IN THE MATTER OF: **AN ARBITRATION**

BETWEEN:

EVERGREEN SCHOOL DIVISION,
(herein "the Division"),

- and –

C.U.P.E. LOCAL 3164,
(herein "the Union").

Re:	**Teachers' Assistants**
Arbitrator:	**Donald G. Baizley, Q.C.**
Appearances:	
For the Division:	**Rob Simpson**
for the Union	**Robb Tonn**

AWARD

This arbitration arises as a result of five grievances. Three are policy grievances filed by the Union, and two are grievances brought on behalf of Crystal Sigurdson and Kathy Grimolfson, teachers' assistants employed by the Division at Riverton School. All grievances were heard together by agreement.

A hearing was held April 11, 1995, and November 6, 1995. The parties agreed at the outset that I had jurisdiction to decide the matters in issue.

The grievances arise because of changes made by the Division with respect to the manner in which teaching assistants are employed and paid. The policy grievances claim that the Division created two separate positions where there had previously been one; that the Division failed to post the positions; and then refused to allow individuals to bump into these positions, all of which violate the Collective Agreement. The individual grievances relate to the Division's refusal to allow the Grievors to bump into the positions.

The Division has employed both regular classroom and special needs teachers' assistants for some years. They are ten month employees who are laid off in June and rehired in September. Job descriptions for the positions were filed as Exhibits 10 and 11 respectively. The responsibilities and duties for the positions are the same, save and except that special needs assistants have the additional responsibility of providing assistance for handicapped students, such as assisting with dressing, feeding, use of washroom facilities, mobility, and providing interpretation, if necessary. Until 1994, teachers' assistants were all paid at the special needs rate.

In the spring of 1993, a pay equity assessment was conducted. Following the assessment, the pay differential between the two classifications was increased from $0.32 to $1.59 per hour. At the same time, the Province reduced the Division's funding by 4.8%, which required the Division to eliminate some $600,000.00 from its 1994-1995 budget.

In order to achieve the required reduction in costs, a decision was made to reduce regular hours for teachers' assistants from six to five and half hours per day. This was done as an alternative to eliminating the same total number of hours from one position. Brian Wallace, the principal of Riverton School, testified that he felt this was preferable, as a reduction at one spot would have the potential to hurt students. At the same time, and in light of the pay equity assessment, Wallace also reviewed job assignments for all six teachers' assistants to ensure the positions were properly classified. Wallace indicated that up until this point, there had been little analysis of the work that was being done by teaches' assistants, in terms of the distinction between special needs and regular classroom duties. It appears that the pay differential was so small that the Division never considered the issue to be important.

Wallace concluded that with one exception, teachers' assistants could perform the required special need duties in just three hours of each day. As a result he decided to split the positions into part special needs and part regular classroom.

The teachers assistants affected were notified that commencing September 1995, the regular workday for teachers' assistants would be five and half-hours per day. Further, except as noted, the positions would be classified as three hours' special needs, and two and a half hours' regular classroom. Employees were also advised of their right to displace more junior employees.

Crystal Sigurdson has been employed as a teachers' assistant since 1980. She is number 30 on the seniority list. Prior to September 1994, her position was classified as special needs. By letter dated June 13, 1994 (Exhibit 18), she was advised that for the 1994/95 school year, this position would be classified as four hours special needs and one and a half hours regular classroom.

Sigurdson notified the Division that she wished to displace the special needs portion of two positions, one of which was held by the other Grievor, Kathy Grimolfson. Grimolfson then made a request to displace the special needs portion of a position held by a more junior employee. The Division refused both requests on the basis that Article 12.01 of the Collective Agreement allows an employee to displace another member of the bargaining unit from a position, not portions of a position.

The Union advances several arguments. It argues that the change in the rate of pay for that portion of the work now designated as regular classroom assistant amounts to a reclassification of the position. As there has been no change in job duties or functions, a reclassification is inappropriate, and a breach of the Collective Agreement. Further, the Union maintains that the work done during the regular classroom portion of the position is really special needs work, and that the regular classroom work is only performed intermittently.

In the alternative, the Union argues that the Division has, in effect, created two positions, where formerly there was one, by dividing each position into regular classroom and special needs portions. Pursuant to Article 6.03 of the Collective Agreement, the Division is required to negotiate the rate of pay and classification with the Union, which did not happen. In any event, employees should be entitled to exercise their seniority rights to bump into the higher paying special needs positions. Lastly, says the Union, the reduction in hours was a layoff and any layoff must be done according to seniority. Thus, the total number of hours should have been eliminated from the person who had the least seniority, rather than reducing the workday of all teacher' assistants by half an hour.

The Division acknowledges that it has created a position that is part one classification, and part another. It also agrees the reduction in hours amounts to a layoff. In both instances the Division maintains that its actions are a legitimate exercise of management rights. As to the issue of reclassification, the Division admits that the work has not changed. It argues, however, that it was as a result of oversight that

employees were being paid at a special needs rate, rather than the regular classroom rate. This change simply corrected the situation.

The crux of the matter is whether the Division has the right to create a "hybrid" position that is classified part special needs and part regular classroom.

I find I agree with the Division in this matter. There are some practical considerations which must be kept in mind in this situation. This is a rural school division with schools located in disparate locations within its boundaries. Seniority rights could and would be exercised on a division wide basis. The Division was faced with a significant reduction in resources – made worse by the increase in differential between the two classifications. Wallace's objective was to find the best solution in the circumstances, keeping in mind the primary goal of how to best serve the students. I am mindful of Wallace's conclusion that the changes made to the schedule, which would result in two assistants working with a child instead of one, in the end was positive. The ability to respond to changing circumstances is essential to any employer, and in this instance, is recognized by Article 3.03 the Collective Agreement between the parties:

> 3.03 The Union recognizes the right of the Division to determine matters in respect to employment. subject to the provisions of this Agreement, the operation of the schools and direction of the work force; including the right to hire, suspend or discharge for just cause; to assign to jobs; to classify; to increase; to decrease or reorganize the work force; and to determine the services necessary for the most efficient operation of the schools, is clearly a function of management and is vested exclusively in the Division or its agent.

In my view, the changes affected by the Division fall squarely within this Article.

As was stated by Arbitrator Shime in Re Ontario Hydro and CUPE, Local 1000 (1983), 11 L.A.C. (4th) 404:

> Generally, an employer has a presumptive right to make changes in the organization of its workforce and the employer has wide powers of initiative to be able to respond to change: *Re Windsor Public Utilities Com'n and Int'l Brotherhood of Electrical Workers, Local 911 (1994), 7 L.A.C. (2d) 380 (Adams); Re U.S.W. and Algoma Steel Corp*. (1986), 19 L.A.C. 236 (Weiler). The rights and obligations of the employer when changing work assignments or shifting functions are set out in the cases cited and need not be repeated here. What is significant is that where an employer initiates change and assigns the work to an employee, the employee is required to perform the assigned tasks. A refusal may subject an employee to discipline – hence the rule – work now and grieve later. While the employer has the right to make changes there is no reason why the employer should not pay where changes have been made and some payment is warranted. It is too narrow and inflexible a position to require an employee to bring himself or herself squarely within a higher-rated classification once the employee can demonstrate that he or she has performed a set of tasks extending beyond (but not merely incidental to) his or her normal classification. The employer

> should not be entitled to a benefit of work which is clearly beyond the lower-rated classification. In those instances, we believe some form of payment should be made.
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> A board of arbitration has a broad power to fashion remedies in order to bring about a final and binding result: *Re Samual Cooper & Co. Ltd. and Int'l Ladies Garment Workers' Union et al* (1973), 35 D.L.R. (3d) 501, [1973] 2 O.R. 841, 73 C.L.L.C. para. 14, 184 (Ont. Div. Ct). In this case, the employer assigned work that was not strictly provided for in the job description and thus in the collective agreement and which the grievors were obliged to perform. The assignment was the employer's right under the collective agreement; however, when administering the collective agreement in this manner the employer should be required to properly compensate the employees and failure to do so may be characterized as an abuse or violation of managements right in administering the collective agreement and, more particularly, the job classification and wage schedule of the agreement.

This leads to the next issue. Here, teachers' assistants are performing work that is part one classification and part another. Just as it would be inequitable and unfair to pay employees at a lower rate when they perform work of a higher classification, the Division should not be required to pay employees at a higher classification when the work they perform is that of a lower classification. I am satisfied that with the changes made to assignments and schedules, the classifications accurately reflect the work that is being done.

This is also not a case where there has been a reclassification. Whether the Division was paying teachers' assistants at special needs through inadvertence, or simply because the relative cost of doing so was not a concern, the fact is that it was not because it considered the work to be special needs work. Once the pay differential changed, and the issue became of significance, the Division did what it was entitled to do – pay employees at the appropriate rate for the work performed.

I also do not accept the argument that this "hybrid" position is a new position as contemplated by Article 6.03 of the Collective Agreement. Rather, this is simply a position which is part one classification, and part another. No new duties have been assigned. The parties have already decided on the appropriate pay, and classification for these duties.

As to the manner in which the layoff was effected – that is through the half hour reduction for all teachers' assistants – Article 13 of the Collective Agreement provides that the working hours of teachers' assistant shall be up to six hours per day, and may be varied by the Division upon 2 weeks notice. In responding to financial constraints, the Division concluded that it would be in the best interests of the students to make the adjustments in the manner in which it did. This was reasonable and consistent with the Collective Agreement.

In light of the foregoing, the grievances are dismissed.

DATED this 24th day of January 1996.

Donald G. Baizley, Q.C.
Arbitrator