BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
WISCONSIN INDIANHEAD VOCATIONAL, TECHNICAL, AND ADULT EDUCATION DISTRICT	Case 45 No. 46119 MA-6875
and	
WISCONSIN FEDERATION OF TEACHERS, LOCAL 395, AFL-CIO	

Appearances:

Mr. William Kalin, Wisconsin Federation of Teachers Representative, Route 1, Box 469K, South Range, Wisconsin 54874, appearing on behalf of the Union.

Weld, Riley, Prenn, and Ricci, by Mr. Stephen L. Weld, 715 South Barstow Street, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the District.

ARBITRATION AWARD

Wisconsin Federation of Teachers, Local 395, AFL-CIO, hereinafter referred to as the Union, and the Wisconsin Indianhead Vocational, Technical and Adult Education District, hereinafter referred to as the District, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration, the undersigned was appointed to arbitrate a dispute over a teaching assignment schedule. Hearing on the matter was held in Shell Lake, Wisconsin, on May 4 and July 21, 1992. A stenographic transcript of the proceedings was prepared and received by the undersigned by August 19, 1992. Post-hearing arguments and reply briefs were received by the undersigned by December 1, 1992. Full consideration has been given to the evidence, testimony and arguments presented in rendering this Award.

ISSUE

During the course of the hearing the parties were unable to agree on the framing of the issue. The undersigned frames the issue as follows:

> "Did the District violate the collective bargaining agreement when it scheduled the grievant for the first nine weeks of the Spring of 1991 to work more than 22 periods per week and did not pay the grievant an overload payment?"
>
> "If so, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS

8. Teacher contact hours shall be as follows:

(a) Class Type	Periods Per Week
Lecture, Demonstration and Discussion	22
Lecture and Lab	25
Skill, Laboratory and Shop	25
Cosmetologist Instructors	30 (60 minute periods)

(b) No more than three (3) communication preparations shall be assigned to a teacher in any given semester.

(c) A teacher shall be assigned no more than five (5) preparations.

9. A full-time teaching schedule shall be for a 38-week duration based upon classroom assignment of 22-25 hours per week in their area except for Cosmetology (30) in their area.

10. Section G-1 does not apply to Farm Training, Production Agriculture, Circuit Teachers teaching non-credit courses and Project instructors.

11. Sections G-2, G-8, and G-9 do not apply to Farm Training instructors, Production Agriculture instructors, Librarians, Counselors, Career Education Evaluators, Circuit teachers teaching non-credit courses and project instructors.

BACKGROUND

The District and the Union have been parties to several successive collective bargaining agreements. While for many years the District offered traditional eighteen (18) week semester courses, beginning in the late 1970's the District, in order to increase off campus work experience for students, began offering six (6), nine (9) and twelve (12) week course schedules. The parties have established a practice whereby employes who do not meet the contact hours as described in Article IV, Section G., paragraph 8 (a), continue to receive pay as if they had been assigned a full teaching load. The instant matter arose when the District assigned Fred Johnson, hereinafter referred to as the grievant, to have a contact schedule of twenty-four (24) hours the first nine (9) weeks of the District's second semester 1990-1991 and eighteen (18) hours the second nine (9) weeks. The District averaged the grievant's contact hours, twenty-one (21), and paid him his regular salary. The grievant, whose full time teaching assignment calls for twenty-two (22) contact hours, filed a grievance over the matter alleging he should not be assigned a overload or to receive additional compensation for being assigned the overload. Thereafter the matter was processed to the arbitration step of the grievance procedure.

The record demonstrates that the instant matter is not the first time

employes have filed grievances over contact hours. Nor is the instant matter the first time the District has averaged an employe's contact hours to determine whether the teacher has any entitlement to overload pay. In some instances the Union and the District have signed special schedule agreements which resulted in the District averaging an employes contact hours over an eighteen (18) week period. In other instances special schedule agreements have not been signed and an employe's contact hours were averaged by the District over an eighteen (18) week period.

UNION'S POSITION

The Union contends the District does not have the right to assign teacher contact hours beyond those listed in Article IV, Section G-8, twenty-two (22) or twenty-five (25) hours per week. The Union contends this provision is clear and unambiguous and is supported by Article IV, Section G-9. The Union argues that the District's position, that a past practice has been established which allows the District to average contact hours over a semester, fails to meet the burden that such a practice was unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time. The Union also argues the District cannot rely on its Administrative Procedures to justify the District's actions as this is a unilaterally developed document. The Union also points out the collective bargaining agreement is silent on the use of averaging to determine an employe's contact hours. The Union asserts the District is attempting to obtain through grievance arbitration that which it has not brought to the bargaining table, flexibility in scheduling instructors.

