BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between SUPERIOR FEDERATION OF TEACHERS and SUPERIOR SCHOOL DISTRICT	Case 115 No. 53298 MA-9300

Appearances:

Mr. William Kalin, WFT Representative, appearing on behalf of the Union.

Hendricks, Knudson, Gee & Hayden, S.C., by Mr. Kenneth A. Knudson, appearing on behalf of the District.

ARBITRATION AWARD

The Employer and Union above are parties to a 1992-94 collective bargaining agreement which provides for final and binding arbitration of certain disputes, and which the parties agreed to use for purposes of the present case. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the grievance of Thomas Locken, concerning the District's refusal to assign him work as summer school instructor for June, 1995.

The undersigned was appointed and held a hearing on February 15, 1996 in Superior, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, both parties filed briefs, and the record was closed on August 7, 1996.

Stipulated Issues:

1. Is the grievant entitled to backpay for summer school driver's education for the summer of 1995?

2. If so, what amount is appropriate?

Relevant Contractual Provisions:

ARTICLE IV - GRIEVANCE PROCEDURE

Section A - Definitions

1. A grievance is a complaint by the employee of the bargaining unit, or by the Federation in which:

   a. A policy or practice is alleged to be improper or unfair, or
   b. There has been a deviation from, a misinterpretation or misapplication of a practice or policy, or
   c. There has been unfair or inequitable treatment by reason of an act or condition contrary to existing policy or practice, or
   d. There has been a violation, misinterpretation, or misapplication of any agreement existing between the parties hereto.

Discussion:

The essential facts are undisputed. The grievant has worked for the District as a guidance counselor for 31 years, and also as a driver's education teacher for 25 years. The District has historically scheduled a certain number of students for behind-the-wheel driver instruction during the summer, as well as others during the school year. The grievant's performance of this work during the summer constitutes the circumstances of the current grievance.

On October 3, 1994, the grievant was one of a number of teachers to receive a memo from Dan Ronn, coordinator of the District's Alcohol and Other Drug Awareness (AODA) training. Ronn thereby scheduled a workshop on alcohol traffic safety for October 10 and 11, 1994. Other full-time teachers receiving this memo apparently all attended the event, but the grievant did not. It is undisputed that the grievant had attended a two-day AODA seminar in 1993 at CESA 11. The grievant, however, made no explicit reply to the memo.

On February 28, 1995, the summer school co-chairs, Dennis Mertzig and Al Nelson, sent a memorandum to Richard Smith, a teacher who schedules other teachers for summer school driving with individual students, which laid out requirements for the upcoming summer's training. The memo included a paragraph to the following effect:

> As you are aware, it is now a requirement that the driver's education instructors complete an alcohol and other drug awareness (AODA) training course. We have contacted Dan Ronn who will

> be making the arrangements and advising us of the dates. The instructors who have applied but not yet taken the course will then be informed.

It is undisputed that about the same date the grievant heard informally about the training requirement: the grievant testified that Al Nelson told him that if he did not take the AODA training, he would not get a contract for driver ed. The grievant further testified that in a conversation on or about May 1st, Dennis Mertzig informed him that he should take the training, but did not specifically require it. The grievant testified that he told Mertzig about his 1993 training and that it was on record with the Board of Education. It is undisputed that Mertzig, in this conversation, said he would check into the matter.

Mertzig testified that he told the grievant on May 1st that he should take the training, and never released the grievant from that requirement. Mertzig testified that he searched for records of the grievant's prior AODA training, but could find nothing, and that when he asked Dan Ronn to look, Ronn also was unable to find documentation. Mertzig said that he had gone to see Locken on May 1st because he knew that Locken had not taken the October, 1994 course, and that while he did volunteer to look into whether there was something on Locken's record to demonstrate prior training, he made no further offer and Locken did not volunteer an explanation of where the material was. Mertzig admitted he did not call Locken back in person to tell him he could not find the documentation.

On May 15, 1995 Mertzig sent Locken a memo entitled "Follow-up to our meeting on May 1, 1995". This memo stated as follows:

> On May 1, 1995 we met and discussed the Alcohol Traffic Safety Workshop scheduled for May 26, 1995. I informed you that the course was required for all Driver Education Instructors who will teach Summer School 1995.
>
> You said, that you had attended a similar course the spring of 1993. I told you that I would check to see if it would qualify.
>
> I encouraged you to attend the May 26, 1995 training.
>
> You will receive an invitation to the May training.

On the same day, Mertzig sent a formal letter to the grievant inviting him to attend an alcohol traffic safety workshop to be held May 26, 1995. This memo stated as follows:

> This letter is to invite you to attend an Alcohol Traffic Safety Workshop. This course is now required for all driver education instructors who will teach Summer School 1995.

