BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
WISCONSIN FEDERATION OF TEACHERS, LOCAL 395, AFL-CIO	Case 47 No. 47009 MA-7133
and	
WISCONSIN INDIANHEAD VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT	

Appearances:
Mr. William Kalin, WFT Representative, appearing on behalf of the Union.
Weld, Riley, Prenn & Ricci, S.C., by Mr. Stephen L. Weld, appearing on behalf

ARBITRATION AWARD

The Employer and Union above are parties to a 1989-91 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties agreed that the terms of this Agreement should be applied to a grievance filed by three employes protesting their placement under the Supplement to the collective bargaining agreement, and requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the grievance.

The undersigned was appointed and held a hearing on September 23, 1992 in Shell Lake, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. A transcript was made, both parties filed briefs and reply briefs, and the record was closed on January 5, 1993.

STIPULATED ISSUES:

1. What is the proper placement of the three counseling positions that were created in the Fall of 1991; i.e. do they belong under the main body of the collective bargaining agreement or under the Supplement to the Agreement?

The parties stipulated that in the event the grievants are found entitled to placement under the main body of the collective bargaining agreement, the modified wages, hours and conditions of employment that would result would take effect as of the date of the Arbitrator's decision.

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE I - RECOGNITION OF THE UNION

Section A. Recognition and Implementation

1. The Board recognizes the Union as the bargaining representative for all teachers teaching at least 50% of a full teaching schedule in their area (a full teaching schedule shall consist of the normal student contact hours), Student Counselors, Librarians, Career Education Evaluators, and School Health Nurses employed full-time by the Wisconsin Indianhead VTAE District. From this unit the following management positions are excluded: Assistant Directors, Administrators, Subject Discipline Coordinators, Instructional Services Coordinators, Grants and Contracts Coordinators, Public Relations Officer, Law Enforcement Specialist, High School Relations Specialist, Student Services Outreach Specialists, CETA Counselor, Native American Liaison Specialist, Nursing Assistant Specialist, Program, Department and/or Special Services Supervisors, Data Processing Programmer, Tribal Financial Management Training Specialist, Tribal Leadership Training Specialist, Fire Training Specialist, Emergency Medical Services Specialists, Supervisors Management Specialists, Financial Aids Officer, and Program, Department and/or Social Services Assistants. Also excluded from this unit are any employees considered administrative, supervisory, managerial, confidential, custodial and clerical not mentioned above. Instructor/ Supervisors employed less than 50% supervision are included within the Union. If the Board changes these positions to more than 50% supervision, the change will be implemented the following year. This change may be implemented earlier upon the mutual consent of the Board and the instructor/supervisor affected. The individual in said position will have the option of continuing employment as a supervisor and member of management or of returning to full-time teaching and remaining in the bargaining unit. The option to return to full-time teaching must be exercised within fourteen (14) days following notification of the position change. Failure to meet this timetable will automatically qualify the individual as a supervisor. Notification will be given to the Union.

a. To clarify the bargaining unit definition set forth above, the parties agree that teachers teaching ten (1) consecutive weeks or less, or carrying less than 50% of a full-time teaching schedule are not included in said definition. The parties recognize that what constitutes a "full teaching schedule" will vary depending upon the requirements of the projects/programs involved. Such teachers are not covered by the terms and provisions of this contract. Those teachers teaching more than ten (10) consecutive weeks (but less than eighteen (18) consecutive weeks) and teaching at least 50% of a full-time teaching schedule shall be covered by the terms and provisions of the Supplement to Contract, appearing at the end of

the Master Contract. Those teachers employed in projects such as ABE, JTPA, Vocational Education, or under any other similar arrangement are covered by the Supplement to Contract. Those teachers teaching more than eighteen (18) consecutive weeks and teaching at least 50% of a full-time teaching schedule shall be covered by the terms and provisions of this contract.

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ARTICLE III - GRIEVANCE PROCEDURE

Section A. Definition

1. A grievance is defined as any dispute arising out of the interpretation or application of the master agreement or any dispute arising out of the reasonableness of Board policy relating to wages, hours, and working conditions adopted after the signing of this Agreement.

Section B. Procedures for Adjustment

1. The grievant shall submit the grievance in writing to the appropriate administrator with or without representation, with 20 school days following the act or condition which is the basis for the grievance. The appropriate administrator shall give an answer within 10 school days.

2. If the grievances (sic) is not satisfactorily resolved, it shall be submitted to the District Director within 5 working days after having received the answer in Step 1. At the discretion of the Director, prior to the Director's response, a hearing may be called by the Director of designee within 7 school days to discuss said grievance with the grievant and/or representative. If grievance is not resolved satisfactorily at this hearing, the District Director shall respond to the grievance in writing within 8 working days. A copy of the District Director's answer will be sent to the union.

3. If the answer in Step 2 is unsatisfactory, the grievance shall be submitted in writing ten (10) school days to the Board or a committee thereof. At the next scheduled meeting of the Board, the Board will review grievance and decide a) to schedule a conference with representative to hear grievance at its next scheduled Board meeting, or b) waiver the conference and proceed directly to arbitration. Within eight (8) school days after the hearing, the Board shall communicate its decision in writing, together with its supporting reasons to the grievant and the union.

4. If the grievance is not satisfactorily resolved in Step 3 of the grievance procedure, the grievant or the union may submit the grievance to arbitration. If the issue is to be submitted to arbitration, the grievant or the union must advise the Board of same within ten (10) days of the answer in Step 3.

The Wisconsin Employment Relations Commission will be requested to provide a member of the Commission or its staff to serve as the arbitrator. The decision of the arbitrator will be final and binding.

5. All arbitration proceedings shall be held at such place as shall be mutually agreed upon between the Board and the Union. If the Board and the Union are unable to agree, the place of hearing shall be designated by the arbitrator.

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ARTICLE IV - WORKING CONDITIONS

Section G. School Day and Assignments

1. Teachers will have their regular teaching days scheduled within a span of seven (7) working hours at all attending centers, except nursing instructors in the ADN program may be scheduled a span of 8 1/2 working hours on regular teaching days, providing however, that such schedule shall not increase the number of their actual working hours beyond those worked by other teachers.

a) Evening classes conducted by the adult education administrative units which are not part of state approved full-time programs shall not be considered part of the regular teaching day. This clause does not apply to teachers hired for specifically funded positions or projects.

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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.

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SUPPLEMENT TO CONTRACT

The following working conditions are agreed upon by both parties to apply to those employees teaching more than ten (10) consecutive weeks but less than one semester (18 weeks if the unit of instruction is not offered on a semester basis), and the teaching of at least fifty percent (50%) of a full-time teaching schedule, and also to those employees employed in projects such as ABE, JTPA, Vocational Education, or under any similar arrangement.

> These annual working conditions are in effect for those employees as identified above only for the duration of the project and are prorated accordingly for projects of less than one (1) year. . . .
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FACTS:

The facts are not significantly disputed. Joyce Marienfeld, Steve Olson, and a third counselor who has since left the District's employ were hired in the fall of 1991 to work as counselors. Marienfeld was assigned to the Superior Campus and Olson to the New Richmond Campus, and there is no dispute that each worked side by side with other counselors who were under the main body of the collective bargaining agreement, and performed work which was essentially interchangeable. There is also no dispute that as of their initial hire all three of the grievants were placed under the Supplement to the collective bargaining agreement. This resulted in a number of differences in their wages, hours and working conditions as compared to other counselors, including the lack of a paid lunch period, working a total of more hours for the same pay, and not being on the same seniority list. Marienfeld testified that the only one of the employment conditions which was drawn to her attention during the interview as being different from other counselors was hours, though Personnel Specialist Jeff Southern testified that all of the applicants were told that the work was project-based. It is clear, however, that the project-funded nature of these positions was identified in the letter of appointment issued to each of the grievants after the interview.

District Business Manager Chuck Levine testified that the District determined to create the three positions at issue only because grant money was available to fund them. Levine testified, in essence, that the District has reached its levy limit for property taxation and is therefore dependent on other sources of funding for any expansion. Among these sources, he testified, is a federal program known as the Carl Perkins Act. Levine stated without contradiction that Marienfeld, Olson and the third grievant were employed because the District was able to obtain monies under this grant process for a projected five years, though the amounts were to be reviewed each year. But Levine also testified that the District adjusts allocation of positions between "hard", i.e. general fund, and "soft", i.e. project monies, from year to year in order to obtain the most flexibility and the largest overall dollars. According to testimony from Personnel Director Wayne Sabatke, in the summer of 1992, Olson was converted (for an unspecified length of time) to essentially hard-dollar funding and replaced on soft dollars by an existing employe of the District, counselor Joyce Nelson. Personnel Director Wayne Sabatke testified that this action was taken because Nelson was unwilling to work during the summer that year. This apparently placed Olson in a position where he was put into the financial category that Nelson had been occupying so that he could cover her work during the summer.

Sabatke testified that the District had frequently moved employes from the Supplement to the main body of the contract based on the funding of their positions changing from soft to hard dollars. Sabatke maintained that the District had the corollary right to move an employe from the main body of the contract to the Supplement, if the funds underwriting the position changed in the opposite direction. But Sabatke testified that the District had not yet exercised what it viewed as its right because of the "turmoil" that would result. Sabatke testified that there are three criteria which go into the determination of whether a position belongs under the main body or the Supplement to the collective bargaining agreement: whether the position was

developed as a result of the availability of grant monies, whether the position would continue to exist if the grant money was terminated, and whether the Board has approved the course to be taught or the position to be created specifically as a District-funded position, as opposed to approving a project grant proposal which might generate a position.

In 1982, Arbitrator Edward B. Krinsky issued an award in an interest-arbitration proceeding over the 1981-82 master contract. The sole issue which was referred to arbitration was the status of so-called CEE [Career Education Evaluation] employes. Arbitrator Krinsky found that the CEE employes should be included prospectively under the main body of the collective bargaining agreement, contrary to the District's prior interpretation. Sabatke testified that the CEE's were not counselors, even though they are included in the counseling department on the respective campus, because they are not certified as counselors but as teachers, and students register for "courses" using them as "instructors". Sabatke admitted that the CEE's were federally funded until 1992, but contended that all other project employes are under the Supplement.

The Union's Position:

The Union contends that the Krinsky award establishes that all employes, regardless of their title, who work as counselors belong under the main body of the Agreement. The Union notes that there is no dispute that the counselors at issue perform the same work as the counselors under the main body of the Agreement, and that the Employer and Union stipulated that the Union had a history of flexibility in waiving contract provisions to meet the needs of the District. The Union contends that the job posting referred to the position involved as "counselor", and did not identify that it was a project-funded position or that its wages, hours and working conditions would be different. The Union further argues that the Employer's fundamental position leads to an absurd interpretation of the contract, under which the Employer would have freedom to move employes back and forth between the main and supplemental part of the contract in the District's sole discretion. In addition, the Union argues that even if the Krinsky decision is not read as placing these counselors under the main body of the Agreement, Arbitrator Krinsky's dismissal of the "grievance" aspect of the issue then before him was based on factors not present here, because the CEEs involved therein were placed under the Supplement prior to its ratification and no grievance was filed concerning this.

In its reply brief, the Union argues that the separate status of project employes under the collective bargaining agreement is irrelevant here because the recognition clause specifically places "student counselors" under the main body of the Agreement. The Union also contends that the Krinsky award was broad enough to have the effect of placing all counselors under the main body of the contract, because he discounted source of funding as a basis for determining placement. In addition, the Union contends that independently of the above, the Arbitrator has the authority to make an award based on the "reasonableness of board policy relating to wages, hours, and working conditions adopted after the signing of this agreement", based on Article 3, Section A of the Agreement. The Union contends that under the circumstances of this case it is unreasonable to place the counselors at issue under the Supplement.

The Employer's Position:

The Employer contends first that the collective bargaining agreement is clear in identifying the existence of two differently-treated groups of employes, and that separate treatment of project-funded employes has been accepted since 1978. The District argues that the employes in question are clearly funded by "soft money" and the fact that their work is similar to other

counselors is immaterial, because source of funding is explicitly the basis for placement under the Supplement to the contract. The District contends that Arbitrator Krinsky's award referred not to a grievance proceeding but to interest-arbitration, and that the arbitrator therein legislated certain particular project employes into the main body of the collective bargaining agreement. The District argues that questions of fairness arise in an interest arbitration context, but in the present rights-oriented arbitration, the Arbitrator's task is to interpret and apply the existing collective bargaining agreement.

In its reply brief the District contends that the Union argument as to specific inclusion in the recognition clause of counselors obviates the distinction between the regular and supplemental parts of the contract. The District contends that it recognizes the Union as representative of the counselors at issue, while maintaining that they fit under the Supplement. Finally, the District contends that the grievants were in fact advised prior to acceptance of the position that it was project-funded.

DISCUSSION:

The first question to be addressed is whether the Krinsky award effectively disposes of this matter. I conclude that it does not, for the following reasons: A review of that award demonstrates that Arbitrator Krinsky was serving as an interest-arbitrator under the mediation-arbitration provisions of the Municipal Employment Relations Act. While Arbitrator Krinsky referred to some aspects of the issue before him in grievance-related terms, there is nothing in his award that demonstrates that the parties submitted the matter to him as a grievance arbitrator as well as for interest arbitration, and I note specifically that Arbitrator Krinsky states that no grievance was ever filed. The Krinsky award clearly relates to positions identified as CEEs, and the unrebutted testimony in this record from Wayne Sabatke is to the effect that the CEEs are classified as instructors and licensed as such even though they work in the counseling department. This is a distinction from the three positions at issue herein which is not overcome by any evidence to the effect that the District has engaged in a ruse, or a mere renaming of CEE positions, to avoid these positions' placement under the main body of the contract. It is true that Arbitrator Krinsky determined that there was little or no justification for the existing placement of career education evaluators under the Supplement to the Agreement, and also true that much of the rationale used by Arbitrator Krinsky might well apply to the positions at issue herein. But, as the District argues, I do not have the authority to create equity, which Arbitrator Krinsky was specifically empowered to do. As an arbitrator operating under the terms of the existing collective bargaining agreement, my authority is merely to determine whether those terms are violated by the District's actions. In that context it is significant that while Arbitrator Krinsky's logic might be applied more broadly, Arbitrator Krinsky's award specifically refers to placement of career education evaluators, and not other project employes. His award therefore cannot be read fairly as applying directly to the employes involved in this matter.

The Union's argument related to the recognition clause, meanwhile, fails for the reason identified by the District: The recognition clause simply covers both the main and the supplemental parts of the collective bargaining agreement. Thus the fact that counselors are included in the recognition clause does not identify which part of the contract they belong in. While Article I, Section (A)(1)(a) arguably creates a distinction between "teachers employed in projects . . . ." and other classifications for purposes of placement under the Supplement, the Supplement itself refers more broadly to "those employees employed in projects . . . ." Given that the underlying economic distinctions between project and "hard-dollar" jobs appear to exist

equally for non-teaching as for teaching jobs, I conclude that it is the applicable phrase of the Supplement which more accurately expresses the meaning of the Agreement as a whole.

It is clear that the creation of these positions was based solely on the availability of grant monies to underwrite them. This fact was disclosed to the employes involved, although it is apparent that the communication as to what this implied was less forthright than it might have been. But disclosure or non-closure of the information is not the touchstone. All of the evidence demonstrates that it is widely understood that project employes generally are subject to the Supplement rather than the main body of the contract; source of funding is the primary criterion as to whether a position is a project or regular position; and the source of funding for the three positions at issue was clearly a federal grant.

That is not to say that the case does not have its troubling aspects. In particular, the degree of discretion claimed by the District as to ability to shift employes from the main to the supplemental body of the Agreement implies that employes who are under the main part of the Agreement enjoy less security of employment and seniority than would appear to be the case on the face of that document. 1/ The potential for abuse is obvious, even though the evidence indicates that the District has asserted a right to move employes from main to Supplement only in theory, at least up to the date of the hearing. This concern appears related to the Union's argument based on Article 3, Section A's reference to the "reasonableness of board policy". I find, however, that in this instance Article 3, Section A will not serve to establish that the three positions at issue should be treated differently, essentially because the board policy which determined their placement was not "adopted after the signing of this agreement" but was inherent in the existence of the Supplement already. Positions come and go, particularly project positions; the fact that a new one is created after the signing of the Agreement does not of itself indicate that a policy change has been made. Here, the positions are clearly project-funded, they are being treated similarly to all other project-funded positions, and the sole exception of the CEEs is clearly governed by the Krinsky award. For reasons already noted, the Krinsky cannot be read as so broad as to encompass the newly-created positions at issue. Therefore, there is no new policy whose reasonableness should be tested by Article 3A.

For the foregoing reasons, and based on the record as a whole, it is my decision and

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1/ I note that this could cut both ways; Sabatke testified that grievant Olson was transferred to hard-dollar funding in the summer of 1992, thus apparently trading funding with Joyce Nelson. The Union does not, however, argue that this act (the duration of which is not established in the record) should be read as giving Olson main-contract rights from that date forward. My conclusions are therefore limited to the disputed jobs' nature as of the date of their creation.

AWARD

That the proper placement of the three counseling positions that were created in the fall of 1991, under the collective bargaining agreement, is under the Supplement to said Agreement.

Dated at Madison, Wisconsin this 19th day of March, 1993.

By _____
Christopher Honeyman, Arbitrator