

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

FOND DU LAC SCHOOL DISTRICT,

and

FOND DU LAC EDUCATION ASSOCIATION

Case 47
No. 50279
MA-8200

Appearances:

Mr. Mark F. Vetter, Davis & Kuelthau, S.C., 111 East Kilbourn
Avenue, Suite 1400, Milwaukee, Wisconsin 53202.

Mr. Armin Blaufuss, UniServ Director, Winnebagoland UniServ,
P.O. Box 1195, Fond du Lac, Wisconsin 54936-1195.

ARBITRATION AWARD

The parties jointly requested that the Wisconsin Employment Relations Commission designate the undersigned Arbitrator to hear and determine a dispute concerning the above-noted grievance under the grievance arbitration provisions of their 1992-94 collective bargaining agreement (herein Agreement).

The parties presented their evidence and arguments to the Arbitrator at a hearing held at the District Office in Fond du Lac, Wisconsin, on March 17, 1994. The hearing was not transcribed, but the parties agreed that the Arbitrator could maintain an audio tape recording of the evidence and arguments for his exclusive use in award preparation. The parties summed up their positions in post-hearing briefs which were exchanged on May 4, 1994, marking the close of the record.

ISSUE AND RELATED STIPULATIONS

At the hearing the parties authorized the Arbitrator to decide the following issue:

1. What shall be the disposition of the amended grievance dated October 1, 1993?

The Association agreed that it is asserting only violations of Agreement Arts. II.C. Bargaining Unit Work and IX.D.2. Department Coordinator Stipends. The parties agreed that the "incidental bargaining unit work" exception in Agreement Art. II C.1. is not an issue in this arbitration.

PORTIONS OF THE AGREEMENT

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ARTICLE II

* * *

C. BARGAINING UNIT WORK

1. Subject to the conditions of this provision, bargaining unit work shall only be performed by persons who are members of the bargaining unit and who are certified under state law to perform such work.

a. Incidental bargaining unit work may be assigned to non-bargaining unit personnel. Incidental bargaining unit work may not exceed .2 of a full-time position in any certification area.

2. Bargaining unit members shall be entitled to all benefits of this Agreement except as follows

. . .

3. Bargaining unit work is defined as work which may only be performed by a person under a teaching certificate or license issued by the Department of Public Instruction and/or is work that is regularly assigned to bargaining unit members during the regular work day.

* * *

ARTICLE V

BOARD RIGHTS

The Board, on its own behalf and on behalf of the District, hereby retains and reserves unto itself, without limitation, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and Constitution of the State of Wisconsin and of the United States, including but without limiting the generality of the foregoing, the right:

1. To the executive management and administrative control of the school system and its properties and facilities, and the professional activities of its employees.

2. To hire all employees and, subject

to the provisions of law, to determine their qualifications and the conditions of their continued employment, of their dismissal or demotion, and to promote, and transfer all such employees;

3. To establish grades and courses of instruction, including special programs, and to provide for athletic, recreational and social events for students, all as deemed necessary or advisable by the Board;

4. To decide upon the means and methods of instruction, the selection of textbooks and other teaching materials, and the use of teaching aids of every kind and nature;

5. To determine class schedules, the hours of instruction, and the duties, responsibilities and assignments of teachers and other employees with respect thereto and with respect to administrative and non-teaching activities, and the terms and conditions of employment.

The exercise of the foregoing powers, rights, authority, 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 only by the specific and express terms of this Agreement and Wisconsin Statutes; Section 111.70, and then only to the extent such specific and express terms hereof are in conformance with the Constitution and laws of the State of Wisconsin, and the Constitution and laws of the United States.

In the exercise of the Board function, the District or Administration shall not act in an arbitrary or capricious manner.

* * *

ARTICLE VII

GRIEVANCE PROCEDURE

* * *

B. A grievance is defined as an alleged violation of a specific article or section of this Agreement and/or policies, rules and regulations of the Board of Education that cover wages, hours, and working conditions.

* * *

F. . . . Step Six . . . The arbitrator shall be limited to an interpretation of the express terms of the Agreement. The arbitrator shall in no way add to, subtract from, modify or delete the revision [sic] of the Agreement. .

. .

