BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between WEST DE PERE EDUCATION ASSOCIATION and WEST DE PERE SCHOOL DISTRICT	Association grievance re Robert Wolslegel dated November 2, 1989 Case 26 No. 43466 MA-55981

Appearances:

Mr. Ronald J. Bacon, Executive Director, United Northeast Educators, 1136 North Military Avenue, Green Bay, WI 54303, appearing on behalf of the Association.

Mr. Dennis W. Rader, Mulcahy & Wherry, S.C., Attorneys-at-Law,, 414 East Walnut Street (Suite 201), PO Box 1103, Green Bay, WI 54305-1103, appearing on behalf of the District.

ARBITRATION AWARD

The Wisconsin Employment Relations Commission designated the undersigned Arbitrator to hear and determine a dispute concerning the above-noted grievance arising pursuant to the grievance arbitration provisions of the 1987-89 collective bargaining agreement (herein Agreement). (While the Agreement does not nominally cover the date on which the above-noted grievance was filed, the parties have treated the dispute in all respects as governed by the terms of the Agreement, and the Arbitrator is doing so for that reason, as well.)

The parties presented their evidence to the Arbitrator at a hearing held at the District offices in West De Pere, Wisconsin on April 26, 1990. The hearing was transcribed. Briefs and reply briefs were exchanged, the last exchange occurring on June 19, 1990, marking the close of the record.

ISSUES

At the hearing, the parties authorized the Arbitrator to frame the issues in the matter as follows:

1. Was the grievance timely filed?

2. If so, did the District violate the collective bargaining agreement by not paying Grievant Wolslegel, a part-time teacher, an additional 1/7th of a contract for department head duties for the 1988-89 year and that portion of the 1989-90 year that he served as a department head?

3. If so, what is the appropriate remedy?

PORTIONS OF THE AGREEMENT

ARTICLE VII - GRIEVANCE PROCEDURE

A. Definition: A grievance shall be defined as a claim by the bargaining unit representative of a teacher or teachers regarding the interpretation or application of hours, wages and working conditions as stated by any provision of this agreement.

B. The procedure for adjustment of grievance:

1. An aggrieved party shall attempt to resolve the grievance by discussion with the principal within twenty (20) days of the event or act upon which the grievance is based.

. . .

4. The grievants) may immediately appeal to the next step if no written answer is received within the time limits set out for any step.

. . .

5. The arbitrator will be without power or authority to make any decision which requires the commission of any act prohibited by law or which is in violation of the terms of this Agreement. The decision of the arbitrator will be final and binding on the parties. . . . It is understood that the function of the arbitrator shall be to interpret and apply specific terms of this Agreement and shall have no authority to add to, to subtract from, or modify this Agreement in any way.

. . .

8. Grievances not complying with the mandated time limits shall be waived.

. . .

ARTICLE XIV - TEACHING HOURS

A. All teachers will be granted a thirty (30) minute duty free lunch period.

B. The- work day will consist of seven and three quarters (7 3/4) consecutive hours including the thirty (30) minute duty free lunch.

. . .

ARTICLE XV - ASSIGNMENTS, TRANSFERS, REASSIGNMENTS, AND STAFF REDUCTION

A. Assignments

. . .

2. Teaching Conditions

a. The Board and the Administration will attempt to limit the number of classes in grades 7 through 12 to five (5) fifty five minute classes per day, or the equivalent time, plus one preparation period and one study hall or duty period. (Duty period means within one particular period; not after school) A teacher with five (5) preparations will not be assigned a duty period.

APPENDIX B
EXTRA DUTY CO-CURRICULAR SCHEDULE

. . .

Department Chairperson	$57.25 per 5 hours taught by teachers (7-12) in department (minimum $100.00) A

> department chairperson will not be assigned a duty period if there are ten or more hour [sic] taught within that department. A chairperson will not be assigned to departments with four or less hours taught within that department.

FACTUAL BACKGROUND

Robert Wolslegel is a long service industrial arts teacher in the District. For seventeen years preceding 1988-89, he worked 100% of a full teaching schedule. As such, his teaching hours were as in Art. XIV and his workload was that prescribed in predecessor provisions paralleling Agreement XV. 2.A., to wit, five 55-minute classes, plus one preparation period, and one duty period (typically a study hall or hall supervision).

