

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 SUN PRAIRIE SCHOOL DISTRICT : Case 73  
 : No. 44240  
 and : MA-6221  
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 SUN PRAIRIE EDUCATION ASSOCIATION :  
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Appearances:

Mr. A. Phillip Borkenhagen, Executive Director, Capital Area UniServ-North, on behalf of the Association.  
Mr. Jon E. Anderson, Godfrey and Kahn, S.C., on behalf of the District.

ARBITRATION AWARD

According to the terms of the 1989-91 collective bargaining agreement between Sun Prairie Education Association (hereafter Association) and Sun Prairie School District (hereafter District), the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as impartial arbitrator of a dispute between them involving the District's refusal, since January 1, 1990, to assign a bargaining unit member to staff the in-school student suspension room at the Senior High School. The undersigned was designated arbitrator and made full written disclosures to which no objections were raised. Hearing was held at Sun Prairie, Wisconsin on October 30, 1990 and no stenographic transcript of the proceedings was taken. The parties filed initial briefs by January 14, 1991 and reply brief by February 5, 1991.

ISSUES:

The parties stipulated that the following issues are before the undersigned in this case:

1. Did the District violate the terms of the 1989-91 collective bargaining agreement when it did not assign a Sun Prairie Education Association bargaining unit member to staff the In-School Suspension room at the High School?
2. If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS:

I. RECOGNITION CLAUSE

- A. The Board recognizes the Association as the exclusive negotiations representative for all professional staff members excluding: principals, director of finance, director of instruction, director of pupil services, athletic director, and the school district administrator.

This section (I.A.) is subject to modification by the results of any WERC unit clarification.

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- C. The purpose of this article is to recognize the right of the bargaining unit to represent employees in negotiations with the Board as provided in 111.70 of the Statutes. Granting of recognition is not to be construed as obligating the Board in any way to continue any functions, the Board reserving the right to create, combine, or eliminate any positions as, in their judgment, deemed necessary, provided it does not violate this contract.

II. MANAGEMENT RIGHTS

The School Board, on its behalf, hereby retains and reserves unto itself, all powers, rights, authorities, duties, and responsibilities conferred upon and vested in it by applicable law, rules and regulations to operate the school

system. These rights include, but are not limited to, the right to direct all operations of the school system; establish work rules and schedules of work; hire, promote, transfer, schedule and assign employees in positions within the school system; suspend, demote, discharge or take other disciplinary action against employees for cause; relieve employees from their duties because of unavailability of work or any other reason not prohibited by law or this agreement; maintain the efficiency of school system operation; take whatever action is necessary to comply with state and federal law; to introduce new or improved methods or facilities; to contract out for goods or services; to establish and supervise the program of instruction and to determine after consultation with the appropriate department means and methods of instruction, selection of textbooks and other teaching materials, the use of teaching aids, and class schedules; to take whatever action is necessary to carry out the functions of the school system in situations of natural disasters or similar catastrophes.

In exercising its powers to contract out for goods and services, (except in those cases relating to exceptional children which is covered in the next paragraph), the Board may contract only for services a total of which constitutes less than a full-time bargaining unit position, but in no event will such contracting out result in a reduction in the then existing bargaining unit staff.

In exercising its powers to contract out for goods and services in order to comply with federal and/or state mandates relative to exceptional children, the Board will, whenever possible, utilize bargaining unit personnel. If it is not possible to utilize the aforesaid bargaining unit personnel, the Board is then free to contract with nonbargaining unit personnel.

The exercise of the foregoing powers, rights, authorities, duties and responsibilities by the Board; the adoption of policies, rules, regulations and practices in furtherance thereof; and the use of judgment and discretion in connection therewith shall be limited by the Wisconsin Constitution, applicable state law, rules and regulations of the Department of Public Instruction, and the express terms of this agreement. The Board will be guided, but not unreasonably bound, by established Board policies and administrative decisions in forming the framework of school policies and projects.

III. BOARD FUNCTIONS AS PROVIDED BY LAW

- A. The Board's right to operate and manage the school system is recognized, including the determination and direction of the teaching force; the right to plan, direct, and control school activities, to schedule classes and assign workloads; to determine teaching methods and subjects to be taught; to maintain the effectiveness of the school system; to determine bargaining unit member complement; to create, revise and eliminate positions; to establish and require observance of reasonable rules and regulations; to select and terminate bargaining unit members, and to discipline and discharge bargaining unit members for cause.
- B. The foregoing enumeration of the functions of the Board shall not be deemed to exclude other functions of the Board not specifically set forth, the Board retaining all functions not otherwise specifically nullified by this Agreement.

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IX. GENERAL CONDITIONS -- CHANGES IN PAST PRACTICE

- A. In the event the employer desires to change a past practice not specifically covered by this agreement which primarily relates to compensation, hours, or conditions of employment and which change would reduce the previous conditions to less than the highest minimum standard in effect in the district at the time this agreement is signed, it shall notify the Association of its proposed change and, if the Association so requests within ten (10) calendar days of said notice, the employer shall enter into negotiations with the Association in respect to said proposed change.

