BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between MID-STATE VOCATIONAL-TECHNICAL FACULTY ASSOCIATION and MID-STATE VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT	Case 63 No. 50427 MA-8252 (Scott Osborne Grievance)

Appearances:

Mr. Thomas S. Ivey, Jr., Executive Director, Central Wisconsin UniServ Councils South/West, appearing on behalf of the Association.

Ruder, Ware & Michler, S.C., Attorneys at Law, by Mr. Dean R. Dietrich and Ms. Cari L. Hoida, appearing on behalf of the District.

ARBITRATION AWARD

Pursuant to the request made by Mid-State Vocational-Technical Faculty Association, hereinafter referred to as the Association, and the subsequent concurrence by Mid-State Vocational, Technical and Adult Education District, hereinafter referred to as the District, Dennis P. McGilligan was appointed Arbitrator by the Wisconsin Employment Relations Commission pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. 1/

1/ On February 23, 1994 the District requested of the Commission that one of the two Mid-State VTAE grievance arbitration cases assigned to the undersigned (the other case being Case 62, No. 50426, MA-8251, involving the GOAL Grievance) be assigned to another arbitrator. By letter dated March 29, 1994, Marshall L. Gratz, Commission Attorney/Team Leader denied the request because it was "neither joined in by the Union nor premised on a sufficient basis to be granted at the unilateral behest of the College." By letter dated June 6, 1994, the District requested the undersigned recuse himself from hearing the above-entitled matter because "you have previously served as arbitrator in a dispute between the District and the Association known as Grievance of Scott Osborne, Case XIII, No. 26528, MA-1800 . . . a ruling was issued by you as arbitrator on March 17, 1981." The District added in said letter "We believe that the similarity of issues and the potential for challenge to the impartiality of the arbitrator due to the similarity of issues and the grievant requires that you remove yourself as impartial

(Footnote continued on page 2)

Hearing was conducted on June 9 and September 7, 1994 at the Mid-State Technical Institute, Wisconsin Rapids, Wisconsin. The hearing was not transcribed. The parties completed their briefing schedule on November 17, 1994. After consideration of the evidence and arguments made by the parties, the Arbitrator makes and renders his decision and Award.

ISSUES:

The parties were unable to stipulate to the issue. The Association framed the issue as:

> Did the District violate the terms and conditions of the Master Contract Agreement when it assigned Scott Osborne to work beyond the contractual thirty-five hour work week without additional compensation?

While the District framed the issues in the following manner:

> Whether the College violated Article VI, Section B in the manner in which it assigned work and travel time to the Grievant for an affiliation outside his community of assignment?

1/ (Continued)

arbitrator of this dispute." The District renewed this request in the form of a motion at hearing on June 9, 1994. The undersigned denied the District's recusal request at the aforesaid hearing for a variety of reasons including, but not limited to, the past history of actions on this subject in the case noted above, the fact the parties followed the contractual grievance/arbitration procedures resulting in the selection of the undersigned as Arbitrator in the case, the fact the parties could have agreed on an alternative procedure to select an arbitrator in the matter but failed to do so and the absence of any persuasive evidence or argument by the District for recusal.

If so, what is the appropriate remedy?

Based on the entire record, the Arbitrator adopts the District's statement of the issues.

FACTUAL BACKGROUND:

Bargaining History

The Association began representation of the faculty at the District in 1970 and negotiated the first contract between the District and the Association for the 1970-71 school year. In that contract, the parties negotiated language on school day and school week which read as follows:

> 1. Each full-time contractual professional employee shall be responsible to the school for an eight-period span daily, Monday through Friday. A period is defined as not more than 60 minutes continuous span of time.
>
> 2. The span of class time for each professional employee shall not exceed eight periods (including, a one hour lunch period between 11:00 a.m. and 2:00 p.m. per day) i.e., the beginning of the first and the ending of the last class taught in any given day. The span of time for each staff member not engaged in instructional activities shall not exceed nine consecutive periods per day including a one hour lunch period.
>
> 3. Professional employees are expected to fulfill other professional responsibilities such as pre-instructional planning, student counseling, and other functions as defined by the Area VTAE District 14 Organizational Manual, Chapter I, page 5, during contract hours of employment. Requests to leave campus for professional or personal reasons, except for lunch, must be cleared through the professional employee's immediate supervisor.

This contract language remained the same through the 1977-78 agreement between the parties.

In the 1978-79 agreement, the parties negotiated new contract language as follows:

> 2. The span of class time for each professional employee shall not exceed eight periods (including a one hour lunch period between 11:00 a.m. and 2:00 p.m. per day) i.e., the beginning of the first

and the ending of the last class taught in any given day. The span of time for each staff member working as a counselor, librarian, media specialist, curriculum specialist, or as a teacher supervising or instructing students participating in an affiliation shall not exceed nine consecutive periods per day including one hour for lunch.

3. If responsibilities for an affiliation causes a teacher to work beyond the normal nine (9) hour span of time, then compensation shall be paid at a rate equal to $5.00 per 50 miles of distance traveled. It is understood that this provision, and the nine (9) hour provision stated in sub-paragraph 2 pertains to affiliations that are conducted in medical facilities located outside of the instructor's community of assignment.