Beginning in 1988-89, he was reduced to 42.7% of a full teaching schedule due to a partial layoff. As has always been true of every part-time teacher, Wolslegel was not assigned a duty period once his load was reduced to part-time. The evidence establishes that part-time teachers are paid for the number of classes taught and for a prorated amount of preparation time, but they have been required to be on school premises only during the times they are actually teaching classes.

In the year preceding the layoff, Wolslegel served as department chairperson in the Tech Ed department. At all material times, there have been ten or more class hours taught in that department. Accordingly, in 1987-88, Wolslegel was paid an APPENDIX B cash stipend based on the number of classes taught in the department and was relieved of the duty period he would otherwise have worked as a part of his full-time workload for that school year.

He remained the chairperson of his department after being reduced to part-time as of the beginning of 1988-89. At the time of the reduction in his workload, Wolslegel discussed with the principal, Robert Hoerning ways his 42.7% figure could be increased. Wolslegel commented that as department chairperson in a department with ten or more class hours, his load should be increased to include an additional 1/7 to represent the duty period that he is entitled to be relieved of. The principal stated that as a part-time employe his work load did not include a duty period such that he did not qualify for a paid 1/7 of a schedule for serving as department chairperson. Wolslegel did not grieve or question the principal's assertion in that regard and was neither scheduled for nor paid for a period associated with his serving as department chairperson. Wolslegel's treatment in that regard is consistent in all respects with

the only other example of record in which a part-time teacher served as a department chairperson of a department with ten or more class hours, that of Carol Duffin in the Home Economics department in the 1983-84 school year. No grievance was filed concerning the District's compensation of Duffin as department chairperson in 1983-84.

At all material times, the District has published and distributed to each member of the bargaining unit handbooks identifying the chairperson of each department and the schedules of each member of the high school faculty. Department Chairpersons who were being relieved of a duty period had that period labeled "Dept. Head" on their schedule. Thus, Wolslegel in 1987-88 (and presumably Duffin in 1982-83) had one period per day so identified. However, in their respective subsequent years, when they served as department chairpersons when their work load was less than fulltime, they remained listed as the chairpersons of their department in the handbooks but their schedules did not contain any period during their shortened work day identified either as "dept. head" or as a duty period for study hall, hall supervision or the like.

Wolslegel resigned from his position as Tech Ed department chairperson effective October 23, 1989. During the somewhat strained discussions surrounding that resignation, Association grievance committee members realized for the first time that Wolslegel was not then being provided a duty free period for department chairperson duties and had not been since the beginning of the 1988-89 school year. Shortly thereafter, on November 2, 1989, the instant grievance was submitted in writing bearing the signature of Association grievance committee chairperson Barbara Jukowski on behalf of the Association. In that grievance, the Association claimed that the District's failure to provide Wolslegel with a paid, duty free period from the beginning of the 1988-89 school year until the date of Wolslegel's resignation from the department chairpersonship in October of 1989 violated past practice and Agreement Art. XIV and APPENDIX B such that the District should make the Wolslegel whole for the monies he would have been paid had he been paid all compensation due when acting as department chairperson.

It is undisputed that the grievance was processed in accordance with contractual timelines (including one mutually agreed extension thereof confirmed in writing by the District) after it was initiated in November of 1989. However, it is disputed whether and when the District raised the issue of untimeliness of the initiation of the grievance. Wolslegel and Jurkowski testified that at no time did any District representative raise the issue of timeliness of grievances initiation during the processing of the grievance through the grievance procedure steps. Principal Hoerning testified that in discussions with Wolslegel and Jurkowski he referred to the fact that the grievance involved an event occurring a long time previous and countered the Association contention that it only learned of it in the recent past by referring to the fact that all of the relevant facts were contained in handbooks and schedules distributed to all bargaining unit members at the beginning of the 1988-89 and 1989-90 school years. District Superintendent Randy Freese also testified that he raised the timeliness of grievance

initiation in a telephone conversation that he had with Ronald Bacon, the Association's UniServ Director, during the pendency of the grievance. Bacon did not testify. The District's written responses to the grievance deny the grievance without specifying the reason or reasons for denying the grievance, and without making any express reference to untimeliness or to procedural arbitrability of the grievance.

POSITION OF THE ASSOCIATION

Wolslegel did not pursue this matter immediately because he was relying on principal Hoerning's statement to him that he was not eligible for that compensation. Contrary to District contentions, Wolslegel did not know about the District's treatment of Carol Duffin in 1983-84 until after the grievance was filed. The matter first came to the Association's attention when Wolslegel was told by the principal that he could not resign immediately as department chairperson and Wolslegel inquired about about that with the Association officers. Upon learning the facts constituting the claim set forth in the grievance in the course of its investigation of the resignation issue, the Association then promptly initiated the grievance. The Association has not and need not scour every document given out to every teacher to be sure no Agreement violation has occurred; rather the Association operates on the principle that it will pursue contract violations when they are brought to the Association's attention by an employe in the bargaining unit. Because neither Wolslegel nor the Association have purposely ignored or abused the contractual time limits in the circumstances, and because the District did not make any reference to untimeliness in its written grievance responses, the Arbitrator should resolve any doubts about procedural arbitrability in favor of reaching the merits.

On the merits, the evidence shows that the District has a longstanding practice of providing a duty free period to all department chairpersons with ten or more hours being taught in his/her department. In light of the regular schedule of 5 classes taught one preparation period and one duty period, the District's practice has had the effect of providing the chairperson receiving the duty free period with 1/7 of their contract as compensation for serving as department chairperson. Wolslegel's part-time status is not a basis for excepting him from that practice. He was expected to and did perform all of the department chairperson activities, and he is entitled to the 1/7 of contract in addition to the APPENDIX B stipend that full-time teachers receive. The District's reliance on a single instance in which the District failed to pay 1/7 of contract salary to Carol Duffin in 1983-84 is misplaced, since a single incident does not establish a precedent or a practice, especially when compared to the longstanding tradition of giving chairpersons in sufficiently large departments a full 1/7 of their contract to conduct department chairperson activity. The District's contention that Wolslegel could have resigned at will earlier if dissatisfied with the compensation he was receiving as department chairperson is factually inaccurate.

The Arbitrator should therefore fashion an equitable remedy to make whole Wolslegel for the loss of 1/7 contract for the period of time from the beginning of 1988-89 through

October 23, 1989, and further to protect similarly situated part-time employes serving as department chairpersons in the future from similar violations on the District's part.

POSITION OF THE DISTRICT

The grievance was not timely filed. Agreement VII.B.1. clearly and unequivocally requires that an aggrieved party orally initiate a grievance with the principal ". . . within twenty (20) days of the event or act upon which the grievance is based." The event or act on which the instant grievance is based is the District's failure to pay Wolslegel 1/7 of his contract as part of his compensation for serving as department chairperson. The District's initial failure in that regard preceded by more than a year the date on which the grievance was in fact initiated. Wolslegel's failure to grieve or to bring the matter to the attention of the Association promptly--despite his knowledge of how he was being compensating him and how the District had treated similarly situated part-time employe Carol Duffin in 1983-84--renders the instant grievance initiation untimely. The contractual time limit for grievance initiation is pegged to the event or act on which the grievance is based, not on when the aggrieved party knew or should have known of that event or act. Furthermore, the Association cannot be permitted to defeat the agreed-upon time limit by claiming that it had no knowledge of the act or event even though the affected employe had clear knowledge thereof. Even if knowledge rather than event were relevant, the Association is chargeable with knowledge of the fact that the District was not crediting Wolslegel with 1/7 of a contract for department chairperson work since the handbook identifying department chairpersons and the set of all teachers' schedules was issued to all bargaining unit personnel near the outset of the 1988-89 and 1989-90 school years put everyone in the unit (Association officers included) on notice that Wolslegel was a department chair of a ten-hour-or-more department and that he was not being assigned either a duty period or a period designated for department chairperson activities.

The District did not waive the untimely filing of the grievance. Agreement VII.B.8. shows the parties have agreed that time is of the essence and that untimely grievances are deemed waived. The parties' seriousness about timely grievance handling is further underscored by the fact that the extension of time at a subsequent step had been reduced to writing. There is no written or oral agreement by the District waiving the contractual time limit for initiation. On the contrary both the principal and the superintendent testified that they orally noted the untimeliness of the grievance during their respective processing of the matter at their levels. The District representatives' written responses to the grievance were broadly based, such that they fairly constitute denial of the grievance not only on its merits but also on procedural untimeliness grounds. Moreover, the appropriate arbitral law holds that "[t]he right to contest arbitrability before the arbitrator is not waived merely by failing to raise the issue of arbitrability until the arbitration hearing." Citing, Elkouri and Elkouri, How Arbitration Works, 220, (BNA, 4 ed., 1985).

Because the grievance is therefore untimely under the clear and unambiguous language

of the Agreement, the Arbitrator is foreclosed by Agreement VII.B.l., 5. and 8. from considering the merits of the dispute.

If the merits are reached, the grievance must nonetheless be denied. The only monetary payment for serving as department chairperson is the cash stipend provided for in APPENDIX B. The second provision of APPENDIX B states that the District cannot assign certain department chairpersons (Wolslegel included) a duty period. The District did not assign Wolslegel a duty period, consistent with its well-established and longstanding practice of not assigning a duty period to any part-time employe. The Association, in effect, is asking the District to violate that provision by assigning a paid duty period to Wolslegel so that he can get paid another 1/7 of a contract. The purpose of that language is to allow full-time employes to find time during the full schedule to perform department chairperson work. Neither APPENDIX B nor any part of the Agreement provides extra pay over and above their regular contract salary plus APPENDIX B cash stipend. Given Agreement VII.B.5., the Arbitrator cannot modify the Agreement to provide such additional compensation when the parties have not seen fit to do so through negotiations.

Far from being due equitable consideration in this case, Wolslegel is guilty of sitting on his rights and failing to mitigate damages. Rather than resign over his expressed dissatisfaction with the compensation being paid him as department chairperson throughout 1988-89 and into 1989-90, he chose to continue to doing that work with full knowledge of what the District was paying him for doing so. Only much later did he go the Association and claim that he had not been properly compensated throughout the period of time involved. For that reason, as well, the grievance should be denied.

For all of those reasons, the Arbitrator should deny the grievance in its entirety.

DISCUSSION

Timeliness at Grievance Initiation

In the Arbitrator's opinion, the District has waived its defense of untimeliness by failing to clearly preserve it during its processing of the grievance at the pre-arbitral steps. As Elkouri and Elkouri, on whom the District has relied, have stated in dealing specifically with the subject of grievance procedure "time limitations,"

> . . . In many cases time limits have been held waived by a party in recognizing and negotiating a grievance without making a clear and timely objection. But there are some cases holding to the contrary. Where clear and timely objection is made to time-limit violations, no waiver will result from subsequent processing of the grievance on the merits. . . .

How Arbitration Works, 194-195 (BNA 4.ed, 1985)(footnotes omitted). In the Arbitrator's opinion, the majority view and the better view is that a clear objection is necessary to preserve a procedural defense of untimeliness. See, e.g., Harbison-Walker Refratories, Inc., 22 LA 775, 778 (Day, 1954) (The Company's conduct with respect to the grievance. . . makes it apparent that both lack of timeliness and the failure to follow the grievance procedure were waived as possible defenses. For it is absolutely clear that management discussed the grievance at every step after the first. . . . It is also reasonably evident that there was never a clear reservation of the right to assert the procedural defenses while discussing the merits until the appeal to arbitration. By then it was too late. [footnote omitted]. The waiver had already been effected."); and Patterson Steel Co., 38 LA 400, 403 (Autrey, 1962) (". . . if there was a failure of the Union to file the grievance within the five (5) workday time limits, such failure was waived by the Company when it allowed the Union to proceed to arbitration and incur the expense thereof without advising the Union that the issue of the timely filing was specifically reserved for a determination by the arbitrator.").

Here, the District's written responses to the grievances make no mention at all of untimeliness or of the idea that the District's processing of the grievance is without prejudice to its right to rely on such a procedural defense if the matter ultimately goes to arbitration.

The testimony of the principal and superintendent concerning their references to untimeliness during grievance processing does not reflect a clear District objection to the arbitrability of the grievance based on untimeliness of initiation of the grievance. Principal Hoerning testified only that when Wolslegel orally stated in October of 1989 that the District owed him money from the previous year, Hoerning responded

> that he would have to see Mr. Freese, our Superintendent, about that issue, but that it was last year we were talking about. It was quite a while ago. And so in effect I felt that Mr. Freese should deal -since it's fiscal and should deal with the issue."

(tr.35). Hoerning further testified that, thereafter,

> Mrs. Jurkowski came to see me over the grievance, and again, as she had indicated, it was a short discussion because it mainly was one in which the district superintendent would have to deal with it. But I can recall vividly discussing how come she was unaware of the fact that Bob had performed these responsibilities for the full year previous and they had not grieved it before. And she indicated she was unaware of it and I -- we had a little discussion about well, the information was all there, you know, why wouldn't you be aware of it. But that was it. That happened -- the grievance was pushed onto the next step.

(tr.36). Superintendent Freese testified only as follows:

> Q: At any time during the processing of that grievance did you have occasion to speak . . . with any of West De Pere Education Association representatives regarding this matter?
>
> A: Yes.
>
> Q: And in any of those conversations did the matter of the timeliness of the grievance arise?
>
> A: Yes.
>
> Q: And do you recall when approximately, to the best of your recollection, that issue would have arisen and under what circumstances?
>
> A: I don't recall specifically but I know that I talked to Mr. Bacon on the telephone regarding the grievance and the issue of timeliness was discussed.

(tr.41). Given the District's failure to make any reference to untimeliness in its written responses to the grievance, the foregoing testimony does not constitute a clear enough objection to the alleged untimeliness of the initiation of the grievance to preserve the defense the District now seeks to raise at arbitration.

The Arbitrator therefore has no occasion herein to discuss or rule upon the balance of the parties' arguments relating to the untimeliness defense. However, the District's contention that it would be inequitable for Wolslegel to be awarded back pay in the circumstances of the case is a matter that would properly be considered in connection with appropriate remedy if an Agreement violation were to be found as regards the merits of the grievance.

Given the District's above-noted waiver of the defense of untimeliness, the Arbitrator finds it appropriate to reach the second of the ISSUES.

Merits of the Grievance

The Agreement contains specific and express language concerning compensation of department chairpersons in the form of cash and nonassignment of duty period in specified circumstances. That language is contained in APPENDIX B, which provides, in addition to the cash stipend that Wolslegel was undisputedly paid, as follows: "A department chairperson will not

be assigned a duty period if there are ten or more hour [sic] taught within that department." It is undisputed that there were more than ten hours taught within the department for which Wolslegel was chairperson at the times in question. It is also clear that Wolslegel was not "assigned a duty period" during any of the times in question. Accordingly, the District has not violated the clear and unequivocal requirements of APPENDIX B. The District has also not been shown to have violated Agreement XIV.

The Association asserts that Wolslegel should have been allocated a duty period in addition to his part-time duties so that the District could then free him of those duties without loss of pay in order to comply with the above-quoted language. Neither the language of the Agreement on its face nor the evidence concerning the parties' practice under it supports such an interpretation.

The evidence establishes that whereas full-time teachers' workloads normally include a duty period, whereas part-time teachers' workloads do not. This appears to be entirely consistent with the Art. XV.A.2.a. promise that the District

> . . . will attempt to limit the number of classes in grades 7 through 12 to five (5) fifty-five minute classes per day, or the equivalent time, plus one preparation period and one study hall or duty period. (Duty period means within one particular period; not after school). A teacher with five (5) preparations will not be assigned a duty period.

As written, that language does not guarantee, but only calls for an attempt" to maintain the stated workload maximum. That language also does not expressly require that part-time employes or others will have a duty period of which they can be relieved. Nor can such a requirement fairly be inferred from that language or from the language of APPENDIX B or from the Agreement as a whole.

Thus, for example, if a full-time employe were department chairperson of in a ten-hour-or-more department had five preparations, Art. XV would require that he would not be assigned a duty period. The APPENDIX B proviso to the same effect would not mean that such employe must, in addition, be granted an 8th 1/7th of a contract from which APPENDIX B must then be deemed to relieve him without loss of pay, as part of his compensation for being chairperson of such a department.

Similarly, Wolslegel did not have a duty period from which to be relieved during the times in question. In his case that was because the District does not assign duty periods to part-time personnel in the first place. The District has complied with its APPENDIX B obligations by paying the cash stipend and by not assigning Wolslegel a duty period. In other words, the Arbitrator finds that APPENDIX B was intended to avoid an overload by relieving a department chairperson of a large enough department of a duty period <u>if</u> <u>he/she</u> <u>is</u> <u>otherwise</u> <u>being</u> <u>assigned</u>

one. Had the parties intended it to further require that the department chairperson be deemed to have a duty period even if he/she would not otherwise be assigned one, it could and should have said so in substantially different language than the parties used in APPENDIX B.

The Association partly bases its claim that Wolslegel is entitled to an additional 1/7 contract on past practice. However, the past practice evidence in the record shows only that the District has historically granted full-time employes a duty-free period and paid them a full salary, when they served as chairperson of a ten-or-more-hours department. That practice is a direct result of the application of the no-duty-period requirement of APPENDIX B in the context of a full-time workload as defined in Art. XV.A.2.a. The workload of a part-time employe is materially different since part-time employes have never been assigned a duty period. The past practice evidence does not show any instance in which a part-time employe serving as chairperson of a ten-or-more-hour department was paid an extra 1/7 of contract salary as the Association is seeking for Wolslegel. Indeed, in the only instance of record in which a part-time employe has served in that capacity, Carol Duffin (in whose department 11.5 hours were taught) was not paid an additional 1/7 salary in 1883-84, but rather was paid just as Wolslegel was. Because the Duffin situation was only a single instance, it is arguable that it does not create a binding precedent. What it does highlight, however, is that the past practice evidence relied upon by the Association does not involve facts paralleling the situation at issue here, to wit, a part-time employe serving as chairperson of a ten-hour-or-more department.

Even more fundamentally, by specifying the District's compensatory obligations to department chairpersons in APPENDIX B, the parties have, by implication, excluded claims for additional compensatory obligations based on past practice. That conclusion is supported both by the limitations on the Arbitrator's authority in Agreement XV.A.5. and the well-recognized contract interpretation principle of "expressio unius est exclusio alterius," i.e., to express one thing implies exclusion of any others.

In sum, the language of APPENDIX B specifies the District's compensatory obligations to department chairpersons, and the District has complied with those requirements. The language of APPENDIX B in that regard is clear and unambiguous, such that no resort to past practice is necessary to determine its meaning. Even if APPENDIX B were ambiguous, however, the Association's past practice evidence does not establish that the District's treatment of Wolslegel is inconsistent with an established practice as regards the proper application of APPENDIX B to part-time department chairpersons.

For the foregoing reasons, then, the District did not violate the Agreement by refusal to assign and pay Wolslegel for an extra 1/7 of a full teaching load, and the grievance is denied on its merits.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole it is the DECISION AND AWARD of the undersigned Arbitrator on the STIPULATED ISSUES noted above that:

1. The District waived its defense of untimeliness by its pre-arbitral conduct in this matter.

2. The District did not violate the Agreement by not paying Grievant Wolslegel, a part-time teacher, an additional 1/7th of a contract for department head duties for the 1988-89 year and that portion of the 1989-90 year that he served as a department head.

3. Because no Agreement violation has been foundr there is no basis for any remedy, and the November 2, 1990 grievance is denied.

Dated at Shorewood, Wisconsin this 24th day of September, 1990.

By Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator