to satisfactorily perform the job. Within the first thirty (30) days the employee may return to her/his former job at the employee's request.

3. Where no employee with the proper qualifications applies within the time required, the EMPLOYER may fill such opening by recruitment.

4. The Employer's conclusions with regard to employee's qualifications shall be subject to the grievance procedure. . . .

. . .

Article XIX - Managerial Rights

1. During the course of negotiations, which preceded the execution of this Agreement, the parties discussed matters pertaining to custodial and maintenance operations, supervision of the work force and managerial prerogatives. Pursuant to these negotiations the parties agreed that all functions of management to run its operations and to direct its employees, are retained by the School District. This would include scheduling work hours in a manner which is deemed most advantageous to the School District.

2. Nothing contained in this Article shall be construed as divesting an employee of any right granted elsewhere in this Agreement or the Wisconsin Statutes.

3. The Employer agrees that it will exercise the rights enumerated above in a fair and reasonable manner, and further

agrees that the rights contained herein shall not be used for the purpose of undermining the UNION or discriminating against its members.

Article XXII - Subcontracting

The District has the right to subcontract work, provided that no present employee(s) shall be laid off or suffer a reduction of hours as a result of subcontracting or by the use of volunteers and/or teachers.

BACKGROUND:

The Grievant, JoAnn Lee, has been employed by the District as a School Bus Driver for the past 15 years. From February, 1992 to the end of the school year, Lee was hired and employed as a Learning Disability Aide by the District. Also, in November, 1992 to the end of the school year, Lee was employed by the District as a Fourth Grade Teacher Aide. From October 1993 to the end of the school year, Lee was employed by the District as a General Teacher Aide. For the remainder of her tenure at the District, Lee has been employed as a bus driver. Lee has been a Union officer for the past seven years.

Lee stated that she spoke to Elementary School Principal Dan Nylund at various times during the 1993-94 school year and indicated that she was interested in any Teacher Aide openings that might occur. Nylund told Lee that he would let her know if any arose. Sometime in May, 1994, Lee was informed that the District could not tell her that she would have a Teacher Aide position for the following school year (1994-95). The District offered Lee a bus driver contract for the 1994-95 school year. Lee filed and received unemployment compensation (UC) equal to the difference between her former Teacher Aide position and the job that the District offered her for 1994-95, that of full-time bus driver.

During the first semester of the 1994-95 school year, the District experienced overcrowding in various grades including Kindergarten, Fourth grade and Sixth grade. At its regular Board meeting on December 13, 1994 the School District discussed the problem of overcrowding in the District. The minutes of the December 13, 1994 meeting read in relevant part as follows:

. . .

Jan Cheney addressed the Board about the large class size of the 4th and 6th grades. She feels that the education of the students may be suffering because there is (sic) too many students for one teacher. The situation was discussed and Mr. Nylund will present information about the class sizes and possible solutions at the January regular meeting.

. . .

Request for Aide in Kindergarten Room: Mrs. White the Kindergarten teacher has requested additional Aide time due to large enrollment and EEN students. There is (sic) presently 27 Kindergarten students, several of those have special needs. Mr. Vander Zeyden read Mr. Nylund's recommendation that additional aide time be given to the Kindergarten room. Mrs. Patrice Wartick, a parent of a kindergarten student, also addressed the Board requesting that a full time aide be put into the Kindergarten room. Options, as to the best solution, were then discussed by the Board, as well as the best way to hire an additional aide.

Jerilyn Seidel made the motion to peruse (sic) the hiring of a substitute teacher for the second semester, as a Kindergarten room aide, or \$5300, if one can not be found then an aide would be hired through CESA, a certified aide if possible. Second by Ethelyn Tewel, all voting aye, none opposed, motion carried.

The Board of Education conducted a special meeting on January 3, 1995. At this meeting, the Board again discussed large class sizes. The minutes from the January 3rd Board meeting read in relevant part as follows:

. . .