This language was negotiated by the parties partly in response to a February, 1978 request by the grievant for additional compensation for travel time from Marshfield to Wisconsin Rapids as a result of his affiliation assignment. This language continued through the 1981-82 agreement.

On February 20, 1979, the grievant filed a grievance alleging a violation of Article VI, Section B entitled School Day and School Week and seeking additional compensation for time worked in excess of an eight hour span of time. This grievance, along with several others, proceeded to arbitration before the undersigned on September 24, 1980. In said arbitration proceeding there were substantial differences between the parties with respect to interpretation of agreements arrived at in previous bargaining sessions. In its brief, the Association argued that a normal assignment for an outside affiliation instructor was a total of nine hours including seven hours of work, one hour of lunch and one hour of travel. The Association also argued that if travel exceeded the total of nine hours, the instructor should be compensated at the rate of $5.00 per fifty miles. The District, on the other hand, maintained that it had the right to assign affiliation instructors a nine period work day.

The undersigned concluded in an arbitration decision dated March 17, 1981, that the District had not violated the agreement when it assigned an affiliation instructor to a nine hour work day. The undersigned found:

> Therefore, based on all of the above, and absent any persuasive evidence to the contrary, the Arbitrator finds that the answer to the two aforementioned issues as stipulated to by the parties is NO, the District did not violate Article VI, Section B of the Master Agreement in the manner of assigning hours of work to employes conducting affiliations within and outside their community of assignment. . . .

The language in paragraph 3 of Section B - School Day and School Week has remained in all subsequent agreements between the parties, including the 1992-94 agreement. That language as noted above reads as follows:

> 3. If responsibilities for an affiliation causes a teacher to work beyond the normal nine (9) hour span of time, then compensation shall be paid at a rate equal to $5.00 per 50 miles of distance traveled. It is understood that this provision, and the nine (9) hour provision stated in sub-paragraph 2 pertains to affiliations that are conducted in medical facilities located outside of the instructor's community of assignment.

In the negotiations for the 1981-82 agreement, the Association presented a proposal to modify Section B - School Day and School Week by eliminating the "nine consecutive periods" reference in paragraph 2 and by changing the "affiliation" work day from nine hours to eight

hours. The intent of the Association proposal was to change the work day of counselors, librarians, certain specialists and affiliation instructors to coincide with other contract personnel at eight hours. This proposal was not adopted and, as noted above, the parties subsequently agreed to continue the same contract language for the 1981-82 school year.

For the 1982-83 agreement, the Association again sought a change to Section B - School Day and School Week by seeking language placing a thirty-five hour per week limit on teacher assignments and providing additional compensation if an employe was assigned hours in excess of thirty-five hours per week. The parties were unable to voluntarily resolve the negotiations for said agreement and the matter proceeded to interest arbitration. One of the main issues in dispute in the interest arbitration proceeding was the School Day and School Week language. Arbitrator Gordon Haferbecker was selected as arbitrator to resolve the dispute between the parties.

The final offer of the Association before Arbitrator Haferbecker included the following:

> ARTICLE VI
>
> WORKING CONDITIONS
>
> Section B - School Day and School Week
>
> 1. - 4. (Repeat the 1981-82 language.)
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> 5. Beginning in the 1983-84 year, each employee assigned to more than thirty seven and one-half (37 1/2) hours per week shall be compensated at 1/1330 of the employee's salary for each additional hour. Beginning in the 1984-85 year, each employee assigned to more than thirty-five (35) hours per week shall be compensated at 1/1330 of the employee's salary for each additional hour.

The District's position was status quo on School Day and School Week.

In its brief before Arbitrator Haferbecker, the Association attacked "the current work day/work week situation at Mid-State" because it "had created problems for the parties." The Association added "clearly this is a problem area which is ripe for a solution, and the proposal of the Association is an appropriate solution."

The Association first compared the situation at the District with other vocational technical districts in Wisconsin:

> Exhibit 10 clearly shows that in Wisconsin Vocational Technical Schools a work week of thirty-five hours or fewer hours is the rule

> for schools other than Mid-State where the work week is thirty-five to forty plus hours per week. . . . Exhibit 13 explains the variables for Exhibit 12 and clearly shows that where employees have to work longer hours in other vocational technical districts, they receive additional compensation for the additional time.

The Association next argued for the thirty-five hour per week language by comparing to private sector employes at the paper mill in Wisconsin Rapids, private sector professional positions at said mill and K-12 instructor positions. By its proposal the Association allowed the District to adjust the work load of bargaining unit members who worked beyond a 35 hour week and to reduce the immediate monetary impact when it phased in its proposal of providing a limitation of thirty-seven and one-half hours of assigned work before additional compensation had to be paid by the District during the 1983-84 school year while dropping the limitation to thirty-five hours of assigned work in the following school year. However, the Association relied upon the District's established practice of paying bargaining unit members 1/1330 of their salary for contract extensions beyond the normal work year and cited this practice as consistent with the Association's proposal to pay bargaining unit members who work beyond a thirty-five hour week.

As part of its argument, the Association also entered into extensive discussion attacking the practice of having some levels of bargaining unit members work longer than others. The Association stressed the concept of equal pay for equal work. The Association again claimed there was no comparability which would justify one bargaining unit member being required to work longer than other bargaining unit members for the same pay:

> When Vocational Technical Schools are examined from across the state and contiguous to Mid-State, it is instantly clear that where the positions in question in this arbitration are examined, the facts are that the employees have the same length of work week or they are paid proportionately higher for any extended work day/work week. In some vocational technical districts the guidance counselor, librarian, media specialist, or instructor of affiliation, are not part of the bargaining unit. In these cases, the circumstances of their employment are not covered by the Master Agreement and thus are not applicable to the instant matter. Specific attention is drawn to Association Exhibits 12 and 13 which show beyond any doubt, that either the work day/work week for all bargaining unit members is a constant known quantity or the bargaining unit member who works a longer day or week, receives proportionately higher compensation for their extra work.
>
> Thus, it's clear that in the private sector the K-12 districts and more importantly in the Vocational Technical districts, bargaining unit

> members are required to perform a uniform work day/work week for uniform pay. Where variation exists, extra pay is given.
>
> . . . Thus, the Association proposal is a promise of fair treatment in the future.

The Association made it clear in its brief that it was out to make a major change in the way a certain group of employes, including those involved in clinical affiliation work, were treated with respect to their work day/work week:

> The Association by its proposal wishes to change the status quo at Mid-State beginning in 1983-84.

The District, on the other hand, recognized the impact of the Association proposal. Their brief recognized its application to clinical affiliation programs including Respiratory Therapy, Operating Assistant, Practical Assistant, Medical Assistant, Farm Training and Dietetic Technician programs. Further, the District understood the Association's proposal to apply to all employes and that, if adopted, could lead to additional employe compensation:

> The Association offer treats all types of instructors uniformly and allows no flexibility for balancing an employee's workload beyond a five day work week. This proposal is highly restrictive and will force the District to pay excessive amounts of <u>weekly overload pay</u> which could be avoided if on the balance, the workload were viewed over a period of a full school year. (Emphasis supplied)
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> . . .
>
> The Association proposal provides for payments tied to the number of hours in <u>each workweek</u>. (Emphasis supplied)

The District warned that the Association's efforts to change the status quo regarding the workload of certain instructors:

> 2. The Association offer is ambiguous on its face and will subject the District to grievance arbitrations in the future.

In its reply brief, the District continues on this theme of ambiguity and possible adverse consequences:

> . . . the District is compelled to point out a disconcerting problem with the Association proposal. The current contract language (ARTICLE VI, WORKING CONDITIONS, Section B - School

> Day and School Week, Paragraph 3) provides a procedure for compensating an Affiliation Instructor whose work extends beyond the normal nine (9) hour span of time. The Final Offer suggested by the Association also establishes a procedure for compensating Affiliation Instructors who exceed a maximum number of hours of work each week. In fact, the Association Offer by its ambiguity, could very well apply to all Instructors in the District. The Arbitrator must note that these two provisions could result in duplicate payment to an Affiliation Instructor for services provided to the District. An individual could receive the negotiated travel pay compensation as well as additional payments under the extra pay provision proposed by the Association. . . .

Arbitrator Haferbecker issued his award on June 7, 1983 selecting the final offer of the Association. He recognized the "hours" issue as ". . . a major goal of the local in recent negotiations." Arbitrator Haferbecker acknowledged the history of prior voluntary settlements, but recognized "that the teachers' perception of what is fair and equitable has changed since that time." Furthermore, in concluding that the "union has carried the burden of proof and has shown a need for change," Arbitrator Haferbecker noted:

> As indicated in the Union Brief and exhibits, most of the Wisconsin Vocational-Technical schools do not require counselors, media specialists, librarians, and instructors on affiliation to work more hours than regular classroom teachers. In those cases where the hours are greater, the employees usually receive additional compensation.

Finally, Arbitrator Haferbecker conceded that the District "raised some legitimate concerns as they relate to duplicate pay situation possible grievances, and the problems of adjusting loads that vary during the semester or school year" but found that the weight of the evidence favored the Association's position. Arbitrator Haferbecker concluded a more uniform approach to the question of hours was reasonable, and the Association's offer on this subject was ultimately incorporated into the parties' agreement.

Following the Haferbecker arbitration award, the parties entered into a "Win-Win" bargaining process for the 1985-86 agreement. "Committee II" was assigned the responsibility to address various issues involving flexible scheduling and work load formulas. The Committee had various discussions regarding work load for teachers and also discussed Section B - School Day and School Week. The minutes of the June 3, 1985 meeting indicate discussion of the Clinical work load:

Workload Ranges According to Method of Delivery

Delivery	Contact Hours	Preps
Lecture/Discussion	18-21	4
Lab/Shop	22-25	4
Supervised Clinical/ Activity	25-30	4
Non-Instructional	35	

A June 6, 1985 memo from B. Landerman and Mary Zurawski includes this specific reference: "Time required for travel will be included within the eight hour day," under Article VI, Section H, 1.

At the June 12 Committee meeting, Committee members proposed language indicating that the class time for professional employes shall not exceed eight periods including a one period meal break. Language regarding the thirty-five hour work week was proposed to continue but to be renumbered. Paragraph 3 referring to compensation for instructors required to travel to affiliations outside the community of assignment was proposed to remain as is but to be renumbered Paragraph 4. Committee members also discussed new language providing protection to faculty members by allowing assignment of eight consecutive hours to include evening credit courses in order to avoid layoff. The new language incorporated into the 1985-86 agreement read as follows:

1. Each full-time contractual professional employee shall be responsible to the District for an eight-period span daily, Monday through Friday. A period is defined as not more than 60 minutes continuous span of time.

2. The span of work time for each professional employee shall not exceed eight hours, including a one hour meal break at an appropriate mid-point of his/her work day.

3. If responsibilities for an affiliation causes a teacher to work beyond the normal nine (9) hour span of time, then compensation shall be paid at a rate equal to $5.00 per 50 miles of distance traveled. It is understood that this provision, and the nine (9) hour provision stated in sub-paragraph 2 pertains to affiliations that are conducted in medical facilities located outside of the instructor's community of assignment.

4. Any faculty member who has completed one full year of employment as an instructor at Mid-State Technical Institute, may be assigned a workload of 8 consecutive hours extending into evening credit course offerings in order to

avoid a layoff of the faculty member. Beginning in the 1984-85 year each employee assigned to more than thirty-five (35) hours per week shall be compensated at 1/1330 of the employee's salary for each additional hour.

5. Professional employees are expected to fulfill other professional responsibilities such as pre-instructional planning, student counseling, and other functions as defined by Mid-State VTAE District Organizational Manual, Chapter I, page 5, during contract hours of employment. Requests to leave campus for professional or personal reasons, except for lunch, must be cleared through the professional employee's immediate supervisor.

This language was extended in the 1986-87 agreement and has remained consistent through the 1992-94 Agreement.

For the 1986-87 agreement, the parties agreed to drop the reference to the "1984-85" school year in paragraph 4. The language of paragraph 4 has remained the same through the 1992-94 agreement and reads as follows:

4. Any faculty member who has completed one full year of employment as an instructor at Mid-State Technical Institute, may be assigned a workload of 8 consecutive hours extending into evening credit course offerings in order to avoid a layoff of the faculty member. Employees assigned to more than thirty-five (35) hours per week shall be compensated at 1/1330 of the employee's salary for each additional hour.

During negotiations for the 1992-94 agreement, the Association proposed a modification to Section B - School Day and School Week which would eliminate Paragraph 3 regarding compensation for instructors whose responsibilities require travel beyond the nine period day for an affiliation. The District did not accept this proposal and the paragraph regarding travel beyond the nine period day remained a part of the agreement.

Specific Facts of the Grievance

Scott Osborne, hereinafter the grievant, is an instructor for the District and is assigned to teach in the Respiratory Care Program. His assignment includes work at a clinical affiliation.

Since about 1982, the grievant's base reporting school has been the Marshfield campus of the District. He works two days a week at the District's clinical affiliations outside the Marshfield area.

From 1982 to the beginning of the 1992-93 school year, the grievant's work week consisted of no more than 35 hours. These work weeks included two hours of travel time (one hour each way), two days per week for travel between his base reporting school, the District's campus in Marshfield to his clinical affiliate assignments.

During the 1992-93 and 1993-94 school years the grievant was assigned 37 hour weeks (including travel time). During this period, he did not work more than eight (8) hours in any one day. The grievant's schedules were developed in conjunction with and with the approval of his supervisors.

On September 15, 1993, the grievant filed a grievance alleging a violation of Article VI, Sections B and H of the agreement. The grievance alleged, in material part, that he was assigned more than a thirty-five hour work week in violation of the agreement.

At issue is the assignment of work on days when the grievant was assigned an affiliation outside his normal community of assignment, Marshfield. For example, in the Spring of the 1993-94 school year, the grievant was assigned to an affiliation on Mondays and Thursdays. On those days, the grievant was assigned to work six hours/periods of instruction, an hour of travel to the affiliation and an hour of travel from the affiliation. The grievant was also allowed to take one hour of lunch or reduce the lunch period to one-half hour at his discretion. The District expected the grievant to travel to and from the assigned clinical site on his own time while the grievant felt this should be included as work time.

The grievance was processed in accordance with procedures outlined in the agreement. By letter dated November 3, 1993, the District Director summarized the position of the District in response to the grievance as follows:

> I have reviewed the circumstances surrounding your assignment of work and have determined that there has been no violation of the contract language. Specifically, it is my determination that there is no violation of the provisions of the master contract agreement as your clinical practicum assignment for the 1993-94 school year is consistent with the language found in Article VI, Section B, Paragraph 3 of the agreement. This article allows the district to assign a nine-hour work day to instructors in affiliations that are conducted in medical facilities located outside of the instructor's community of assignment.
>
> The language of Article VI, Section B, Paragraph 4 relating to the assignment of 35 hours per week does not interfere with the right of the district to assign a nine-hour work day to instructors participating in affiliations conducted in medical facilities located

outside the community of assignment. Rather, the language of Article VI, Section B, Paragraph 4 merely provides for additional compensation in the event an instructor is assigned to work more than 35 hours per week. Further, the language in Article VI, Section H, does not apply to this assignment of duties.

Based upon the existing contract language, I find there is no violation of the master contract agreement and your grievance is denied.

Barb Lato received paid travel time to and from her affiliations although she did less teaching of students at affiliations than the grievant.

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE VI

WORKING CONDITIONS

. . .

Section B - School Day and School Week

1. Each full-time contractual professional employee shall be responsible to the District for an eight-period span daily, Monday through Friday. A period is defined as not more than 60 minutes continuous span of time.

2. The span of work time for each professional employee shall not exceed eight hours, including a one hour meal break at an appropriate mid-point of his/her work day.

3. If responsibilities for an affiliation causes a teacher to work beyond the normal nine (9) hour span of time, then compensation shall be paid at a rate equal to $5.00 per 50 miles of distance traveled. It is understood that this provision, and the nine (9) hour provision stated in sub-paragraph 2 pertains to affiliations that are conducted in medical facilities located outside of the instructor's community of assignment.

4. Any faculty member who has completed one full year of employment as an instructor at Mid-State Technical College, may be assigned a workload of 8 consecutive hours extending into

evening credit course offerings in order to avoid a layoff of the faculty member. Employees assigned to more than thirty-five (35) hours per week shall be compensated at 1/1330 of the employee's salary for each additional hour.

5. Professional employees are expected to fulfill other professional responsibilities such as pre-instructional planning, student counseling, and other functions as defined by Mid-State VTAE District Organizational Manual, Chapter I, page 5, during contract hours of employment. Requests to leave campus for professional or personal reasons, except for lunch, must be cleared through the professional employee's immediate supervisor.

. . .

Section H - Teaching Assignments and Vacancies

1. The Board retains the right to make subject assignments and to make transfers between schools as necessary to the best interest of the District. Assignments and transfers will take into consideration the professional employee's professional training and competence. In making involuntary assignments and transfers, the convenience and wishes of the individual professional employee will be considered to the extent they do not conflict with the instructional requirements and best interests of the District and the students. Travel will be paid to the professional employee from the professional employee's base or reporting school to the secondary assignment and return at the regular rate, actual mileage to be determined by the District Director. Time required for travel will be included within the eight hour day.

. . .

PARTIES' POSITIONS:

The Association argues that the District is required to pay the grievant 1/1330 of his salary for each additional hour worked (2) beyond 35 hours a week. The Association maintains the grievant's claim is supported by:

1. clear, specific and unambiguous language detailing that travel time will be included in the eight hour day (Article VI, Sec. H, para. 1) with an eight hour day including a one hour, duty free lunch (Article VI, Sec. B, para. 2), and instructors will be compensated for work beyond 35 hours per week at 1/1330 of their salary (Article VI, Sec. B, para. 4);

2. the fact that the Association's interpretation of the contract gives full meaning to all the provisions (Article VI, Section B, para. 3 -"'Affiliation instructors' can be assigned to more than eight hours at an affiliation" as well as Article VI, Section H, para. 1 providing for travel time to be included within the eight hour day and B, para. 4 providing for compensation for additional hours beyond the 35 hour work week as noted above);

3. the fact that the Association's interpretation avoids disparate treatment of bargaining unit employes, thus avoiding harsh and unfair results; and

4. the bargaining history including, in particular, the Association position during bargaining leading up to the 1983 Haferbecker Award that the work week for all bargaining unit members be set at a fixed number of hours so as to eliminate disparate treatment afforded some bargaining unit members including "affiliation instructors," the District's concern during said bargaining that adoption of the Association's position by Arbitrator Haferbecker "could result in duplicate payment to an Affiliation Instructor for services provided to the District, and, finally, the Haferbecker Award which found for the Association and consequently incorporated into the applicable collective bargaining agreement the Association's final offer on Article VI, Section B - School Day and School Week the following language: "Beginning in the 1984-85 year, each employee assigned to more than thirty-five (35) hours per week shall be compensated at 1/1330 of the employee's salary for each additional hour."

The Association feels the District's arguments should be rejected by the Arbitrator because they fail:

1. to give meaning to the language in Art. VI Sec. H, para. 1 which includes travel time in the work day,

2. to represent the well established practice testified to by the grievant and Barbara Lato with respect to including travel time in their work day/week, and

3. to honor the thrust of the Haferbecker Award and treat all employees equally with respect to the thirty-five hour work week.

Based on all of the foregoing, and the entire record, the Association requests that the Arbitrator sustain the grievance and find:

1. Affiliation instructors are covered by the thirty-five hour work week provision of the contract,

2. the grievant's schedule exceeded the thirty-five hour work week by two hours each week, and

3. he should be compensated at 1/1330 of his salary in effect at the time for the additional two hours per week worked.

The District, on the other hand, basically maintains it has not violated the collective bargaining agreement by the manner in which it assigned work hours to the grievant and is not obligated to pay him additional compensation for time spent in travel to affiliations outside the community of assignment.

In support thereof, the District first argues that the nine hour workday provision -- Article VI, Section B -- is ambiguous and, therefore, must be interpreted by the Arbitrator. The District claims that a review of the parties' bargaining history, and the prior grievance and interest arbitrations over Article VI, Section B indicates that outside affiliation instructors are only to receive additional compensation for work beyond a nine hour span of time. In particular, the District points to the language in paragraph 3 referring to a "nine (9) hour provision" which was added to the 1978-79 labor agreement, and which, along with other language agreed to at the time, provided for a nine period (8 hours work plus one hour lunch) span of time for each staff member involved in an affiliation instruction as well as a "method of payment of compensation if an affiliation causes a teacher to work beyond the normal nine hour span of time." The District emphasizes this language in paragraph 3 has remained in every agreement since despite other changes in the contract in the intervening years. In this regard, the District also points out that its position on this point -- that it can assign affiliation instructors up to a nine (9) hour work day without additional compensation was upheld in a grievance arbitration in 1980 and has withstood various attempts by the Union to change it in bargaining over the years. Based on the foregoing, the District concludes "since the grievant is assigned six hours of work at the outside affiliation, is allowed one hour for lunch and two hours for travel, the nine hour span of time has not been exceeded . . . additional compensation for travel is not required under the contract."

The District next argues that the "nine-hour" language of paragraph 3 cannot be deemed "superfluous" but is reasonably interpreted, based on the District's success in bargaining retention of said language in the contract thus preserving the District's need for flexibility in meeting affiliation needs, to require additional compensation only when an outside affiliation assignment requires work beyond nine hours.

The District further maintains that requiring a nine hour work day at an outside affiliation is not inconsistent with paragraphs 2 and 4 because the thirty-five hours of assignment is not being exceeded. More specifically, the District opines the "nine hour span of time" language of paragraph 3 pertains to assignments at affiliations conducted in medical facilities located outside of the instructor's community of assignment, while the "eight consecutive hours" provision of paragraph 2 applies to all professional employes performing on-campus or inside affiliation assignments. The District goes on to state "It is important to note the difference in language between the 'assignment' of thirty-five hours each week, the 'workload' of eight consecutive hours within a thirty-five hour week, and the nine hours of 'work time' which cannot be exceeded without additional compensation on outside affiliation days." Based on same, the District feels the use of words 'work' and 'assignment' in Section B indicates that 'work' is considered time spent on the job, while 'assignment' means time spent conducting work-related activities, i.e., class time but not lunch. "For example, sub-paragraphs 2 and 4 refer to the normal 'work time' and 'workload' as eight hours and go on to state that employes are normally 'assigned' to not more than thirty-five hours a week." In contrast, the District points out, "sub-paragraph 3 indicates that 'work' at an outside affiliation cannot exceed nine hours without additional compensation." Based on all of the foregoing, the District concludes Article VI, Section B read as a whole clearly indicates that instructors 'working' at outside affiliations can be required to spend up to nine hours

on the job and still remain within

thirty-five hours of 'assignment' because, according to the District, 'work' does not include travel time. Since the grievant is currently assigned to six periods on each of his outside affiliation days and to seven hours of work on the remaining three days, the grievant is not entitled to additional compensation under either the thirty-five hours of assignment provision of paragraph 4, or the nine hour span of time provision of paragraph 3.

In its reply brief, the District makes the following rebuttal argument:

> 1. while the Association has argued that its interpretation of the contract avoids disparate treatment of bargaining unit employes in terms of payment for travel time, it's not what the parties have bargained;
>
> 2. the language of Article VI, Section H, para. 1 applies to 'secondary' assignments, not 'affiliation' assignments. In fact, the language itself shows that affiliation assignments are treated differently. Read in its entirety, the contract indicates the District is not bound by this section when assigning instructors to outside affiliations, and that Section B, para. 3 should be applied;
>
> 3. simply because a full nine hour span was not always required to accomplish the affiliation needs (the grievant and Barbara Lato, a co-employe, both testified they did not receive assignments which required work at outside affiliations beyond an eight hour span of time) does not mean the District cannot invoke the provision which allows a nine hour span of time when the program's needs change;
>
> 4. the grievant correctly identified the additional number of hours worked as 36 rather than 37 hours since the grievant was allowed at his discretion, to take one-half hour for lunch on each of the affiliation days rather than a one hour lunch period;
>
> 5. finally, the Association has done everything but argue the pertinent issue in this case, whether the District assigned the grievant to work more than 35 hours of work in a work week. The hours of work for the grievant do not exceed 35 hours because lunch periods and travel time for affiliation instructors are not counted as part of this total.

In light of all of the above, the District requests that the grievance be denied and the matter be dismissed.

DISCUSSION:

At issue is whether the District violated Article VI, Section B, in the manner in which it assigned work and travel time to the grievant for an affiliation outside his community of assignment. The Association basically argues that the District violated the agreement while the District takes the opposite position.

The District first argues that it was contractually within its rights to assign the grievant the hours in question without additional compensation, and that outside affiliation instructors are only to receive additional compensation for work beyond a nine hour span of time. For the reasons discussed below, the Arbitrator disagrees.

It is true, as the District points out, that the nine hour work day provision -- Article VI, Section B -- is ambiguous, and, therefore, subject to interpretation by the Arbitrator. However, contrary to the District assertion, that does not mean the District can assign affiliation instructors a nine hour day without paying additional compensation if the thirty-five hour work week is exceeded. Bargaining history is persuasive on this point. In this regard, the Arbitrator first notes that the record is clear, as alleged by the District, that bargaining history, from 1970 through the 1981-82 agreement including a grievance arbitration award issued by the undersigned in 1981, supports the proposition that outside affiliation instructors were only to receive additional compensation for work beyond a nine hour span of time. However, the record is also clear that following my 1981 arbitration case the Association began a major effort to change contract language to provide equal treatment of all bargaining unit employes including limiting the number of hours worked by any professional employe.

The Association's 1981-82 initial proposal for Article VI, Section B eliminated the "nine consecutive period" reference in paragraph 2 and attempted to change the "affiliation" work day from nine to eight hours. The intent of this proposal was to change the work day of affiliation instructors to coincide with other contract personnel. Although this proposal was not adopted during the 1981-82 negotiations, the Association raised the concept at the subsequent bargain which ended up in arbitration.

The Association again sought a change to Section B - School Day and School Week for the 1982-83 agreement by seeking language placing a thirty-five hour per week limit on teacher assignments and providing additional compensation if an employe was assigned hours in excess of thirty-five hours per week. The parties were unable to voluntarily reach an agreement and the matter proceeded to interest arbitration before Arbitrator Gordon Haferbecker. The Association's final offer provided that "Beginning in the 1983-84 year, each employee assigned to more than thirty-seven and one-half (37 1/2) hours per week shall be compensated at 1/1330 of the employee's salary for each additional hour." For the 1984-85 year, the threshold number for receiving additional pay was lowered to thirty-five (35) hours per week. The District's position

was status quo.

It is clear that the Association sought by its contract proposal to have all bargaining unit members work the same number of hours and to be paid additional compensation for additional time. The record is also clear that the District understood the impact of the Association's proposal, and warned the Arbitrator of the potential adverse financial impact if the Association's offer was accepted. Arbitrator Haferbecker, nevertheless, found the Association's position "more reasonable" particularly with respect to the major issue of the work week and incorporated the Association's final offer into the 1982-83 agreement. 2/ It has remained in the parties' collective bargaining agreement ever since without material change. The Haferbecker Award, in the Arbitrator's opinion, makes it clear that any bargaining unit employe including affiliation instructors who work in excess of the contractually established work week (thirty-five hours beginning in the 1984-85 agreement, and continuing thereafter by agreement of the parties) shall receive additional compensation at the rate of 1/1330 of the employe's salary for each additional hour.

The District argues contrary to the above that it retained its right to assign affiliation instructors a nine (9) hour work day without additional compensation based on the "nine (9) hour provision" which was added to the parties' 1978-79 agreement and has remained in every agreement since. It is true that the District provided some testimony to the effect that the District's negotiators, in the years following the Haferbecker Award, successfully fought to retain this language in the parties' agreement, and in doing so felt they had retained the District's right to assign affiliation instructors up to a nine (9) hour day without additional compensation. However, there is no persuasive evidence in the record that the Association agreed to the District's interpretation of the effect of leaving this provision in the agreement at any time material herein. In addition, the parties dropped the provision providing for a nine (9) hour work day for affiliation instructors in paragraph 2 as a result of win-win bargaining following the Haferbecker Arbitration Award and for the 1985-86 agreement. Although the parties make no persuasive arguments as to why this provision was dropped from paragraph 2 or why paragraph 2 was re-written to provide that "The span of time for each professional employee shall not exceed eight hours . . ." (Emphasis supplied), a reasonable interpretation, based on bargaining history (in particular, bargaining for the 1985-86 agreement), is that the parties did so in order to implement the basic thrust of the Haferbecker Award -- to treat all bargaining unit employes equally -- by giving them the same work day/work week. However, assuming arguendo, as claimed by the District, that it retained its right to assign affiliation instructors a nine hour day by preserving the language in paragraph 3 referring to the "nine hour provision" the Haferbecker Arbitration Award clearly requires the District to pay additional compensation beyond the thirty-five (35) hour work week when such assignments are made.

2/ Board Exh. No. 13, page 10.

The District next argues that the "nine-hour" language of paragraph 3 is not superfluous but is reasonably interpreted to require additional compensation only when an outside affiliation assignment requires work beyond nine hours. However, as pointed out by the Association in its reply brief, while said "additional travel time compensation provision" is not superfluous

neither is it relevant to the instant case because the grievant never worked beyond nine hours in any one day "so the issue of the $5/50 mile compensation does not apply." Had the grievant worked beyond the nine hour threshold, then additional compensation would have kicked in and 'duplicate compensation' as anticipated by the District and Arbitrator Haferbecker would have occurred. 3/

The District further maintains that requiring a nine hour work day at an outside affiliation is not inconsistent with the '35 hours of assignment' provision. More specifically, the District claims "a reasonable meaning, consistent with the eight-hour day/thirty-five hour work week can be given to the language of Article VI, Section B . . ." if you find the 'nine hour span of time' language of paragraph 3 pertains to assignments at outside affiliations while the 'eight consecutive hours' provision of paragraph 2 applies to on campus or inside affiliation assignments. The District then links the "eight hours" provision of paragraph 2 relating to inside affiliations with the "eight consecutive hours" provision of paragraph 4 as well as the thirty-five (35) hours provision of said paragraph. Since according to the District the nine (9) hour provision only has to do with outside affiliation instructors, the thirty-five (35) hours of paragraph 4 does not apply.

The District contends the specific language of paragraph B supports this approach. The District opines that the use of the words 'work' and 'assignment' in Section B indicates that 'work' is considered time spent on the job, "while an 'assignment' is considered the time spent conducting work-related activities, i.e., class time but not lunch. For example, sub-paragraphs 2 and 4 refer to the normal 'work time' and 'work load' as eight hours and go on to state that employes are normally 'assigned' to not more than thirty-five hours a week." In other words, paragraphs 2 and 4 are to be read together and make the eight hour work day/thirty-five hour work week apply only to on-campus or inside affiliation assignments. However, since paragraph 3 indicates that "work" at an outside affiliation cannot exceed nine hours without additional compensation Section B as a whole indicates that instructors "working" at outside affiliations can be required to spend up to nine hours on the job while not exceeding thirty-five hours of "assignment."

The problem with this approach, in the Arbitrator's opinion, is that it ignores the main thrust of the Association's argument before Arbitrator Haferbecker (to treat affiliation instructors the same as other professional employes regarding the work week) as well as the outcome of his Award. In addition, there is no persuasive evidence of bargaining history that the Association

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3/ Supra. p.6, paragraph 10; p.7, paragraph 7.

agreed at any time material herein following the Haferbecker Award to the meaning attached to the terms or words noted above by the District or to the proposition said language excluded outside affiliation instructors working a nine hour day from the thirty-five (35) hour work week provision found in paragraph 4. There certainly is no past practice which supports the District's

interpretation of the disputed language. Finally, the Arbitrator finds this argument of the District less persuasive than the Association's reliance on clear contract language and "the contract should be read and interpreted as a whole" arguments noted on page 13 of this decision which supports an opposite conclusion.

The District utilizes the aforesaid analysis to conclude that "The Grievant is currently assigned to six periods on each of his outside affiliation days and is thus within the thirty-five hour/week provision of sub-paragraph 4." However, the District's arguments misrepresent the number of hours the grievant was working each week by failing to include travel to and from affiliations in the work week calculations. Travel time should be included in the grievant's work day/week. The Arbitrator reaches this conclusion for the following reasons. One, prior to the instant dispute, the grievant's assigned schedule has included travel time to and from outside affiliations in his assigned work day at all times material herein. In addition, Barb Lato testified unrebutted that she has always been assigned travel time to and from her outside affiliation work. Brian Oehler, Mid-State Vice President also admitted that other instructors' travel time to off campus work sites (secondary assignments) was counted in their work day/week. Finally, such an approach is consistent with Article VI, Section H, paragraph 1 of the agreement which provides that travel time "will be included within the eight hour day." It is also consistent with the changes made in paragraph 2 discussed on page 18 of this decision. To hold otherwise, would defeat the intent and purpose of the thirty-five (35) hour work week language in paragraph 4 which provides for additional compensation for any bargaining unit employe who works more hours. If an arbitrator finds that alternative interpretations of a clause are possible, one of which would give meaning and effect to another provision of the contract, while the other would render the other provision meaningless or ineffective, he will be inclined to use the interpretation which gives effect to all provisions.

Based on all of the above, and absent any persuasive evidence to the contrary, the Arbitrator finds that the answer to the issue as framed by the District is YES, the District violated Article VI, Section B in the manner in which it assigned work and travel time to the grievant for an affiliation outside his community of assignment. In particular, the District violated Article VI, Section B, paragraph 4 when it assigned the grievant to work beyond the contractual thirty-five hour work week without additional compensation. A question remains as to the appropriate remedy.

The District argues that the grievant himself correctly identified the additional number of hours of work as 36 rather than 37 hours because he was afforded the opportunity at his discretion to take one half-hour for lunch on affiliation days rather than a one hour lunch period. It is true that prior to filing a grievance, while still attempting to resolve the matter informally, the grievant referred to 36 hours instead of 37. 4/ However, the grievance filed by the grievant makes it clear

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4/ See, for example, Association Exh. No. 1.

that he is talking about all "assigned time required for travel outside of the normal eight hour day" for which he is requesting additional compensation "at 1/1330 of the employee's assignment for each additional hour incurred since this assignment." 5/ In addition, the grievant clearly testified to the additional hours of work as 37 rather than 36 hours. Finally, the record is clear that the grievant's choice to take half-hour lunch periods on affiliation days rather than one hour for lunch had no effect on his required travel time for which he requests additional compensation because it led to him working more than 35 hours in a week.

The Association requests that the Arbitrator provide the grievant and itself with reimbursement for the expenses incurred for processing this grievance. However, the Association offered no persuasive argument or evidence in support of this claim. Therefore, the Arbitrator rejects same.

In view of all of the foregoing, it is my

AWARD

That the grievance is sustained, and the District is ordered to make the grievant whole at 1/1330 of his salary in effect at the time for the additional two hours per week worked since August 16, 1993.

The Arbitrator will retain jurisdiction over the application of the remedy portion of the Award for at least sixty (60) days to address any issues over remedy that the parties are unable to resolve.

Dated at Madison, Wisconsin this 6th day of February, 1995.

By Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator

5/ Joint Exh. No. 14.