The Union contends the District has in effect assigned overtime. The Union argues that when the District assigns overtime it must pay for that overtime. The Union asserts the contact hour limitations assigned in the contract are there to insure quality instruction and a reasonable stress level for the instructor. The Union argues that to assign the grievant an overload for a nine (9) week period lowered the quality of instruction, was for an unreasonable duration, and that it was too much work at one time. In support of its position the Union points to the District's brief in a previous case where the District successfully argued it had the right to assign overloads and the District acknowledged that when it assigned an overload the instructor received additional compensation.

DISTRICT'S POSITION

The District contends that under the Management Rights' provision of the collective bargaining agreement it has the right to assign the grievant the contact hours which resulted in him having twenty-four (24) hours the first nine (9) weeks of the semester. The District argues that where the undersigned to conclude that the instant matter is an overload situation and that the District did not have the right to average the grievant's contact hours, the parties have already been informed by an arbitrator the District has the right to assign reasonable overtime. 1/ The District argues that if the Union seeks a maximum number of hours it desires an instructor to be assigned it can negotiate such a maximum into the collective bargaining agreement.

The District also contends past practice supports the averaging of teacher hours on a semester basis. The District does acknowledge that when the matter of averaging was first broached with the Union back in the 1970's, the Union did not agree to this concept. However, since that time the District has averaged hours. The District contends that in order to meet the needs of

1/ Wisconsin Indianhead VTAE District, Case 44, No. 41992, MA-6576.

students in cannot schedule every instructor to a twenty-two (22), twenty-five (25) or thirty (30) hour schedule every week of the school year. When an instructor exceeds the hours on a semester basis it pays overload pay. The District points to the following ten (10) examples to demonstrate it has practiced averaging teacher hours on a semester basis:

1) Gary Dado, dairy herd management instructor at New Richmond--averaged in 1979-80 (ER EX 9)

2) Ed Dombrock, agricultural instructor at New Richmond--averaged 1982-83 through 1991-92 (ER EX 10)

3) Russell Rich, electronic computer program instructor at New Richmond -- averaged 1982-83 through 1989-90 (ER EX 11)

4) Mike Green, agricultural instructor at New Richmond--averaged 1983-84 through 1987-88 (ER EX 12)

5) Gerald Hazen, marine program instructor at Ashland--averaged in 1991-92 (ER EX 13)

6) Paul Hoff, agricultural/diesel mechanics instructor at New Richmond--averaged 1987-88 through 1991-92 (ER EX 14)

7) Dan Richter, trade & industry instructor at New Richmond--averaged 1987-88 through 1991-92 (ER EX 15)

8) Carolyn Larson-Cowles, dairy herd management instructor at New Richmond--averaged 1990-91 and 1991-92 (ER EX 16)

9) Ann Curtin, business education instructor at New Richmond--averaged 1990-91 and 1991-92 (ER EX 17)

10) John Schreck, agricultural instructor at Rice Lake --averaged second semester 1991-92 (ER EX 19)

The District also points out that even the Union itself provided a perfect example of averaging when it introduced at the hearing a "waiver" which allowed the District to schedule an employe twenty-nine (29) hours the first nine (9) weeks and twenty-three (23) hours the second nine weeks which resulted in only one (1) hour of overload pay (Union Exhibit #1). The District asserts that the fact such waivers were signed does not demonstrate overload assignments are voluntary in nature but merely stand for the proposition that the District was attempting to avoid litigation. Here, the District points out that one instructor, Ed Dombrock, has had his hours averaged since 1982 but has had only one (1) executed waiver for the second semester of the 1991-92 semester, during the pendency of this grievance. The District asserts the practice of averaging has been in existence since at least 1981, when the parties discussed Administrative Procedures developed by the District.

The District also asserts it had justifiable reasons for assigning the grievant to twenty-four (24) hours of contact the first nine (9) weeks, a nine

(9) week required course for Agri-Business students which than allows the student to spend time "on site". This curriculum design met the needs of the students. The District contends it has been assigning similar hours to other instructors and that the grievant is the first employe to object to semester averaging in all the time the District has been doing so.

The District also asserts that if it were required to pay overload pay for all hours over the teacher's normal assignment, then it should not be bound by its practice of paying an instructor full pay when the employe is assigned less hours than the instructor's normal load.

UNION'S REPLY BRIEF

The Union reasserts that the District does not have the right to assign an employe an overload during a semester. The Union also points to the District's Administrative Procedures and argues that these procedures do not allow for the schedule in question herein because the grievant's weeks of instruction were not reduced to facilitate the unique programing the District assigned. The Union also asserts that the Hackbarth grievance is not binding as Hackbarth was a new instructor at the time, he processed his own grievance, and the issue in that grievance was one-to-one ratio for students on-the-job training and instructor load.

DISTRICT'S REPLY BRIEF

The District asserts the Union is attempting to relitigate the arbitration award which acknowledged the District had the right to assign reasonable overloads. The District also asserts that the instant matter is not an overload situation because on a semester basis the grievant's contact hours did not exceed twenty-two (22) hours, the grievant's full-time teaching load. The District also asserts that Article IV, Section G., 9, implies that during the 38 (thirty-eight) week school year flexibility in week to week, quarter to quarter, and semester to semester scheduling can occur. The District also asserts that the Union was aware that the District never has paid for an overload when the average contact hours for a semester was under the instructor's contact hour standard. Since 1982 the Union has been aware of the District's Administrative Procedures, yet, at most, the only action the Union had taken is to have some members sign waivers. The District acknowledges it has been its practice to compensate instructors when they exceed the contact standard, however, only on an average basis. The District concludes the grievant's assignment did not constitute an overload and therefore the District did not violate the collective bargaining agreement.

DISCUSSION

The undersigned notes at the onset of this discussion that the parties have already litigated the issue concerning what restrictions are placed on the District when it assigns an overload. Arbitrator Burns concluded the District has the right to assign reasonable overtime. The undersigned concurs in that conclusion. While the grievant did testify that this action placed an undue burden on him and impacted on the quality of education received by his students, as the District pointed out, balancing such an impact with other needs of the students is a reasonable consideration the District can make. Herein the District concluded programing needs of the students were more important and the undersigned concludes the District's conclusion was not unreasonable.

The undersigned also finds Article IV, Section G., paragraph 8, is ambiguous. While on its face it may seem clear, a teacher such as the grievant shall have twenty-two (22) contact hours per week, Article IV, Section G.,

paragraph 9, is poorly written and states a full time schedule is based upon a classroom assignment of 22-25 hours per week in their area..., and shall be for a 38-week duration. This provision can be interpreted to mean that a classroom assignment can vary during a thirty-eight (38) week duration. The undersigned also notes there is no provision in the parties' collective bargaining agreement which specifies what occurs when during a one (1) week period the hours per week as defined in Article IV, Section G., paragraph 8, is exceeded or, for that matter, is not met.

At the onset of the hearing the Union argued that evidence concerning what actions the District took when hours assigned to an employe did not meet the established hours identified in Article IV, Section G., paragraph 8, should be excluded from the hearing as such evidence was not relevant to the grievance filed herein. The Union pointed out that the grievance was limited to the assignment of hours over the grievant's twenty-two (22) hours and the District's failure to make overload payments during the timeframe the grievant has an assignment greater than twenty-two (22) hours per week. However, the record demonstrates that the complained of action the District took was one of averaging the grievant's workload over an eighteen (18) week period. Further, that the parties have a practice whereby when an employe works less than their established hours the District continues to pay the employe a full salary. The undersigned finds these matters to be relevant to the instant issue. Further, the District's claim that it has had a practice of averaging hours since at least 1981 and that the Union was aware of this practice is supported by the record. Here, the undersigned notes, even when the Union has actively sought a waiver concerning an overload assignment, such assignments have involved averaging an employe's weekly hours over an eighteen (18) week period.

The undersigned finds the evidence submitted by the Union supports the District's claim that not only was the Union aware of averaging of overload hours over an eighteen (18) week period, the Union agreed with the averaging when it actively sought a specific waiver for an employe. Had such examples been limited to just one or two occasions the Union could argue it was unaware of the District's actions, or, one or two occasions does not establish a binding practice. However, it is clear to the undersigned that the District has been averaging overload assignments since at least 1981. Further, the Union has been aware of this. Based upon the above and foregoing, and the arguments, evidence and testimony presented, the undersigned therefore concludes that the actions taken by the District in the instant matter did not violate the parties' collective bargaining agreement. The grievance is therefore denied.

AWARD

The District did not violate the collective bargaining agreement when it assigned the grievant more than twenty-two (22) contact hours during the first nine (9) weeks of the Spring of 1991 school year and did not pay the grievant overload pay.

Dated at Madison, Wisconsin this 26th day of February, 1993.

By Edmond J. Bielarczyk, Jr. /s/
Edmond J. Bielarczyk, Jr., Arbitrator