Concerns of the Large Enrollment in Grades 4 & 6: The Board discussed possible solutions to the large enrollments in grades 4 & 6. At the present time the enrollment in grade 6 is 32 and grade 4 is 31. Mr. Nylund suggested as one alternative that a substitute teacher be hired as an aide to be split between the 4th & 6th grade classrooms. The substitute teacher could take small groups into an extra classroom to teach subjects that the students need extra attention in. Both the 4th and 6th grade teachers were present and the Board asked their opinion on this alternative. They felt that this plan was a good solution. The Board asked Mr. Nylund to present to them, a recommendation on Tuesday, January 10, 1995, the date of the next Regular Board meeting. . . .

At the Board's next regular meeting, January 10, 1995, the Board again discussed class size in grades Four and Six. The minutes for that meeting read in relevant part as follows:

Concerns regarding the large enrollment in grades 4 and 6:
Mr. Nylund recommended to the Board that grade 6 be split and a certified aide be hired for grade 4. This was different from the solution discussed previously due to increased enrollment in grade 6.

Michael Osborne made the motion to hire a sixth grade teacher for second semester and a certified substitute teacher as an aide for 4th grade. Second by Dennis Miller, all voting aye, none opposed, motion carried.

Mr. Nylund also brought the Board up to date on next years (sic) 7-12 grade scheduling. Also discussed was (sic) the large classes and the problems that they create when scheduling.

Motion was made by Dennis Miller that the concerns regarding the large classes in 1995-96 be tabled to the Special Meeting to be scheduled later in the meeting. Seconded by Michael Osborne, all voting aye, none opposed, motion carried.

...

On January 11, 1995, District Administrator Vander Zeyden posted a notice "to all staff members" which read as follows:

...

The Board of Education has directed me to post the following positions.

Immediate Opening
6th Grade Teacher - Second Semester Only

Full Time Teachers' Aid
Second Semester Only
Wisconsin Elementary Teaching License Required

We will be splitting the 6th Grade Class and the 4th grade class will

have a full time licensed teacher as an aid for the remainder of the 1994-95 school term.

If you are interested please contact me before noon, January 16, 1995.

. . .

In addition, the District published the following help wanted ads on January 12 through January 15, 1995:

IMMEDIATE OPENING

6th Grade Teacher

Second Semester Only

Wisconsin Elementary Teaching License Required

Send Application, Credentials and Resume'

To: C. Vander Zeyden, District Administrator

P.O. Box 247

Pembine, WI 54156

Apply before January 16, 1995 at noon.

FAX 1-715-324-5282

IMMEDIATE OPENING

FULL TIME TEACHERS' AIDE

Second Semester Only

Wisconsin Elementary Teaching License Required

Send Application, Resume', and License to:

C. Vander Zeyden, District Administrator

P.O. Box 247

Pembine, WI 54156

Apply before January 16, 1995 at noon.

FAX 1-715-324-5282

Grievant Lee stated that the District never posted the Kindergarten "Aide" or the Fourth Grade "Aide" positions for the AFSCME bargaining unit members. Lee stated that there are no licensed teachers in the AFSCME bargaining unit and she admitted that she is not licensed to teach in the State of Wisconsin. The District stipulated that Lee is a fully qualified Teachers' Aide. Lee also stated that she was unaware of any provision in the collective bargaining agreement which controls or attempts to control how many teachers the District can hire for each classroom and the qualifications for employes in the District. 1/ Lee also stated that she believed that the District had

1/ These admissions were corroborated by Union President Richard Burgess.

never before hired a substitute teacher on a full-time basis to work as an aide in a classroom.

Lee stated that during at least one Board meeting, the Board indicated that its reason for hiring substitute teachers rather than Teachers' Aides in the Kindergarten and Fourth grade classes for the second semester of 1994-1995 was, in part, because the substitute teachers' rate would include no fringe benefits and amount to only \$55.00 per day. (Teacher Aides made

considerably more than this at this time, and were entitled to certain fringe benefits). In addition, bargaining unit member Meaney stated that at the January 3, 1995 special Board meeting, the Board discussed the possibility for a Teachers' Aide opening coming up and also indicated that a licensed teacher was willing to work as a Teachers' Aide and was then available to the District. This licensed teacher had been working for the District as a substitute teacher up to that point and was considered a good worker.