In the event the time for the Association to request bargaining falls during winter or spring recess, its time to make such request is extended to the Friday of the school week immediately following each respective recess. In the event the time for the Association to request bargaining falls during the summer vacation, its time to make such request is extended an additional ten (10) calendar days. All notices by the employer to change a past practice shall be in writing and mailed to the Association President and Chief Negotiator by certified mail.

- B. If the matter is not settled by such negotiations and impasse is reached, rather than implement, an arbitrator will be selected who will hold a hearing promptly and will issue his/her decision within thirty (30) calendar days. The arbitrator's decision will be in writing and will set forth findings of fact, reasoning, and conclusions of the issues submitted, and the decision shall be binding. The arbitrator will be without power or authority to make any decision which required (sic) the commission of an act prohibited by law or which is violative of the terms of this agreement.
- C. Unless the parties mutually agree on an arbitrator, either party may ask the Wisconsin Employment Relations Commission to submit to both parties the names of five (5) disinterested persons. On receipt of these names, the parties shall alternately strike names until only one remains, and the remaining person shall be the arbitrator of the dispute.
- D. The arbitrator shall decide whether the employer may effectuate the proposed change. In making such decision, the arbitrator shall be governed by the criteria enumerated in Section 111.70(4)(cm)7., Wisconsin Statutes.

- E. The arbitrator's decision shall be deemed a term of this agreement and shall remain in effect until its expiration.
- F. Each party shall bear its own expenses in the arbitration proceeding. The parties will equally share the cost of the arbitrator.

XXII. LAYOFF

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- E. Recall

Bargaining unit members who have been laid off under this Article and (sic) subject to recall shall be reinstated according to (1) seniority (as defined in this Article) and (2) certification (as defined in this Article) and (3) based on expanded certification as defined in section C., 6 provided a position is available at grades 7-8, and provided that no bargaining unit member with the appropriate working certification is currently on layoff.

No new, long-term substitutes, or interim bargaining unit appointments (hires) may be made while laid off bargaining unit members, holding appropriate current certification, are available to fill the vacancy.

Any bargaining unit member who has been recalled and is pursuing expanded certification shall be subject to the provision of Article XII., C., 2.

Within ten (10) calendar days (should the 10th calendar day fall on a weekend/holiday, the bargaining unit member will have until the next regular workday) after a bargaining unit member receives a notice of recall to employment, he/she must advise the school district in writing of acceptance or rejection of the position offered and compliance with the starting date of employment specified. Any notice shall be considered received when mailed certified mail, return receipt requested, to the last known address of the bargaining unit member in question as shown by the school district's records. It shall be the responsibility of each bargaining unit member on layoff to keep the school district advised of his/her current address. Any and all re-employment rights granted to a bargaining unit member on layoff shall terminate upon such bargaining unit member's failure to accept, within ten (10) calendar days, the position offered to them by the school district.

A full-time bargaining unit member on layoff status may refuse recall offers of part-time, less than .50 FTE, substitute or other temporary employment without loss of rights to the next available position of .50 FTE or more to which the bargaining unit member is entitled.

It is understood that bargaining unit members do not lose their recall rights if they secure other employment while on layoff.

- F. In case of a tie in seniority, the decision as to whom (sic) will be laid off will be decided by lot.
- G. Layoff pursuant to this Article shall not be subject to the provisions of Article VIII. of this agreement and are only applicable to reduction in staff which occur during the term of the individual bargaining unit member contracts. Layoff provisions under this Article do not affect or limit in any way the rights of the district with respect to the renewal or nonrenewal or termination of a bargaining unit member under Article VIII.]

- H. The School Board will provide an updated seniority list February 15 and October 15 of each contract year.
- I. Bargaining unit members on layoff for six (6) consecutive semesters shall have their layoff status automatically terminated following the sixth consecutive semester in which they have not been recalled to a regular full-time or part-time position. Serving as an interim or substitute teacher does not extend the termination from layoff time line.
- J. Recalled bargaining unit members will be placed on the proper step of the salary schedule based on experience and educational background, without loss of credit or accrued benefits from prior years of service in the school district. No benefits shall accrue for the time on layoff.  
  
When a bargaining unit member accepts recall, unused accumulated reimbursable days to which the bargaining unit member was entitled to at the time of layoff will be carried forward unless the bargaining unit member has requested and accepted severance payment for previously accrued reimbursable days prior to layoff.
- K. During the recall period, bargaining unit members on layoff who are not employed elsewhere where similar insurance coverage is available will be eligible for participation in the group health insurance plan then in effect at his/her own expense.

XXVI. WORKING CONDITIONS

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C. Class Loads

- 3. Grades 7 thru 8 - The normal teaching load shall consist of a minimum of five (5) classroom assignments and one-and-a-half (1-1/2) additional or extra assignments per day, per year.
- 4. Grades 9 thru 12 - The normal teaching load for the departmentalized academic classroom teacher, including physical education, will consist of:  
  
5 instructional class periods per day, per year plus one supervision period either first semester or second semester.

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- 6. The above described teaching loads would be the MAXIMUM teaching loads. If supervision duty could be reduced, the administration would be expected to reduce the load in the following manner:
  - (a) Bargaining Unit Members with the largest number of class preparations.
  - (b) Bargaining Unit Members with the largest cumulative class size.

STIPULATIONS OF FACT:

The parties stipulated to certain facts at hearing as follows:

- 1. The grievance was timely filed at all steps of the procedure.
- 2. The grievance was heard by Principal Hopfensperger on February 5, 1990; denied on February 23, 1990.

3. The grievance was heard by Administrator Rosenthal on March 27, 1990; denied on April 18, 1990.
4. The grievance was heard by the School Board on June 11, 1990; denied orally at hearing.
5. The grievance is properly before the Arbitrator.
6. An In-School Suspension system has been in effect at the Junior High School for over 4 years.
7. The staffing of the Junior High School In-School Suspension system has been performed by certified teachers, as one of their supervisory assignments.
8. The In-School Suspension system has been in effect at the Senior High School since the beginning of second semester of the 1989-90 school term.
9. The staffing of the Senior High School In-School Suspension system has been performed by Local 60 employees (teacher aides).
10. Supervisory duties are duties assigned by the District relating to the supervision of students.

BACKGROUND:

The evidence showed that as a general rule, study halls, in-school suspension room duties (at the Junior High School), lunch room supervision, faculty supervision and Student Assistance Program (S.A.P.) duties<sup>1/</sup> constitute the array of supervision duties to which teachers are normally assigned by the District. Full-time Senior High School teachers in the District are expected to teach 10 classes per year under the effective labor agreement. Although an eight period day is in effect at the Junior High School, there exists a seven period day at the Senior High School. Thus, at the Senior High School, the normal full-time teacher's semester schedule consists of five classes, one supervision and one preparation period, or five classes and two preparation periods with no supervision assigned. Because of the specific terms of the agreement, full-time Senior High School teachers are guaranteed three preparation periods per academic year. If Senior High School teachers teach six classes they are not assigned any supervision. At the Junior High School, full-time teachers are assigned five classes, one preparation period, one full-time study hall and one shared study hall per semester, pursuant to the labor agreement.

Senior High School Principal Hopfensperger stated that prior to the 1980-81 school year, the District had a practice of filling up teachers' schedules with supervisions to make them full-time. However, beginning with the 1980-81 school year and consistently thereafter, the District has not assigned extra supervisions to District teachers in order to fill up their schedules. No evidence was presented to show that the Union objected in any way to the cessation of this practice

In regard to the District's Student Assistance Program, the District established a S.A.P. at the Junior High School several years ago after seeking teacher input. The District established the S.A.P. at the Junior High School, utilizing Junior High teachers in the program. Initially, Junior High School teachers who became involved with the S.A.P. were given released time. At first, one shared study hall was removed from their schedules, and later one full-time study hall was taken from each teacher in the S.A.P., in recognition of each involved teacher's time and work commitment to the S.A.P.

Additionally, four years ago the District established an in-school suspension room or I.S.S., at the Junior High School after consulting with Junior High School teachers. The Junior High School I.S.S. is staffed during each school hour by a different teacher (in each of the four academic areas), but in the fifth hour two teachers staff the room. Junior High teachers have generally volunteered for assignments to the Junior High I.S.S. room and the District has assigned these teachers to the I.S.S. in lieu of one full-time study hall. These Junior High teachers can then also be assigned to one shared study hall each semester, per the contract.

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1/ The S.A.P. program was designed to screen for and then address and deal with increasing problems students were encountering with their own, their parents' and others' use of alcohol and other drugs.

Notably, prior to and during the same four year period, Senior High School administrators continued to either supervise suspended students informally in school, utilizing teachers, administrators and at times clerical employes, or suspended students were sent home. In approximately 1988, Senior High School administrators began sending suspended students to one of three study halls (one of which was known as Room 602). These study halls were staffed by certified teachers, who kept track of the suspended students' activities and school work in much the same manner as is now done in the newly created Senior High I.S.S. room.

The duties involved in the I.S.S. room at the Junior High as well as those at the Senior High I.S.S. room, do not appear to differ significantly from the duties performed previously by teachers in study halls such as Room 602, and by administrators, teachers and clerical employes who were called upon to informally supervise suspended Senior High students in school. Basically, the suspension supervisor was and is expected to take role, get assignments and tests (if any) from each student's teacher, deliver such to each student and collect same upon student completion thereof, and, if necessary, at the end of the supervisor's period of supervision, to record any supervision problems and to pass along any necessary information to the person who relieves the supervisor at the end of their supervision period. 2/

FACTS:

The facts surrounding the instant grievance are not disputed. Those facts are as follows. In its "Standard (0) - Performance Disclosure Report" for April 1990, the District indicated that one of its goals for 1989-90 was to have truancy and student suspension dealt with in-school. "The student is disciplined, but still receives instruction and does not lose valuable education time." In a later portion of this "Report", the District listed the following:

Goal III: To develop an in-building suspension program.

Achievement . . .

Method 2: Involve certified staff and administration in the planning of an independent study room . . .

It is undisputed, however, that neither the Union nor Senior High School teachers were contacted or given the opportunity to comment upon or contribute to the development of the I.S.S. room position at the Senior High School. Instead, the District's Administrative Team (consisting only of District managers), drafted and implemented the following Role Description for the "In-building suspension monitor (Instructional Aide)," as follows:

TITLE: In-building Suspension Monitor (Instructional Aide)

QUALIFICATIONS: The In-building Suspension Monitor shall:

1. Possess the ability to direct and relate to high school students who have behavioral problems.
2. Possess a high school diploma.
3. Possess organizational skills relative to classroom records, student assignments.
4. Possess the ability to interact with high school teachers regarding student assignment/makeup work.
5. Possess the ability to organize media/computers for student assignments.
6. Possess such alternatives to the above qualifications as the School Board may find appropriate and acceptable.

REPORTS TO: High School Principal/Designee

JOB GOAL: The In-building Suspension Monitor shall:

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2/ It is undisputed that should a suspended student have questions relating to their school work, if a teacher is staffing the I.S.S. room, that teacher would be more likely to be able to answer academic questions than would a teacher's aide.

1. Assist the administration in the operation of an in-building suspension room. . . . (the room is an alternative to out-of-school suspension).



PERFORMANCE RESPONSIBILITIES: The In-building Suspension Monitor shall:

1. Closely monitor students assigned to the in-building suspension room.
2. Assist students, when appropriate, with classroom assignments and with the use of computers/media.
3. Maintain records concerning attendance and student progress as directed.
4. Maintain a classroom textbook library as well as a leisure reading library (magazines, fictional, nonfictional books) as directed.
5. Regulate student lunch and restroom visitations.
6. Work with the teaching staff regarding daily classroom assignments, as well as "repetition" assignments that will aid a student regarding basic skills.
7. Assist students in the operation of computer and media equipment as well as for recordkeeping purposes.
8. Carry out other duties as assigned by the high school principal/designee.

SPECIFIC RESPONSIBILITIES:

1. Closely monitor student assigned to the in-building suspension room relative to the direction given by the high school principal or designee.
2. Accompany students to lunch and/or restroom.
3. Update and inventory textbook library yearly as directed.
4. Update and inventory leisure reading materials weekly as directed.
5. Monitor student use of all equipment.
6. Keep attendance and assignment records for all students assigned to the in-building suspension.
7. Ensure the room is a quiet learning area.
8. Work closely with classroom teachers.
9. Provide a written year-end report as directed.
10. Be aware of all school rules (Student Handbook) and specific rules governing the in-building suspension room.
11. Communicate with parents as directed.
12. Collect assignments from teachers.
13. Carry out other duties as assigned by the high school principal/designee.

The Administrative Team drafted the above "Role Description" after internal discussions. District witnesses involved in the decision to assign Local 60 AFSCME members to perform the available I.S.S. room work testified that they considered the following facts in reaching their decision: that out-of-building suspensions were not beneficial to students; that the I.S.S. room is not an instructional setting; that no Department of Public Instruction certification is required for the monitors of an I.S.S. room; that the District has never employed or recalled teachers from layoff to perform only supervision duties; that it would cost the District more to staff the Senior High I.S.S. room with certificated staff due to contractual limitations on District

supervision, class and preparation assignments to teachers at the Senior High; that the District does not have enough teachers at the Senior High School to cover the supervision periods the Administration wishes to assign/establish; that the District perceives the main job of teachers is to teach and the District, in drafting its Master Schedules, first considers what classes a teacher can teach and then it looks to other requirements, such as preparation and possible supervision periods, that could be assigned to teachers.

The District found that two Local 60 AFSCME members, Simon and Wayland were qualified under the above "Role Description," to staff the Senior High School I.S.S. room and it assigned them to do this work, initially at a 1.6 FTE level (later at a 1.8 FTE level), beginning on January 2, 1990. It should be noted that the District's witnesses admitted that teachers can perform the work described and that they meet all of the requirements of the I.S.S. Room Monitor Role Description.

It is undisputed that after the Union was put on notice that the District intended to establish or had established the Senior High School I.S.S. room staffing it with members of Local 60, AFSCME, the Union did not request to bargain regarding the I.S.S. room position(s). Rather, the Union timely filed the instant grievance, seeking, inter alia, that the District be ordered to assign I.S.S. room work to certified teachers. 3/

The evidence showed that approximately twelve District teachers are currently on full-time layoff status from the District due to cut-backs in staffing which have occurred over at least the past three school years. In addition, according to Master Schedules for the 1989-90 school year, there are four Senior High School teachers (Laurette Anderson, Sue Blahnik, Dayton Sederquist and Georgi Tracy) who were on partial layoffs during the 1989-90 school year and who could have been available in the second semester for Senior High School I.S.S. room work. In addition, Master Schedules for the 1990-91 school year indicated that approximately seven Senior High School teachers (Anderson, Tracy, Voss, Blahnik, Andres, Spellman and Kelly) have been on partial layoff during the current school year and these teachers could have been asked to fill the Senior High School I.S.S. room positions. These same Senior High School Master Schedules also indicated that during 1989-90 school year, the four part-time teachers, Anderson, Blahnik, Sederquist and Tracy, each had at least one student supervision period assigned to them. The Master Schedule for

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3/ During the processing of this grievance, District Administrator Rosenthal sent a memo dated April 9, 1990 to the Union which indicated that Rosenthal was going to seek extra funding in the 1990-91 budget so that the District could assign a teacher to the I.S.S. room at the Senior High. This statement does not constitute an admission by the District of any wrong-doing or that the Union's case had merit. Rather, it is on the order of a statement made during negotiations for settlement (or made in hopes of settlement), and I shall treat it as such.

the 1990-91 school year showed that only teachers Voss and Kelly clearly had no student supervision periods assigned to them. 4/ It appears that in the case of part-time teacher Sue Blahnik, that she was assigned three preparation periods during the 1990-91 school year instead of one supervision period and one or two preparation periods. The reason for such assignment of Blahnik is not evident on this record. The remaining four teachers, Anderson, Tracy, Andres and Spellman, were clearly assigned at least one student supervision period during the 1990-91 school year.

It should also be noted that the Union's witnesses each admitted that no teachers were deprived of supervision duties due to the District's decision to staff the Senior High School I.S.S. room with non-certificated staff; that there are not enough unit teachers at the Senior High School to do the supervision work available there, and; that the District has never assigned a teacher to perform only supervision duties on a full-time basis.

POSITIONS OF THE PARTIES:

Union

The Union asserted that the District "knowingly and purposely" violated the terms of the effective collective bargaining agreement when it established the Senior High School I.S.S. room and staffed it with instructional teacher's aides, members of Local 60, AFSCME, bargaining unit. The management discussions leading to the creation of the position as well as the drafting of the Role Description for the position, were done without any prior notice to the Union. This, the Union contended, amounted to a purposeful circumvention of the District's duty to bargain "over the implementation of a bargaining unit position," in violation of Article I. Further, the Union noted that Principal Hopfensperger testified that a certified teacher could have satisfactorily filled this I.S.S. room position and the District could have recalled a laid off teacher to fill the position had it chosen to do so. The Union also noted that teachers are contractually required to perform student supervision and, therefore, no matter how the District chose to define the new I.S.S. room position, that position constitutes teacher bargaining unit work which should have been assigned to certified teachers.

The Union argued that the District was well aware of teachers who were partially laid off (or whose contracts had been reduced) as of January 2, 1990, who could have been assigned at that time to the new I.S.S. room, but the District chose not to do this. The Union pointed out that according to evidence showing the Senior High School work assignment for 1989-90 and 1990-91, teachers Loretta Anderson, Sue Blahnik, Dayton Sederquist and Georgi Tracy could have been given additional I.S.S. room assignments in the 1989-90 school year to reach full-time employment status. Also, according to the Union, in the current school year, 1990-91, teachers Tracy, Voss, L. Anderson, Blahnik, Andres, Spellman and Kelly "could all assume equivalent additional assignments to fulfill greater employment status with the District." Thus, the Union asserted that the position could have been fully staffed by those teachers on partial layoff, avoiding the necessity to recall any teachers who had been fully laid off. The Union also disputed the District's position that staffing the new I.S.S. room with Local 60 members would be more cost effective. In this regard, the Union noted that fringe benefit costs to the District using partially laid off teachers in the position would have remained the same.

The Union asserted that the District's past practice, binds the District here. That practice consists of four years' experience employing teachers in the Junior High School I.S.S. room. The District's attempts to define the Junior High and Senior High I.S.S. rooms differently, the Union claimed, amounted to mere rhetoric. The only difference between the two rooms, the Union noted, is in the type of employees -- aide or teacher -- who are employed to staff the rooms. The Union noted that the labor agreement applies to both the Junior and Senior High Schools equally such that a practice at the Junior High should be effective for the Senior High.

The Union further asserted that in taking the actions it did in this case, the District has also violated Article II, Management Rights. In addition, the Union contended that the District's refusal to follow the procedures of Article IX relating to negotiating desired changes in past practices, flies in the face of facts indicating that the practice has been set at the Junior High which has had an I.S.S. room staffed by teachers only, for the past four years.

Beyond this, the evidence showed the District had also unilaterally

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4/ The 1990-91 Master Schedules also indicate that teacher Voss was assigned to teach one period of Spanish at the Senior High School and two periods of Spanish at the Junior High School with 1/2 class preparation period at the Junior High School.

In the 1990-1991 School year, teacher Kelly was assigned to teach one period of mixed chorus and three periods of music lessons with one class preparation period assigned, at the Senior High School.

implemented a S.A.P. at the Senior High School several years ago on the heels of its establishment of such an S.A.P. in the Junior High School without complaint or incident. A grievance filed regarding the implementation of the S.A.P. at the Senior High School, the Union pointed out, resulted in the grievance being settled in writing prior to an arbitration hearing therein. The Union argued that at the time the Union and District entered into this grievance settlement, the former District Administrator, Mr. Fritsch, had verbally assured the Union that where teachers could do such monitoring work in the future, the District would cease its "practice of utilizing instructional aides from Local 60" to do the work. However, the Union urged that the District's continued use of Local 60 members to staff the Senior High School S.A.P. without Union complaint should not form a binding precedent/practice here.

The Union anticipated that the District would cite School District Spring Valley A/P M-85-292 (Yaffe, 11/85) and School District of Alma, MA-3794 (Crowley, 3/86), and stated that these cases are factually distinguishable from the instant case. In this regard, the Union cited Howland Board of Education 5/ in which Arbitrator Nelson found that assignment of an I.S.S. room position to a non-unit aide violated the teachers' labor agreement.

In conclusion, the Union stated that as a remedy, it seeks a judgment stating that I.S.S. room duties are teacher bargaining unit work; that the District violated the labor agreement by assigning the work to non-unit members; that the Arbitrator order the District to immediately cease and desist from assigning the work to non-unit employes; and that it assign the I.S.S. room work to teachers currently on partial layoff or to teachers who are currently on full-time layoff or a combination of the two; that should such assignment of teachers to this work result in an overload situation, that the Arbitrator order District to negotiate with the Union over extra class responsibility; that the Arbitrator retain jurisdiction over the case until these District actions are accomplished; and that the District be held liable for any other appropriate relief here.

#### District's Position

The District argued that the labor agreement between it and the Union grants the District broad discretion to determine the assignments for its teachers. In this regard, the District pointed to the language contained in Articles I, II and III of the agreement which specifically reserves to the District the right to schedule classes, assign workloads and schedule employes, and to revise, create and eliminate positions unless express provisions of the agreement limit these rights. The District urged that because no express provision of the agreement limits the District's authority to create an I.S.S. room and to staff it with a teacher's aide rather than a teacher, the District did not violate the terms of the labor agreement here.

The District argued that any restrictions on subcontracting contained in Article II of the agreement do not restrict the District's right to assign an aide to supervise the new I.S.S. room. In this regard, the District noted that Article XXVI defines the teaching load at the Senior High School as ten instructional class periods per day, per year, plus one supervision period, either first semester or second semester. However, no portion of the agreement defines a supervision assignment in detail or scope, leaving such definition to the District. The agreement also provides a mechanism for reducing supervision assignments and keeping them at a minimum, so that District teachers can pursue their primary job, to teach.

The District further asserted, that the language of Article II clearly allows the District to take the action it did in this case: The District did not "contract out" for In-school supervision in the classic or traditional sense. The District did not contract with any outside entity to do the work. Rather, the District decided to utilize AFSCME-represented teacher's aides to staff the new I.S.S. room. The District noted that even applying the specific terms of Article II to this case, the District by its actions here, did not "fill" a full-time Senior High School teacher position by assigning teacher's aides to staff the Senior High School I.S.S. room at a 1.6 or 1.8 FTE level. The District did not layoff or reduce the "then existing bargaining unit staff" by its actions herein. The District emphasized that no teacher bargaining unit member, in the history of the District, has ever been given an assignment consisting solely of student supervision, and such an assignment would contravene the terms of the effective labor agreement.

The District further contended that the contractual past practice language of the agreement (Article IX) does not apply to this case, despite the fact that the District had used teachers to staff the Junior High School I.S.S. room before establishing the Senior High School I.S.S. room (and staffing it with teacher's aides). Here, the District urged, no teacher has been denied a

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5/ The Union cited the following as a reference book in which this case could be found: Arbitration in Schools, American Association, Report No. 225, November 1, 1988, Case 225-8, 6/20/88.

supervision assignment or reduced in work assignments due to the District's staffing decision, so that the "highest minimum standard" language of Article IX, has been met. Also, the District asserted that because the Union did not request negotiations pursuant to Article IX, it should not now be heard to argue that that portion of the agreement is applicable here. In addition, according to the District, the I.S.S. room positions at the Senior High School differ from the staffing of the room at the Junior High School. Because work assignments, in the absence of directory contractual language, are traditionally left to the employer and because the contract here does not specify the kind of supervision assignment the District must make, the District contended that it is free to do as it did at the Senior High School without running afoul of Article IX or any other provision of the contract. Further, the District noted that to read Article IX as a limitation on the District's rights to determine and assign supervision duties would negate the clear language contained in Articles II, III and XXVI. Thus, the District's interpretation and application of the agreement should be preferred.

The District argued that the teachers do not have an exclusive claim to perform supervision work. Historically, this work has been performed by teachers, secretaries, aides and administrators. Because supervision does not require DPI certification, the District urged, it is therefore not professional work, per se. In addition, the District asserted, the contract contains neither a work preservation clause nor does it not prohibit the District from assigning supervision outside the teacher bargaining unit so long as Article XXVI (class loads) is satisfied. Thus, the District's decision to assign one or two aides to staff the Senior High School I.S.S. room did not violate the contract.

The District also contended that the recall provisions of the contract are inapplicable here. Article XXII predicates the duty to recall laid off teachers upon the premise that there is a vacancy in a Senior High School teaching position -- which necessarily consists of five classes per semester and one supervision per school year. No evidence was proffered by the Union to show that any such position existed. Rather, the evidence showed that only the Senior High School I.S.S. room duties were "available". Further, the District notes that teacher recall is also premised upon the certification(s) required for the teaching position available. Because no "position" existed for which DPI certification would be required, the District asserted that it was not required to recall a teacher to staff the new I.S.S. room, as asserted by the Union. Thus, the District urged denial and dismissal of the grievance in its entirety.

## REPLY BRIEFS

### Union

In its reply brief, the Union emphasized many of the points it had argued in its initial brief. In addition, the Union asserted that the District was incorrect when it argued that supervision work is not teacher work, in reality as well as pursuant to the contract. The Union took issue with the District's assertion in its initial brief that it was not technically engaged in subcontracting by assigning student supervision work to non-certificated staff.

The Union reasserted its initial arguments that the District violated an established past practice by assigning the I.S.S. room work to non-unit employes and that the District violated the agreement by refusing to bargain over the position. Finally, the Union also strongly disagreed with the District's conclusion that the Howland case is inapposite here, and it attached the full decision to its reply brief. The Union asked that the grievance be sustained and that the undersigned order the remedy sought by the Union in its initial brief.

### DISTRICT

The District asserted that the Union's discussion as well as its reliance on a prior grievance settlement, not received in evidence herein and which the parties had expressly agreed not to refer to, is at least inappropriate. In addition, the Union's use of statements made to Union representative Marty by the former District Administrator, in the District's view, is improper here, because these statements are not only inadmissible hearsay but also constitute inadmissible parole evidence offered to vary the terms of a written agreement.

The District further asserted that the Union misstated one of the parties' stipulations herein, that regarding a definition of supervision duties. The District re-emphasized that because the Union never requested to bargain regarding the creation of the Senior High School I.S.S. room position, no violation of Article I has occurred. The District also pointed out that the Union could have filed a complaint case alleging that the District refused and/or failed to bargain over the position, if the Union felt such a legal violation has occurred. In the alternative, the District speculated that the Union could also file a unit clarification case to address the proper unit status of the Senior High School I.S.S. position(s).

The District asserted that the question here is not what the District could have done but what it was contractually bound to do. The District also noted that the Howland case cited by the Union in its initial brief is factually distinguishable from the instant case -- the former case having dealt with an I.S.S. room position which had been assigned to teachers for several years before being reassigned by the employer to non-teaching personnel. Finally, the District disagreed with the Union's analysis that the "position" here is anything other than a full-time supervision position. The District contended that it is not required to break up the I.S.S. room position and reallocate the work to teachers on partial layoff based upon the Union's general claim that because such work occurs in school buildings it belongs to teachers. Thus, the District urged that in this case, the Union has failed to meet its burdens of persuasion and of proof, that the District has in any way violated the labor agreement.

### DISCUSSION

In this case, the Union has failed to prove that a violation of the agreement occurred when the District established the Senior High I.S.S. room and staffed it with non-teaching staff. In this regard, I note that no provision of the agreement addresses or defines a student supervision period. Nor does the agreement affirmatively require the District to fill part-time teachers' work schedules with available supervision periods. Notably, an apparent practice of filling up part-time teachers' schedules was discontinued in 1980, without Union complaint on this record.

Furthermore, in my view, no violation of Article XXII (relating to layoffs and recalls) has occurred here because no teacher vacancy or position, as defined in the agreement, was created by the District's establishment of the I.S.S. room position. The fact that no certification is required to hold the I.S.S. room monitor position, also supports a conclusion that I.S.S. room work is not per se teacher bargaining unit work.

Language in the agreement defines, inter alia, teaching loads at the Senior High School and Junior High Schools but there is no language in the agreement which guarantees Senior High or Junior High teachers any particular hours of work or any specific number of periods per day or per week unless the District has already assigned teachers to a full-time schedule. I note that pursuant to the contract, the District can assign full-time Senior High School teachers ten instructional class periods, three preparations and a maximum of one supervision period per year. (Variations of the above are dealt with by, among other things, teacher overload provisions). Thus, the District has a seven period day at the Senior High School and it can only assign teachers

there to a maximum of one supervision period per year. In addition, Article XXVI C.6. calls for a reduction in such supervision periods, if possible.

In contrast, I note that at the Junior High School, the District can assign teaching loads across an eight period day each semester. The contract, also specifically allows the District to assign Junior High teachers to one full-time study hall and one shared study hall per semester, for a total of two full-time supervisions and two shared supervisions per year. This difference in hours of work and potential supervision assignments between the Senior and Junior High is significant here and these factors make the applicability of any alleged practice arising out of the District's staffing of the Junior High I.S.S. room with teachers questionable. 6/

The Union has argued that the use of Local 60 members to staff the S.A.P. at the Senior High School pursuant to a settlement agreement thereon should not constitute a binding past practice. I agree. However, I also agree with the District that the contents of that settlement agreement is inadmissible. I so ruled during the hearing in the instant case. I also find and conclude that any evidence proffered by the Union regarding statements of Mr. Fritsch relating to this settlement agreement are inadmissible hearsay as well as inadmissible parole evidence and I have therefore not considered these statements in reaching my decision herein.

The Union has argued that the District was obliged to follow the notice, negotiation and impasse requirements of Article IX prior to establishing the Senior High I.S.S. room positions. I disagree. The Union produced no evidence to show that as a result of the District's decisions regarding the Senior High I.S.S. room that such decisions reduced previous conditions of employment "to less than the highest minimum standard" in effect at the time of execution of the effective labor agreement. Indeed, the evidence showed that no teacher was reduced in hours, denied a supervision period or laid off because of the District's actions here. Also, no D.P.I. certification is required to hold an I.S.S. room position. 7/ The fact that the District had previously laid off teachers in whole or in part does not require a conclusion that such teachers are therefore entitled to be recalled to perform I.S.S. room work. Rather, the facts clearly showed the District has never recalled or employed teachers to perform purely supervisory work and that the District has rejected and discontinued a prior practice (without Union complaint) of filling up part-time teachers' schedules with supervision periods. Finally, on this point I note that even after the Union knew of the District's actions herein it chose not to pursue a remedy under Article IX because it never requested negotiations. Instead, the Union chose to file the instant grievance. In these circumstances, the Union cannot now successfully assert that the Article IX procedure should have been followed, or that because that procedure was not followed, a violation of Article IX has therefore occurred.

The clear language of Articles I, II and III also confirms the District's management rights, for example, to schedule work, classes and employes, to create, combine, eliminate or revise positions and to contract out for goods or services (subject to certain restrictions discussed later). I note that in Article II the District's exercise of its management rights is restricted by the State Constitution and laws, DPI rules and regulations "and the express terms of this agreement." As stated above, there exists no language in this agreement which expressly prohibits the District's actions here. In addition, the Union proffered no evidence to show that the District, by taking the actions it took in this case, thereby violated the Wisconsin Constitution, state law or DPI rules and regulations. Thus, no violation of Article II has occurred here.

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6/ In addition, I note that no evidence was proffered by the Union to show the content of discussions between the District and Junior High teachers and/or the Union regarding the basis of their agreement to establish and staff the Junior High I.S.S. room with teachers.

7/ The fact that teachers are qualified for and could perform the I.S.S. room work at the Senior High School does not mean that the District was contractually required to assign this work to its teachers.

With regard to the Union's Article II "contracting out" argument, I believe the circumstances of this case clearly demonstrate that the I.S.S. room work has not been "contracted out" either in the traditional sense 8/ or in violation of Article II of the labor agreement. In this regard, Article II clearly states that the District's right to subcontract is limited to subcontracting for "services a total of which constitutes less than a full-time bargaining unit position." It is significant that no teacher in the District has ever been assigned to perform supervision duties on a full-time basis pursuant to Article XXVI and the evidence of past practice supporting that Article submitted here. 9/ In addition, it is undisputed here that the parties intended that supervisions would be a relatively minor part of the duties of Senior High School teachers. Thus, I have rejected the notion that the I.S.S. room work constitutes a teacher bargaining unit vacancy or position.

The question then arises whether a "reduction" was suffered by "then existing bargaining unit staff" when the District assigned Local 60 members to perform I.S.S. room work. In this context, the use of the word "reduction" indicates that the parties intended that current teacher work schedules would have to be reduced below then-existing full-time or part-time levels in order to constitute a contractual reduction. The facts of this case undisputedly demonstrate that such a reduction did not occur here.

Based upon all of the circumstances herein, and having considered all of the relevant evidence and the parties' arguments, I issue the following

AWARD

The District did not violate the terms of the 1989-91 collective bargaining agreement when it did not assign a Sun Prairie Education Association bargaining unit member to staff the I.S.S. room at the (Senior) High School.

The grievance is, therefore, denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 8th day of March, 1991.

By \_\_\_\_\_  
Sharon Gallagher Dobish, Arbitrator

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8/ The District's analysis of a traditional contracting out properly described that process and I agree that such a traditional contracting out has not occurred here.

9/ The Union's reliance on the Howland case is misplaced. I find that case distinguishable on its facts from the instant case. I note that the District made no reference to the other two cases cited by the Union in its initial brief.