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ARTICLE IX

FRINGES AND SALARIES

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D. EXTRA STIPENDS

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2. Department Coordinators Stipends

The Board may create department coordinator positions to give leadership to various subject areas in the secondary schools and may discontinue such positions at its discretion. Extra duty stipends for such responsibilities shall be as follows:

a. All department coordinators at the junior high schools receive additional stipends on the basis of 7 to 9% of the base (Code I-1).

b. Department coordinators at Goodrich Senior High School of English, math, science, social studies, and industrial arts receive additional stipends on the basis of 8 to 10% of the base (Code I-1).

c. Department coordinators at Goodrich Senior High School of business education, foreign language, guidance, home economics, physical education, and special education (EEN) receive additional stipends on the basis of 7 to 9% of the base (Code I-1).

d. All new appointees would start at the minimum of the

respective range and receive increments of one (1) percent per year until reaching the maximum.

e. All department coordinators who are assigned K-12 district-wide responsibilities will receive an additional one (1) percent.

f. Current department coordinators who are not at the maximum will receive increments on one (1) per year until reaching the maximum. They will receive the first increment for the 1978-79 school year.

BACKGROUND

The October 1, 1993 amended grievance referred to in the ISSUE statement was submitted after the District's denial of the grievance in its original form, which alleged that the District had violated Agreement Art IX.D.2. "and all other applicable articles . . . by eliminating the department coordinators' stipends as stipulated in the Master Agreement" and which requested that the District reinstate the stipends retroactive to August 23, 1993. The District denied the original grievance by letter dated September 13, 1993. In that denial, the District asserted that its Board's decision not to fund the stipends of the department coordinators for the 1993-94 school year was specifically authorized by Art. IX.D.2. The denial went on to state, "If the association contends that the positions exist but are not being paid, your assumption is in error. Persons having held these positions in the past are not obligated to provide a service unless they so choose without the stipend." The District also requested that the Association specify what it meant by "and all other applicable articles."

The October 1, 1993 amended grievance reads, in pertinent part, as follows:

Initial Issue:

Has the Fond du Lac School District violated the Master Agreement by 1) eliminating the stipends for Department Coordinator positions and then by 2) assigning the work previously performed by coordinators to non bargaining unit members, specifically secondary building principals.

Articles Violated

Article IX, D,2. Department Coordinators Stipends
Article II,C. Bargaining Unit Work

Statement of Grievance

The FEA contends that the District violated the Master Agreement by eliminating the stipends for Department Coordinator positions and by assigning the bargaining unit work to secondary building principals.

Remedy

The FEA requests that the District reinstate the Department coordinators stipends and have the coordinators perform the bargaining unit work of their respective departments.

On October 18, 1993, the District denied the amended grievance, asserting that the District had the rights under Art. IX.D.2. to discontinue the positions and under Art V.5. to reassign some or all of the duties of the positions to administrators, stating, "the Board does not believe that Article II, Section C restricts its right to assign the work previously performed by the department coordinators to non-bargaining unit members." The District's answer went on to assert,

. . . the work previously performed by the department coordinators was not performed under a teaching certificate or a license issued by the Department of Public Instruction. In addition, the work was not work which is regularly assigned to bargaining unit members during the regular work day. Therefore, the work previously performed by the department coordinators would not be considered bargaining unit work, as defined in Article II, Section C(3).

The grievance remained unresolved and was submitted to arbitration as noted above.

At the hearing, the parties entered into a number of evidentiary stipulations. Both parties introduced a number of documentary exhibits. The Association presented the testimony of Teachers Arthur Godleski, Anthony Pass, Melissa Hayes, Terry Thomas, David Stetter, Debra Ellingen, Dale Lehmann, Jay Frey, and Nancy Kimla. The District presented the testimony of Goodrich Senior High School Principal John Kaiser, Theisen Junior High School Principal Dick Bestor, and Director of Personnel and Human Relations Richard Jorgensen. Both parties had a full opportunity to examine and cross-examine each of the witnesses.

The evidence presented establishes that during 1992-93 and during previous school years since at least 1974, the District has employed bargaining unit teachers as department coordinators in the secondary schools of the District. Throughout that period of time, department coordinator positions have been assigned to bargaining unit teachers as an extra duty which that was not a

part of their contractual duties and responsibilities. In Agreement Art. IX.2.D., the parties describe the role of the department coordinator as, "to give leadership to various subject areas in the secondary schools." One of several District documents in evidence that describe the department coordinator duties is Exhibit 9 (attached at the end of this Award and hereby incorporated by reference.) Testimony regarding whether and to what extent those duties were performed by the department coordinators during the regular work day indicated that the duties were performed for the most part during the regular work day, but to some extent outside the regular work day, as well. The parties stipulated that, in addition to the extra duty stipends provided for in Art. IX.D.2., the department coordinators received release time in one form or another of approximately 21-23 minutes per day consisting of, for example, not having an assigned homeroom or being assigned a guidance workload of 50 fewer students than the other counselors.

At its August 23, 1993 meeting, the District's Board of Education approved an expenditure plan for 1993-94 that included discontinuation of all of the department coordinator positions. The teachers affected by that decision are listed on Exhibit 3, attached at the end of this Award and hereby incorporated by reference.

Following the Board's decision, the District Superintendent advised the principals and assistant principals at the High School and Junior High Schools, all of whom are excluded from the teacher bargaining unit, that they would be responsible for assuming the duties of the department coordinators. As a result of the Board's decision, the former department coordinators were no longer provided with the release time that had been associated with their department coordinator assignments.

In response to the Board's action and the District's directive, High School Principal Kaiser surveyed the former department coordinators at the High School regarding whether they or any other teachers in their departments would be willing to voluntarily perform any of the duties previously done by the department coordinators. Kaiser intended not to assign teachers to a homeroom if they volunteered to perform those duties. Kaiser's proposed procedure was terminated when the instant grievance was initiated, and Kaiser advised the former coordinators that he and his three assistant principals would extend their general oversight responsibilities regarding the various departments to include performing the duties of the department coordinators.

In general, the Association's witnesses testified that, during 1993-94, they continued to perform some of their previous department coordinator duties, administrators performed some of those duties, and some of those duties were not performed at all.

The testimony regarding the extent to which the former department coordinators volunteered or were assigned to perform department coordinator duties during 1993-94 is discussed elsewhere below to the extent necessary to resolve the above-noted ISSUE.

The amended grievance ultimately submitted for arbitration as noted above.

POSITION OF THE ASSOCIATION

The Agreement permits the District to discontinue the department coordinator positions. However, the District may only do so if it is prepared to do without the work being performed by anyone. Stipends for department coordinators first appeared in the parties' 1974 agreement, with the II.D.2 right-to-discontinue language first appearing in the 1979-80 agreement. The parties added the bargaining unit work protection language of Art. II.C. in the 1982-84 agreement. Besides defining bargaining unit work broadly in two different and alternative ways, the language requires that bargaining unit work be performed only by bargaining unit members. The 1982-84 language shows that the parties considered whether and to what extent there could be exceptions to that mandate. They included two expressed exceptions, one of which (regarding incidental bargaining unit work) remains in the current Agreement but by stipulation of the parties is not at issue in this arbitration. Had the parties wished to except other work from the mandate that bargaining unit work must be performed by bargaining unit members they had ample opportunity to do so. Notably, they did not and have not excluded department coordinator work from the bargaining unit work mandate. The Board's reliance on Art. V.5. is misplaced because Art. II.C. constitutes a major limitation on the more general management rights language.

It is true that when department coordinator positions are eliminated, the work does not go away because that work is essential. However, if the District wants to have department coordinator work performed, it must assign that work to bargaining unit members.

The District has not operated without the department coordinator work being performed. Rather, it has nominally assigned that work to administrators. By assigning any of that work to administrators, the District violated Art. II.C.1., which clearly and unequivocally requires the District to assign bargaining unit work exclusively to bargaining unit employees. The department coordinator work involves "administering, directing or supervising any educational activity," such that it falls within the DPI rules definition of the work performed by a licensed "teacher." That work therefore is also "work which may only be performed by a person under a teaching certificate or license issued by the Department of Public Instruction" under Agreement Art II.C.3. The evidence also shows that the department coordinator work has for many years been regularly assigned to bargaining unit members and that it has been performed in part during the regular work day. Thus, under both of the alternative definitions of "bargaining unit work," the District was required to assign the department coordinator work exclusively to

bargaining unit employees.

In actuality the department coordinator work has been performed during 1993-94 not only by administrators, who have a full workload of their own, but also by former department coordinators and other bargaining unit members. The evidence regarding Melissa Hayes shows she has been expected to carry out all of the same duties and responsibilities she performed in 1992-93, just without the discontinued stipend. In other cases the administrative expectation that former department coordinators or other employees continue to do department coordinator work has been more subtle. It is not surprising that the administrators "expected" former department coordinators and/or other department members to perform department coordinator work. This work had to be done, and the administrators who have a full workload of their own did not have time to do it. For a variety of reasons, bargaining unit members have continued to perform department coordinator work.

As bargaining unit work, the department coordinator work had to be assigned to bargaining unit members and had to be compensated at the agreed-upon rate specified in the Agreement. The Arbitrator should so rule. By way of remedy, the Arbitrator should order that the department coordinator positions be restored effective with the beginning of the 1993-94 school year; that the department coordinators be compensated pursuant to Art. IX.D.2.; and that the department coordinators be compensated for customary release time or assignment reduction not provided during the 1993-94 school year.

POSITION OF THE DISTRICT

Article IX.D.2 specifically authorizes the District to discontinue the department coordinator positions "at its discretion." The Board acted pursuant to that authority in this case, for legitimate budgetary reasons. The Board's discontinuance of the positions does not mean that the work previously done by the department coordinators will disappear and not have to be accomplished. The need to schedule and conduct department meetings, to coordinate department budget preparation, to order materials for the department, to provide guidance and suggestions to department teachers, etc. still exists. These are ongoing duties necessary for operation of the departments in the secondary schools. Therefore, if the bargaining unit work language of Art. IX.D.2. were interpreted to mean that the work in question must be assigned to bargaining unit members or to no one, then the Board's Art. IX.D.2. right to discontinue the department coordinator positions at its discretion would be rendered meaningless. On that basis alone, the Arbitrator must conclude that the general Art. II.C.1. does not preclude exercise of the right granted in Art. IX.D.2. To rule otherwise fails to give

meaning to the Agreement as a whole and would constitute a harsh and unreasonable result. If needed, further support of the District's right to reassign the work to the principals and assistant principals is found in the Art. V.5. reservation of the right to determine the duties of employees other than teachers with respect to administrative and nonteaching activities. It may also be concluded that department coordinator work does not fall within either of the Art. II.C. "bargaining unit work" definitions in view of the evidence to the effects that: the Department of Public Instruction does not issue a department coordinator certificate or license; no certificate or license is required to be a department coordinator; and the work performed by the former department coordinators was not necessarily done during the regular work day.

The record evidence indicates that the building administrators assumed the duties of the department coordinators during the 1993-94 school year, though the Superintendent told them that he did not expect them to perform the duties in the exact same manner or to the exact same extent as they were done by the department coordinators during 1992-93. Only in a limited number of situations was it claimed by specific grievants that they continued to perform certain department coordinator duties. In those situations the duties were primarily performed voluntarily. The former department coordinators were never assigned, directed or ordered to perform the department coordinator duties.

There were only 2 or 3 controverted situations where the former department coordinators claimed that they were assigned to do department coordinator duties. With respect to ordering High School Mathematics Department materials, Anthony Pass stated that he felt he was "asked in some respects to do this." However he never questioned the request or told Assistant Principal Turnell that this was no longer his duty, and he admitted at the conclusion of cross-examination that he did not have any expectation that either Principal Kaiser or Turnell expected him to do the work.

Terrance Thomas stated he was told to continue to direct the High School guidance department mail to the appropriate person in the department. Principal Kaiser later testified that he had no recollection of directing Thomas to do so, and such a directive would have been inconsistent with Kaiser's other statements to all former department coordinators that he and the Assistant principals would be assuming the department coordinator duties.

Junior High School Industrial Arts teacher Dale Lehmann stated that he performed all department coordinator duties for his essentially one-person department except the handling of the folder involving department expenditures because, at the beginning of 1993-94, Principal Richard Bestor offered him release time in

exchange for his performance of department coordinator duties. Bestor later testified that he relieved Lehmann of a homeroom assignment on Thursdays and Fridays in order to permit Lehmann to allow students to use the tech education laboratory during homeroom time on those days. Bestor testified that he did so when Lehmann approached him, asked to be relieved of a homeroom and noted that his workload involved four tech education laboratories and that relief from a homeroom assignment would allow him to better serve students in the laboratory during the homeroom period. Because the Association offered no rebuttal evidence regarding Bestor's testimony, and because Bestor's recollection is consistent with the fact that he had told Lehmann and the other former department coordinators that their positions were being discontinued and that they would all be receiving a homeroom assignment in 1993-94, the record does not support Lehmann's testimony as to the reason for his release time in 1993-94. Because Lehmann was not directed or expected to repair machinery, any repairs he did were voluntary rather than calling an outside vendor and were not part of his duties as a teacher.

K-12 Guidance Coordinator Melissa Hayes stated that she performed the same duties in 1993-94 as she did in 1992-93 when she received 50% of the full department coordinator stipend in addition to her salary. However, her situation is somewhat unique and different from the other former department coordinators who testified. Hayes' individual contract assignment was half-time as a Elementary Counselor and half-time as K-12 Coordinator of Guidance and Counseling Services. She performed her department coordination duties primarily in the afternoon when she works as the K-12 Coordinator of Guidance and Counseling Services. Because Hayes was advised that the department coordinator stipend was being discontinued, and because the duties Hayes may be performing that are similar to those of a department coordinator are being performed as part of her basic contract assignment with the District, the District's discontinuation of her department coordinator stipend for 1993-94 was justified.

LD/CD Support Teacher Debra Ellingen's claims were resolved by the parties following the hearing such that it is no longer necessary for the Arbitrator to address that situation.

For those reasons, the grievance should be denied in its entirety.

Even if the Arbitrator were to find that the Agreement has been violated in some way, the remedy requested by the Association is inappropriate. The requested restoration of the department coordinator positions would negate and delete the Board's right to discontinue those positions and therefore would exceed the Arbitrator's authority as defined in Art. VII Grievance Procedure Step Six. The request for back pay in the forms of payment of the 1993-94 stipends and of compensation for the release time or

assignment reduction not provided during 1993-94 would constitute unjust enrichment for duties not performed because the former department coordinators did not even remotely perform the same department coordinator duties in 1993-94 as they did in 1992-93. If a violation is found, the appropriate remedy would be an order directing the District to cease and desist from assigning department coordinator duties to bargaining unit members without compensation. The order should also provide that bargaining unit members should not perform department coordinator duties when directed unless they are advised that they will receive the department coordinator stipend.

DISCUSSION

Article VII.b. defines a grievance as "an alleged violation of a specific article or section of this Agreement and/or policies, rules and regulations of the Board of Education that cover wages, hours, and working conditions." The grievance as amended cites two specific Agreement provisions allegedly violated, Arts. IX.D.2 and II.C. It asserts that the District violated the former by discontinuing the stipends and the latter by assigning the work previously done by department coordinators to non-bargaining unit employees. It is those and only those claims that this Award addresses.

No determination is made regarding the disposition of the grievance as regards LD/CD Support Teacher Debra Ellingen. The District has asserted in its brief that following the arbitration hearing the parties resolved their differences regarding that aspect of this case such that it is no longer a matter before the Arbitrator for determination. There is no specific statement on that subject in the Association's brief. Accordingly, the Arbitrator has reserved jurisdiction to address that aspect of the case if and only if there is a dispute about whether it has in fact been resolved.

The Arbitrator finds the analysis of Melissa Hayes' situation different from that applicable to the other former department coordinators.

Discontinuation of Melissa Hayes' Stipend

Melissa Hayes' situation is different because the District's discontinuation of Melissa Hayes' 50% stipend for K-12 Guidance Coordinator duties does not appear to have been accompanied by a reassignment, nominal or otherwise, of any of her duties to anyone else within or outside the bargaining unit. Indeed, Hayes does not appear to have been relieved of anything but her 50% stipend. She continued to be unequivocally required to perform the same set of duties as she performed in 1992-93.

In that context, the District cannot viably claim that it has discontinued the department coordinator position for which Hayes was paid that 50% stipend in 1992-93. Therefore, the District's failure to pay her that stipend in 1993-94 for the same duties as

she performed in 1992-93 violated the stipend language of Art. IX.D.2.

The Arbitrator has therefore ordered that the District pay her the stipend it improperly discontinued while requiring her to perform the same duties she performed in 1992-93.

Claims Regarding the Remaining Former Department Coordinators

The remaining claims turn on whether the District's Art. IX.D.2. right to discontinue department coordinator positions must be exercised in a manner that does not violate Art. II.C., and if so, whether the District's exercise of that right regarding the remaining former department coordinators violated Art. II.C.

Central to the resolution of the first of those questions is how and whether the parties could have intended both that the District would have the right to discontinue department coordinator positions and that the District would not have the right to assign those duties to non-bargaining unit members. That question arises because, as the District asserts, and the Union more or less concedes, many of the department coordinator duties are essential to the proper functioning of the District. They would have to be performed by someone if they were not performed by bargaining unit department coordinators.

It is useful to note that the general nature of department coordinator duties appears to have remained much the same throughout the years since Art. IX.D.2. initially appeared in the parties' agreements. It is also useful to note that the Art. II.C. bargaining unit work provisions were introduced into the agreements several years after Art. IX.D.2. language regarding department coordinators first appeared.

When Art. IX.D.2. was initially agreed upon, Art. II.C. did not exist and hence the right to discontinue the department coordinator positions in favor of assigning those duties to building administrators outside the bargaining unit involved no conflict with another provision of the Agreement. Then the parties added Art. II.C. It was and is unusually broad in its scope, defining bargaining unit work in either of two alternative ways, the second of which requires only that the work involved "is regularly assigned to bargaining unit members during the work day." Article II.C.1 provides in material part that bargaining unit work shall only be performed by members of the bargaining unit. Moreover, Art. II.C. makes itself "Subject to the conditions of this provision" and sets forth an express exception for incidental bargaining unit work that the parties stipulate is not applicable herein. In its initial form, Art. II.C. set forth an additional exception consisting of "bargaining unit work currently being performed by the director of music and art [consisting of] .4 of a

full-time music position and2 of a full-time art position."

The reality that department coordinator work is essential to the proper functioning of the District appears to have been as true when parties initially agreed that the District had a right to eliminate the positions in its discretion as it is now. However, when the parties later added the bargaining unit work language, they can be presumed to have done so with knowledge of that reality, as well. By adding the bargaining unit work language in the context of that reality, the parties created a seeming conflict between the right of the District to discontinue the department coordinator positions in its discretion and the prohibition against assigning bargaining unit work to non-bargaining unit members.

There are well-established principles of contract interpretation that lend support to both of the parties' arguments about how to resolve the conflict. The District's position draws support from the principles that, if possible, the Agreement must be read as a whole and that the parties should not be deemed to have intended any portion of the Agreement to be meaningless. The Association's position draws support from the principles that the Agreement should be read as a whole and from the principle of "expressio unius, exclusio alterius," to express one is to exclude all others, i.e., the parties' expression of one or more exceptions to the otherwise broad applicability of the bargaining unit work language manifests their mutual intent that there be no other exceptions to that language.

The Arbitrator finds it appropriate, if possible, to seek guidance from other aspects of the language of the Agreement to resolve that conflict.

The District's reliance on the management rights language in Art. V.5. is not helpful. While that language establishes a presumptive baseline right of the District to decide whether teachers or administrators will perform administrative and non-teaching activities, the paragraph following V.5. makes it clear that that right is limited by the specific and express terms of the Agreement so long as they are lawful. The bargaining unit work provision in Art. II.C. is a specific and express prohibition against assigning work regularly assigned to bargaining unit members during the work day to non-bargaining unit members. Given the unusual breadth of that second alternative definition of bargaining unit work in Art. II.C.3., the bargaining unit work protection extends to work of an administrative or non-administrative nature so long as it is "work that is regularly assigned to bargaining unit members during the regular work day."

There has been no contention or showing that the Association's proposed interpretation of that provision would be unlawful. Thus, Art. II.C., if applicable, limits the rights set forth in Art. V.5. Hence Art. V does not provide helpful guidance to resolving the conflict at the center of this case.

However, the language of II.C.1., itself, provides critically

important guidance for resolving the conflict. It not only expressly excepts incidental bargaining unit work from the requirement that bargaining unit work only be performed by bargaining unit members, but it more importantly expressly makes the requirement that bargaining unit work only be performed by bargaining unit members "Subject to the conditions of this provision . . .". That quoted introductory phrase persuasively reflects the parties' mutual intent that the requirement of II.C.1. be subject only to the conditions set forth in Art. II.C., rather than to other conditions that might otherwise reasonably be inferred from other provisions of the Agreement such as Art. IX.D.2. In other words, by that quoted introductory phrase, the parties have expressly indicated that they intended the exceptions contained in II.C. to exclude others not set forth in that provision.

It follows that the District's right to discontinue the department coordinator positions in its discretion may be exercised only in a manner that does not violate Art. II.C. In this case, if the department coordinator work performed by the former department coordinators was "bargaining unit work" within the Art. II.C.3. definition of that term, then the District's exercise of that right would clearly have violated II.C.1. because the District nominally assigned the department coordinator duties during 1993-94 to administrators who are expressly excluded from the bargaining unit.

The evidence satisfactorily establishes that the department coordinator work performed by the former department coordinators was performed for the most part during the regular work day. The Arbitrator so finds in part based on the substantial testimony to that effect from several of the former department coordinators and from the parties stipulation that Kimla, Lehmann and Frey would have testified to that effect had they been questioned on those subjects. In addition, the nature of the work as variously described in District documents and witness testimony indicates that many aspects would naturally (and in some cases necessarily) be performed during the regular work day. Finally it is noted that in practice the department coordinators were granted release time which the Arbitrator finds was for the purpose of permitting them to perform department coordinator duties during the regular work day.

For those reasons, the Arbitrator finds that the department coordinator work performed by the former department coordinators was "work that is regularly assigned to bargaining unit members during the regular work day" within the meaning of Art. II.C.3. It is therefore not necessary to determine whether that

work was also "work which may only be performed by a person under a teaching certificate or license issued by the Department of Public Instruction" because those two criteria for "bargaining unit work" are alternatives either of which is sufficient to render the work involved "bargaining unit work."

It follows, therefore that the District violated Art. II.C. by nominally assigning the department coordinator work previously performed by the remaining former department coordinators to non-bargaining unit building administrators.

While the foregoing Agreement interpretations may render the Board's Art. IX.D.2. right to discontinue the positions in its discretion of little practical value to the District, the Arbitrator finds that these interpretations best give effect to the parties' mutual intent as reflected in the language of the Agreement read as a whole.

By way of remedy, the Arbitrator has ordered the District to pay the department coordinators the stipends that they would have received had they been assigned the department coordinator work which the District nominally assigned to administrators in violation of Art. II.C. The District has acknowledged that the department coordinator work was essential. It therefore appears quite likely that the District would have found it necessary to assign the work to the former department coordinators rather than not to have the work performed at all. To the extent that the work was in fact performed by building administrators, that was due solely to the District's improper action and not at all to fault on the employees' parts. The September 8, 1993 grievance promptly put the District on notice that the Association would seek recoupment of the full stipend retroactive to the beginning of 1993, and the amendment of the grievance on or about October 1, 1993 put the District on further notice that the Association considered the assignment of the work to administrators to be a violation of Art. II.C.

The Arbitrator has not ordered the District to pay additional compensation to the former department coordinators on account of the District's failure to provide them with release time. While the provision of release time to department coordinators appears to be firmly supported by past practice, the practice is not a part of the department coordinator compensation specified in Art. IX.D. The Arbitrator therefore finds it appropriate to view the practice as intended to provide time during the work day to permit actual performance of department coordinator duties assigned by the District. Because the Arbitrator finds that, with de minimis exceptions, the former department coordinators were not required by the District to perform those duties during 1993-94, the practice of providing time during the work day for them to actually perform such duties assigned by the District, was not applicable to them during 1993-94. The evidence satisfies the Arbitrator that the extent to which former department coordinators

continued to perform those duties during the 1993-94 school year was, with de minimis exceptions, voluntary on those employees' parts. Clearly, the evident needs of the departments, the locus of department coordinator expertise, the nature of administrators' workloads, and the former department coordinators' professionalism combined to strongly encourage them to continue to perform the work to at least some extent. Nevertheless, the building administrators' announcements to employees at the beginning of the school year and the District's September 13 grievance answer made it clear enough that employees were not obligated to perform that work.

The Arbitrator has not ordered the District to reinstate the former department coordinators as department coordinators. That remains a matter of District discretion under the express language of Art. IX.D. Instead, the Arbitrator has focused his remedy on the particular violations found so as to make it clear, as noted above, that the District must not exercise its Art IX.D. right in a manner that violates Art. II.C.

DECISION AND AWARD

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

1. With regard to Melissa Hayes, the disposition of the grievance as amended on October 1, 1993, shall be as follows.

a. The District violated Art. IX.D.2. by discontinuing Melissa Hayes department coordinator stipend in 1993-94 while continuing to require her to perform the same duties for which she was paid a stipend in 1992-93.

b. By way of remedy for that violation, the District shall pay Melissa Hayes, without interest, an amount of money equal to the stipend she otherwise would have been paid in 1993-94.

2. No determination is made at this time regarding the disposition of the grievance as regards LD/CD Support Teacher Debra Ellingen because it appears that the parties' differences in that regard have been settled. The Arbitrator retains jurisdiction for a period of 30 days following the date of this Award for the purpose of resolving that aspect of the grievance if, but only if, it has not been previously settled between the

parties.

3. With regard to the remaining employees listed on Exhibit 3 (attached), the disposition of the grievance as amended on October 1, 1993, shall be as follows.

a. The District's Art. IX.D.2. right to discontinue the department coordinator positions in its discretion may be exercised only in a manner that does not violate Art. II.C. The department coordinator work performed by the former department coordinators was "work that is regularly assigned to bargaining unit members during the regular work day" within the meaning of Art. II.C.3, and hence "bargaining unit work" within the meaning of Art. II.C. The District therefore violated Art. II.C. by assigning that work to building administrators who are not members of the bargaining unit.

b. By way of remedy for that violation, the District shall pay the former coordinators, without interest, the stipend they each would have received for 1993-94 had they been assigned as department coordinators rather than the building administrators. The Association's request for additional relief, including its request for relief in the form of compensation for release time not provided to the former department coordinators during 1993-94, is denied.

Dated at Shorewood, Wisconsin
this 10th day of August, 1994 by

Marshall L. Gratz, Arbitrator

DUTIES AND RESPONSIBILITIES OF THE DEPARTMENT COORDINATOR

1. Acquaints teachers in his/her department with the instructional program of that department.

Through conferences and meetings and other ways as developed with the principal and the director of instructional services, he/she orients teachers into the program of studies of the department. The department coordinator gives such assistance to the teacher as may be possible.

2. Assumes a position of leadership in the instructional program of the school.

- a. Plans with the department staff for the use of curriculum materials such as teaching guides and audio-visual listings.
- b. Prepares the schedule of department meetings with the teachers involved.
- c. Assists other planning groups, the principal, or the director of instructional services in defining agendas for meetings.
- d. Assists in writing bulletins and other communications that deal with the instructional program within the school.
- e. Maintains a file of all instructional materials of his/her department.
- f. Helps to interpret his/her department's instructional program to parent-teacher groups.
- g. Works with other city-wide or school-wide committees as may be directed by the principal or director of instructional services.
- h. Aids substitute teachers to interpret and secure instructional materials for daily plans of absent teachers.

3. Given direction to the implementation and evaluation of testing programs within his/her department for the improvement of instruction.

4. Works with the department staff, principal, and the director of instruction services in the study and selection of textbooks and supplementary instructional materials.

5. Aids the principal and director of instructional services in planning the budget and initiating requisitions for instructional supplies and equipment.
6. Works with other individuals, departments, and agencies as they may arise.
7. Is responsible to the superintendent regarding all matters pertaining to the general school program.
8. Participates in departmental meetings and other meetings called by the principal, director of instructional services, or superintendent of schools.
 - a. Department coordinators are expected to attend a number of meetings each year which will be called by the director of instructional services for district-wide coordination. The number of meetings may vary from year to year according to the need for same, but in most cases will range from two (2) to four (4) meetings per year. Coordinators are also obliged to attend such meetings, monthly or otherwise, as will be called by their building principal for purposes of building-level coordination.
 - b. Department coordinators automatically serve on district-wide (K-12 or 7-12) curriculum committees when such committees are active and will attend the necessary number of meetings to accomplish the work which needs to be done.
 - c. Department coordinators shall be available for conferences and talk sessions initiated by their department co-workers, parents, and the public.
9. Keeps abreast of current curriculum trends and developments by reading books and journals and attending professional workshops and conferences.
10. Understands that a well coordinated and balanced program of instruction for the schools can result only if all department coordinators work in a truly cooperative spirit.
11. Department coordinators are assigned a full teaching responsibility but are not assigned homeroom supervision.
12. Carries out other duties and responsibilities as may be assigned by the principal, director of instructional services, or the superintendent of schools.

FOND DU LAC SCHOOL DISTRICT
Fond du Lac, Wisconsin

DEPARTMENT COORDINATOR STIPENDS REMOVED
FROM 1993-94 TEACHING CONTRACT

	<u>TEACHER</u>	<u>DEPARTMENT</u>
GOODRICH:		
	David Bartolutti	Physical Education
	Karen Lindal	Family and Consumer Ed
	Richard Mand	English
	Anthony Pass	Mathematics
	John Schrum	Industrial Arts
	Karen Sheppard	EEN
	David Stetter	Science
	Joanne Thorkelson	Foreign Language
	George Trtan	Social Studies
	Terrance Thomas	Guidance
SABISH:		
	Arthur Godleski	Social Studies
	Michael Scheer	English
	Arthur Thomas	Science
	Walter Tollefson	Mathematics
THEISEN:		
	Jerin Frey	Social Studies
	Allan Larson	Science
	Dale Lehmann	Industrial Arts
	James Strasser	English
	Gary White	Mathematics
WOODWORTH:		
	Karen Buck	Social Studies
	Roger Freiberg	Science
	Nancy Kimla	Mathematics
	Margaret Patton	English
	Rand Vander Schaaf	Industrial Arts
EXTRA DUTY STIPENDS:		
	Debra Ellingen	LD/CD Support Teacher
	Melissa Hayes	K-12 Guidance Coordinator

[attached were copies of three pages of documentary exhibits]