District Administrator Vander Zeyden stated that after the start of the 1994-95 school year, the District experienced quite an enrollment increase in the Kindergarten class. That class also contained some children that needed extra assistance, either physically or mentally. Vander Zeyden discussed the situation with Principal Nylund and they agreed that the best possible solution to the overcrowding problem would be to split the Kindergarten students (then between 26 and 28 students) into two classes. However, the District did not have sufficient classroom space available to physically split the Kindergarten class. 2/

At approximately this same time, there were even larger numbers of Fourth grade students who needed classroom services in the District. Again, Vander Zeyden stated that the District did not have the room to physically split the Fourth grade class into two classes. As a result, Vander Zeyden and Nylund agreed that the best possible solution to the overcrowding in the Kindergarten and Fourth grade classes was to hire a second licensed teacher to provide teaching services in each of those classrooms along with the regular classroom teacher then assigned to the classrooms.

Vander Zeyden asserted that the Board never created any aide positions for the Kindergarten and Fourth grade classes in 1994-95. Rather, Vander Zeyden stated that these positions were called "aide" positions simply because the District did not know what else to call them. Vander Zeyden stated that the substitute teachers that were ultimately hired and employed in the Fourth grade and Kindergarten classes as the second teachers in those rooms, (Ms. Papp and Ms. Johnson), were expected to perform teaching services and were employed in a teaching capacity, not as aides. In addition, Vander Zeyden stated that these two individuals were never brought into the teacher aide bargaining unit or paid on the contractual wage schedule for aides, nor were they paid as certified teachers under the teacher labor agreement. No collective bargaining occurred regarding the arrangements that Vander Zeyden made directly with these two individual licensed teachers: They were offered and agreed to be paid as substitute teachers, they received no benefits pursuant to any labor agreement, and they were not covered by any collective bargaining agreement. Both Papp and Johnson were certified teachers who possessed the

2/ Because of parent complaints, the District split the Sixth grade class into two classes and hired a full-time certified teacher to teach the second Sixth grade class. The second Sixth grade class was given the last available space in the District's annex area.

appropriate licenses for the positions they assumed.

Vander Zeyden stated that under State Law the District is required to have a teacher present in each classroom, so that normally the District hires substitute teachers whenever a classroom teacher is absent and teaching services must be performed in the classroom. Vander Zeyden admitted that the Board has never before hired substitute teachers to work full-time in a classroom where a regular full-time teacher is already employed. The District has a pending (October 3, 1995) referendum to build more classroom space. At the start of the 1995-96 school year, the District received ten new students.

Board President Zeigler stated that in its deliberations, the Board took into consideration the fact that the regular classroom teacher in the Kindergarten room had too many regular students as well as students with special needs to take her attention each day. Zeigler stated that the Board knew they needed to have a teacher in the room at all times and that if the regular classroom teacher were absent, this could have posed a legal problem. Zeigler also stated that the Board hoped it could split the Kindergarten class during the 1994-95 school year and that if it did so and already had two certified teachers teaching in the large class, a split of the class into two classes would be easier to accomplish. Zeigler stated that the Board had a teacher then available who could move into the substitute teacher slot in the Kindergarten for the second semester of the 1994-95 school year and the Board ultimately hired this person for that position. Zeigler admitted that the Board did discuss the fact that hiring substitute teachers would save some money, but this monetary aspect was not the most important factor in the Board's decision to hire two substitute teachers to assist the regular classroom teachers in Kindergarten and Fourth grade for the last half of 1994-95.

Zeigler indicated that he did not believe that the Board ever considered that the Board's actions in this case might undermine the AFSCME bargaining unit when the Board decided to employ substitute teachers to assist the regular classroom teachers in Kindergarten and Fourth grade in 1994-95. Zeigler stated that the Board has always willingly bargained with the Union regarding wages, hours and working conditions for the AFSCME bargaining unit and that the Board has never raised the issue whether the Teacher Aides were appropriately included in that bargaining unit, even though the recognition clause does not list them as included. Finally, Zeigler stated that the Board did not layoff or reduce the hours of any AFSCME bargaining unit members due to its decision to hire substitute teachers in the Kindergarten and Fourth grade in 1994-95. Zeigler and Vander Zeyden stated that the Teachers' Union has not grieved or complained regarding the District's use of two substitute teachers in the Kindergarten and Fourth grade during the second semester of 1994-95.

Briefs:

Union:

The Union noted that the Grievant last worked as a Teacher's Aide for the District during

the 1993-94 school year. Due to the fact that the District did not need Grievant Lee's services as a Teacher's Aide for the 1994-95 school year, Lee was allowed (without a contest from the District) to apply for and receive unemployment compensation (UC) beginning in May, 1994. Lee continued to receive UC benefits during the 1994-95 school year because of the difference in pay between her former aide job and her then-current bus driver job. Thus, the Union argued that despite the District's employment of Lee as a bus driver in 1994-95, the affect of its actions was to layoff Lee as an aide and only later employ her (as it had done previously) as a bus driver. In these circumstances, the Union urged, Lee had been laid off/reduced in hours as an aide, making the District's alleged decision to subcontract aide work to substitute teachers, violative of the Support Staff labor agreement.

The Union argued that the District was not privileged by the labor agreement or the law to unilaterally establish teacher certification as a qualification for a Teacher Aide position. In the Union's view, such a move was unreasonable and abused the District's Management Rights under the contract, in the Union's view. The Union contended that the two positions created by the Board of Education were actually aide positions, not teacher positions as the District claimed, because the employes hired were not made a part of the teacher bargaining unit and because the District consistently referred to these positions as aide positions. In addition, the Union observed that the District offered no evidence to show that the substitute teachers it hired for the Fourth grade and Kindergarten actually performed duties beyond those of Teacher Aides.

The Union urged that Grievant Lee suffered a reduction in pay of \$34.29 per day, due to her having been passed over for an aide position in 1994-95. The Union contended that the District's actions regarding Lee were arbitrary and capricious, and that the District hired two substitute teachers for the open aide positions in order to avoid having to pay the higher contractual pay rates and benefits required, had the District hired either Teacher Aides or full-time teachers, implying that the District had no reasonable motive for hiring substitute teachers in these circumstances.

Therefore, the Union sought an award sustaining the grievance, ordering the District to cease requiring teacher licenses for aide positions and follow the posting procedures of the contract, and an Order making Lee whole for the period involved, at the Teacher Aide pay rate (\$8.90 per hour). 3/

District:

The District urged that it did not violate the labor contract because the vacancies involved

3/ The Union failed to mention whether it believed any offset was appropriate for Lee's receipt of unemployment compensation benefits as well as the bus driver pay during 1994-95.

here were for teachers, not aides. The District observed that the Teacher labor contract cannot be applied to the Grievant or any other Support Staff unit employees. The District also asserted that the Support Staff labor contract does not limit the District's right to determine qualifications, to decide whether a vacancy exists, and whether and when it should be filled. The District noted that the two individuals hired for the Kindergarten and Fourth grade openings were not members of the Union's bargaining unit and that even if these positions were considered aide positions, the District had the right to set the teaching certificate qualification for these positions. The District contended that its decision to require teacher licenses for the two disputed openings was reasonable, based on the lack of classroom space, the possibility that the Kindergarten class would have to be split, and the overcrowding problem in the District which the Board of Education faced in 1994.

In the District's view, the evidence supported the reasonableness of the District's decision to require successful applicants for the openings to possess teaching certificates. The District's decision to seek certified teachers removed the positions from the support staff unit, in the District's opinion, so that the District was not obliged to post the openings in the Support Staff unit. The District asserted that it hired the most qualified individuals for the positions who could provide the best possible education to the students, given the circumstances. On the other hand, the District asserted Grievant Lee was not qualified for either of the positions because she is not certified or licensed to teach.

In addition, the District urged that Article XXII (the subcontracting clause of the effective labor agreement) also allowed it to subcontract the disputed positions, assuming it is concluded that these positions were aide positions. In this regard, the District noted that Lee admitted she was never laid off for the 1994-95 school year and that her work hours were never reduced in 1994-95 as a result of the Board's decision to hire substitute teachers to assist in the Kindergarten and Fourth grade.

Finally, the District argued that the fact that the District had never before hired substitute teachers to assist classroom teachers does not mean a past practice arose that the District could not take this approach in the future. The District observed that such a course of conduct cannot rise to the level of a past practice unless mutuality and awareness of the practice are present. As these qualities were absent from the District's prior choices not to utilize two teachers in a classroom, the District contended that no past practice exists and that therefore, the District had no obligation to bargain regarding hiring substitute teachers in this case. Therefore, the District urged that the grievance should be dismissed in its entirety.

Reply Briefs:

Union:

The Union pointed out that despite assertions in the District's initial brief that the District had in fact filled Kindergarten and Fourth grade teacher positions, the District consistently referred

to the two positions as "Aide" positions prior to the filing of the grievance. Changing the positions' titles, the Union asserted, the District did as a matter of simple convenience and the District continued to conveniently change the titles of the disputed positions at the hearing and thereafter by attempting to call the positions "Second Teacher" or "Substitute Teacher" positions. The Union argued that the District should not be able to have it any way it wishes in this case -- that either the positions were Teacher positions or Teacher Aide positions. In the Union's view, the positions were not Substitute Teacher positions, because the individuals hired were never intended to take the place or function of the regularly assigned bargaining unit classroom teachers, as substitute teachers normally do.

The Union contended that its challenge of the District's determination of the applicants' ability to fill the disputed positions was based on the Union's view that the District's actions were arbitrary, capricious and discriminatory, clearly wrong and/or made in bad faith. On this point, the Union asserted that the fear of losing potential replacements for retiring Teachers, the higher cost of employing Teacher Aides, and an apparent desire to thwart the Teacher and Support Staff units were arbitrary and capricious reasons and amounted to bad faith conduct.

District:

The District noted that the Union has acknowledged the District's right to set qualifications for positions and the District denied that it "abused" its Management Rights in the instant case. The District believed that it proved that its problems, including limited physical space, overcrowding in the classrooms involved, the possibility of splitting classes in the future, and parental concerns regarding the quality of education in the classrooms, reasonably led the Board of Education to its decision to require Wisconsin Teaching Certificates for the positions created. The District further noted that there is no contractual limitation regarding the prerequisites or qualifications the Board can require for an opening.

The District also argued that it hired Papp and Johnson and paid them as Substitute Teachers to fill the disputed positions. The Teacher's Union, knowing the facts, chose not to file a grievance contesting whether these individuals should have been hired and paid as regular full-time bargaining unit Teachers under that Union's labor agreement. The District therefore urged that the Support Staff Union has no right or authority to press the claims of the Teachers' Union here.

In addition, the District asserted that it neither violated the subcontracting clause of the effective labor agreement nor did it violate the Grievant's recall rights. In this regard, the District urged that even if the first vacant position were considered an Aide position, the Grievant was unqualified for that position because she did not possess a Teacher's license. Thus, the Grievant's recall rights under the contract were not violated in this case. In regard to the issue of the subcontracting clause, the District observed that that clause requires a finding that a present employe or employes were laid off or reduced in hours "as a result of subcontracting or by the use of . . . teachers" before the District can be found to have violated this portion of the agreement.

On this point, the District noted that the Grievant admitted that her bus driver work schedule had been set in May, 1994; that she collected unemployment compensation in 1994 as a result of the difference in wages between her 1993-94 Teacher Aide position and her 1994-95 bus driver position; and that during the 1994-95 school year, she was neither laid off nor reduced in hours by the District. The District noted that its decision to hire additional certified teachers for the Kindergarten and Fourth grades came long after the Grievant's schedule had been set by the District, and no "present employe" (including the Grievant) employed at the time of the District's alleged subcontracting decision was reduced or laid off as a result of the District's decision.

The District asserted that the cases cited in the Union's initial brief are not relevant to this grievance, as they concerned the mandatory or permissive status of subcontracting proposals. This topic, the District observed, is already covered by the parties' labor contract, and in any event, the disputed work performed and paid for was teacher work (not aide work), a subject beyond the reach of the effective labor contract. The District cited several cases to support its positions. The District contended that teaching work is not covered by the instant contract; that such work has not been performed by Support unit employes; that the work required was substantially different in character from Support unit work; and that in any event the contract does not prohibit the assigning of bargaining unit work outside the unit if it is done in good faith and for good reasons. Finally, the District urged that it did not act in an arbitrary or capricious manner when it made its hiring decisions herein; that it had no ulterior motives but that it merely considered all the options and made its decisions, putting the best interest of the students and the public first.