Because of the smaller number of people needing the training, Dan Ronn will be able to offer the material in a one day workshop. The training is set to take place on May 26, 1995 at the WITC Conference Center from 8:00 a.m. to 3:30 p.m. Lunch will be provided.

The agenda will cover all of last fall's workshop. It will include:

* Medical aspects
* General Alcohol and Other Drug Abuse (AODA) assumptions
* Assessing chemical dependency - Helman's Symptoms
* The adolescent feeling chart
* The family system - rules and roles
* Codependency - relationships and riding or driving while drinking
* Enabling
* Refusal skills
* The role of drivers training in AODA

Please RSVP by calling Nicole Brown at 394-8714. Thank you!

It is undisputed that the grievant made no response to these memoranda and did not appear for the scheduled training. The grievant testified that he felt it was Mertzig's responsibility, not his own, to "chase down the information to prove the class was adequate."

The summer driving instruction was scheduled to begin on June 15th. On June 14th, Smith advised the grievant that he would not be scheduled to work, because he had not been qualified to do so for that year. The grievant thereupon filed the present grievance. A grievance meeting was held on July 13, 1995, in preparation for which Union Representative Kalin asked the grievant to obtain his own verification of the adequacy of the 1993 AODA course he had taken. The grievant obtained this documentation from the original course instructor in writing, and the Union brought it to the grievance meeting. The District accepted the adequacy of that documentation and scheduled the grievant to work thereafter.

The parties dispute the number of hours the grievant could have worked between June 15th and July 18th, when his actual work began. The grievant's initial claim was for 102 hours. At the hearing, the grievant testified that he could have worked 60 hours up to the date he actually

started. Union witness Richard Smith testified that while the maximum number of hours the grievant could have worked if he had started on June 15th was an additional 60 hours,

he had been informed by Assistant Superintendent Jerry Peck that the grievant was free to work with students who had passed the written part of the driver education prior to the requirement of AODA training. Smith recalculated the number of hours available for such students' training prior to July 13th, and concluded that these would add up to 36 hours. Smith testified that Locken did not agree to work under those conditions, thus leaving 24 hours as his actual possible loss.

The Union contends that Mertzig assumed the responsibility to check if the prior training would qualify for the District's requirement, and that Mertzig did not fulfill his commitment. If Mertzig had done so, the Union reasons, the grievant would have been teaching driver's education on June 15, 1995, and would have worked an additional 56 to 60 hours during summer school in 1995. In a reply to the District's brief, the Union objects to consideration of aspects of that brief in which the District apparently refers to the testimony of witnesses who did not testify. The Union requests a make-whole remedy.

The District contends that the grievant was told of the District's concern for alcohol and drug abuse training as early as October of 1994, and was the sole District employe involved in driver education who did not attend that training. The District contends that in the formal memorandum of May 15, 1995 from Mertzig to the grievant, the word "required" was underlined, and that the grievant could not reasonably have believed beyond that date that he was excused this requirement. The District requests that the grievance be denied.

I do not reach the question of how many hours the grievant would have been entitled to recover for, because while this is a close case, I conclude that the obligation lay more heavily on the grievant than on the District to ensure that he had demonstrated that the prior course qualified as an equivalent to the District's 1995 AODA course.

The grievant could reasonably have interpreted Mertzig's agreement on May 1, 1995 to look into the matter as an undertaking to do so. And Mertzig's failure to tell the grievant explicitly that he had found nothing comes close to putting the burden here on the District. But the grievant was on notice, as of months earlier, that the District took the requirement seriously. And while Mertzig's May 15 memo to the grievant left open the question of whether there was any record of the grievant's course in the District's possession, that memorandum, dated two weeks after the original conversation, might reasonably have raised a red flag to the grievant that such documentation evidently had not been found to date. Both that memo and the formal letter from Mertzig sent on the same date, meanwhile, underline the word "required". At the least, therefore, I conclude that the District had left the matter at a point where the grievant had been given written direction that he must take the May, 1995 course to be considered to be qualified for that summer. When neither the grievant nor the District pursued the issue further until after the May, 1995 course was over, I therefore conclude that the risk of that inaction was assumed by the grievant, by his failure to offer to obtain the documentation timely which he ultimately

did obtain, or even to inquire further into the status of the matter. In turn, the District was acting properly within the information in its possession when it declined to allow the grievant to work during June, 1995, because under the circumstances present here it was more the grievant's responsibility than the District's to make good the deficiency in the District's information.

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

AWARD

1. That the grievant is not entitled to backpay for summer school driver's education for the summer of 1995.

2. That the grievance is denied.

Dated at Madison, Wisconsin this 26th day of September, 1996.

By Christopher Honeyman /s/
Christopher Honeyman, Arbitrator