BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
SUN PRAIRIE EDUCATION ASSOCIATION	:	Case 85 No. 49565 MA-7986
and	:	
SUN PRAIRIE AREA SCHOOL DISTRICT	:	

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

ARBITRATION AWARD

The above-entitled parties, herein "Association" and "District", are privy to a collective bargaining agreement providing for final and binding arbitration. Hearing was held in Sun Prairie, Wisconsin, on October 26, 1993. The hearing was transcribed and both parties filed briefs and reply briefs which were received by January 24, 1994.

Based on the entire record, I issue the following Award.

ISSUES:

Since the parties were unable to jointly agree on the issue, I have framed it as follows:

> Did the District violate Articles IX and XXVI of the contract when it reduced the number of cooperative student work supervision periods for grievant Sue Blahnik and, if so, what is the appropriate remedy?

DISCUSSION:

Home Economics Instructor Blahnik has been employed by the District as a part-time teacher for a number of years, during which time she had four instructional class periods a day and two periods a day of where she left school to supervise students in her work study programs. In the past, she apparently never had more than 19 students in her classes.

The District in the 1992-1993 school year repeated this arrangement and a dispute arose as to whether Blahnik was being properly paid for all of her hours. She grieved over the level of

pay, and ultimately succeeded in receiving higher compensation.

For the 1993-1994 school year, she was assigned to five instructional class periods a day and one supervisory period for work study. She grieved this change, hence leading to the instant proceeding.

In support thereof, the Association mainly argues that practice dictates two student workplace supervision periods per day when "student numbers warrant such"; that so does past practice; that the District violated Article IX when it failed to notify the Association and negotiate over this change; that the contract is not "as clear as the District may contend"; that grievance history supports its position; and that the District has also violated other provisions of the contract. As a remedy, the Association requests resumption of two supervision periods and any commensurate remuneration.

The District, in turn, asserts that it has the management right to make the change implemented here; that the Association's position negates clear contract language; and that the contractual past practice clause does not apply.

The resolution of this case turns on the inherent tension between the management and district functions provided for in Articles II and III of the contract and the past practice clause found in Article IX.

Article II, entitled, "Management Rights", provides:

> 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 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.

Article III, entitled, "Board Functions As Provided By Law", states:

> 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 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.
>
> 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.

This language is extremely broad because it expressly gives the District the right to "direct all operations of the school system"; establish "schedules of work"; "schedule and assign employees"; "establish and supervise the program of instruction"; "the right to plan, direct and control school activities"; "to schedule classes and assign workloads"; and "to determine teaching methods and subjects to be taught."

Cutting down from two to one work study supervision period obviously falls within the parameters of this broad language and enables the District to do what it did here if this was the only language in dispute.

But, it is counterbalanced by Article IX, entitled, "Changes In Past Practice", which states in pertinent part:

> 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.

The key phrase here is the reference to "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. . ."

While this language on its face does not expressly refer to the term "mandatory subjects of bargaining", the phrase "primarily relates to compensation, hours, or conditions of employment. . ." is the term of art used by the Wisconsin Employment Relations Commission and the courts in deciding what items constitute mandatory subjects of bargaining. If that analysis is used here, it must be concluded that the District did not violate the contract since the assignment of classes - including the question of how many periods are to be given to particular subjects such as the work-study program - represents a permissive subject of bargaining, one which is expressly reserved to management by virtue of the broad language in Articles II and III.

Moreover, it is immaterial that the District in the past has not exercised its management rights in this area by always having two work study supervisory periods rather than one. For as Arbitrator McCoy stated in Esso Standard Oil Company, 16 LA 73, 74:

> But caution must be exercised in reading into contracts implied terms, lest arbitrators start re-making the contracts which the parties have themselves made. The failure of the Company over a long period of time to exercise the legitimate function of management, is not a surrender of the right to start exercising such right. If a company had never, in fifteen years, under fifteen contracts, disciplined an employee for tardiness, it would thereby be contended that the Company could not decide to institute a reasonable system of penalties for tardiness. Mere non-use of the right does not entail a loss of it.

The same is true here.

In addition, a past practice does not cover each and every aspect of the employment relationship. Arbitrator Harry Shulman pointed that out in Ford Motor Co. v. United Automobile Workers, 19 LA 237 (1952), which is one of the seminal cases dealing with past practice. There, he explained:

> A practice thus based on mutual agreement may be subject to change only by mutual agreement. Its binding quality is due, however, not to the fact that it is past practice but rather to the agreement in which it is based.
> But there are other practices which are not the result of joint determination at all.

> They may be mere happenstance, that is, methods that developed without design or deliberation. Or they may be choices by Management in the exercise of managerial discretion as to convenient methods at the time. In such cases there is no thought of obligation or commitment for the future. Such practices are merely present ways, not prescribed ways, of doing things. The relevant item of significance is not the nature of the particular method but the managerial freedom with respect to it. Being the product of managerial determination in its permitted discretion, such practices are, in the absence of contractual provisions to the contrary, subject to change in the same discretion...But there is no requirement of mutual agreement as a condition precedent to a change of practice of this character.
> A contrary holding would place past practice on a par with written agreement and create the anomaly that, while the parties expend great energy and time in negotiating the details of the Agreement, they unknowingly and unintentionally commit themselves to unstated and perhaps more important matters which in the future may be found to have been past practice.

A similar "happenstance" developed here over the District's decision to have two work study supervisory periods: since it was never bargained by the parties, it came to be a "present way" and not a "prescribed way" for offering a work study program, one which the District could change pursuant to its "managerial freedom". 1/

In addition, there is no merit to the Association's claim that the District is bound by the settlement involving Blahnik's prior 1992 grievance. The issue there centered on how much Blahnik was to be paid for the work assigned to her, rather than whether she was entitled to supervise two work study periods. Moreover, the Association at that time agreed that the settlement of that grievance (Union Ex. 4) "will not be precedent setting". Hence, it has no value here.

1/ That is why the District is free to alter the 1986 guidelines it adopted without bargaining with the Association regarding the number of students per class and the number of classes in the work study program. The District, by the same token, did not act improperly when it assigned fewer students to teacher Andy Harrison, since that, too, falls within its management prerogative.

The facts here therefore are distinguishable from those in Wood County Nurses Council (AFSCME, Local 5037), wherein I sustained a grievance because of the prior settlement between the parties. For there, unlike here, there was no language stating the settlement could not be used as a precedent. Moreover, that case centered on ambiguous contract language, which could only be resolved through the use of parol evidence, unlike the language here which so clearly spells out the District's rights in the clear and unambiguous language of Articles II and III.

In light of the foregoing, it is my

AWARD

That the District did not violate Articles IX and XXVI of the contract when it reduced the number of cooperative student work supervision periods for grievant Sue Blahnik; the grievance is therefore denied.

Dated at Madison, Wisconsin this 31st day of March, 1994.

By Amedeo Greco /s/

Amedeo Greco, Arbitrator