Discussion:

It is significant that the effective labor contract is silent regarding how and by whom the qualifications for vacancies must be set, and when and whether a vacancy must be filled. Article XIX also states that ". . . all functions of management to run its operations and to direct its employees, are retained by the School District." In these circumstances, it appears that the District has retained to itself the rights to determine qualifications, to decide whether a vacancy has occurred which must be filled and when to fill a vacancy.

At the base of this dispute between the parties lies the District's use of the term "Teacher Aide" at the same time it required successful applicants for the positions in dispute to possess valid Wisconsin Teacher licenses. Thus, the real question in this case is what type of work was actually expected, required of, and done by Ms. Papp and Ms. Johnson, the successful applicants for the positions. On this point, the record contains only the unrefuted statements of District witnesses that the Board of Education expected, required, and received teacher work from Papp and Johnson, both of whom possessed the teacher licenses required by the Board.

Given the fact that regular full-time senior teachers (members of the Teacher bargaining unit) were previously assigned to work in both the Kindergarten and the Fourth grade classes at the time the "Aide" employes were hired, it is little wonder that there was uncertainty as to what

title should be given to those hired for the positions involved in this case. However, the record is clear that Ms. Papp and Ms. Johnson were hired after direct negotiations between them and the District and that they agreed to be paid as substitute teachers. It is also clear that Papp and Johnson were never included in either the Support Staff unit or the Teacher bargaining unit. In addition, the record demonstrates that the full-time teachers originally assigned to the Kindergarten and Fourth grades were well aware of and were in favor of the hiring of these two teachers to assist them in their classrooms. It is also undisputed that no grievance was ever filed by the Teachers' Union contesting the proper pay status and/or job titles of Ms. Johnson and Ms. Papp. Finally, I note that the record in this case shows that the use of two certified teachers in the Kindergarten and Fourth grades was temporary, covering only a part of the second semester of the 1994-95 school year, and that the District had never before utilized two certified teachers in one classroom.

The evidence also showed that Teacher Aides have never performed licensed Teacher duties in the District. In addition, the evidence showed that the District had legitimate concerns regarding overcrowding in the Kindergarten and Fourth grade, the lack of physical space for additional classes in the District, and teacher and parental concerns regarding the quality of education in the Kindergarten and Fourth grade after the start of the 1994-95 school year. The Board discussed these problems in open session at several Board meetings during December, 1994 and January, 1995 and only after the Board of Education made its decision to seek two certified teachers to assist the assigned full-time teachers in the Kindergarten and Fourth grades, did the District post and/or publish ads for the available positions.

In all of these circumstances, the record facts failed to prove that the work involved in this case was actually teacher aide work. Given this fact, the question then arises whether the Board acted in an arbitrary, capricious or discriminatory manner or whether the District acted in bad faith or was clearly wrong in its decisions regarding what qualifications it should seek in successful applicants for the disputed positions. On this point, the District proffered convincing evidence that it faced unusual overcrowding problems in 1994-95 as well as a lack of physical space in the District. The District also proved that it had received both parental and teacher complaints regarding the quality of education in the Kindergarten and Fourth grade. Therefore, I find, based on this record, that the District's reasons for hiring certified teachers to assist in these classes during the second semester of the 1994-95 school year are legitimate business reasons and were not arbitrary, capricious or clearly wrong.

No evidence was offered to support the Union's contentions that the District's actions herein were discriminatory or that they demonstrated an intent to undermine the AFSCME unit. In my opinion, it was up to the Teachers' union, not the Support Staff union, to question, complain or object to the use of substitute teachers in the Kindergarten and Fourth grade during the second semester of the 1994-95 school year. The record herein undisputedly showed that the Teachers' union never questioned, complained or objected to the District's actions herein. Finally,

the Union failed to proffer any evidence that the District otherwise acted in bad faith in hiring Papp and Johnson. 4/

4/ The fact that the District stood to save money in hiring substitute teachers to perform the teaching functions involved, rather than regular full-time teachers for these positions does not distract from the District's proven legitimate business reasons.

Based upon the above evidence and analysis and the specific circumstances proved in this case, I issue the following

AWARD

The Employer did not violate the collective bargaining agreement when it hired additional teachers for the Kindergarten and Fourth grades during the 1994-95 school year. Therefore, the grievance is denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin this 29th day of December, 1995.

By Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator