BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between SUN PRAIRIE EDUCATION ASSOCIATION and FIRST AND SECOND GRADE TEACHERS, GRIEVANTS and SUN PRAIRIE AREA SCHOOL DISTRICT	Case 93 No. 53842 MA-9470

Appearances:

Mr. A. Phillip Borkenhagen, Executive Director, Capital Area UniServ-North, appearing on behalf of the Association.

Godfrey & Kahn, S.C., Attorneys at Law, by Mr. Jon E. Anderson, appearing on behalf of the District.

ARBITRATION AWARD

Pursuant to a request by Sun Prairie Education Association and First and Second Grade Teachers, Grievants, herein the Association and Grievants, and the subsequent concurrence by Sun Prairie Area School District, herein the District, the undersigned was appointed arbitrator by the Wisconsin Employment Relations Commission on April 8, 1996, 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. A hearing was conducted by the undersigned on August 29, 1996, at Sun Prairie, Wisconsin. The hearing was transcribed. The parties completed their briefing schedule on December 4, 1996.

After considering the entire record, I issue the following decision and Award.

ISSUES:

The parties were unable to stipulate to the issues. The Association frames the issues as follows:

> IS THE DISTRICT'S FAILURE TO PROVIDE QUALIFIED SPECIALISTS IN HEALTH EDUCATION, AND ITS REQUIREMENT THAT OTHER STAFF TEACH HEALTH

EDUCATION FOR GRADES 1 AND 2, A VIOLATION OF ARTICLE XXVI, SECTION C, 2 OF THE COLLECTIVE BARGAINING AGREEMENT, WHICH PROVIDES:

> Grades 1 through 6 - Classroom teachers will be relieved from teaching music, art, health and physical education and will be provided with specialists to teach in these special areas?

IF SO, WHAT IS THE APPROPRIATE REMEDY?

The District frames the issues in the following manner:

> Did the District violate Article XXVI, Section C (2) when it eliminated health instruction at the first and second grade levels?
>
> If so, what is the appropriate remedy?

Having reviewed the entire record, the Arbitrator frames the issues as follows:

> Did the District violate Article XXVI, Section C. 2. when it eliminated health instruction by certified health personnel at the first and second grade levels?
>
> If so, what is the appropriate remedy?

FACTUAL BACKGROUND:

The Sun Prairie Education Association, hereinafter the Association, and several first and second grade teachers in the Sun Prairie Area School District filed a grievance on September 25, 1995, alleging that the District violated the terms of the agreement when the District eliminated health instruction by certified health personnel in the first and second grades.

Prior to the 1995-96 school year, health instruction at grades 1 and 2 had been provided by a certified health teacher. The certified health teacher would visit the students' classroom, and during the time that the certified health teacher was with the students, the classroom teacher was free to leave the classroom and use this time for preparation purposes.

For the 1995-96 school year, as a result of the District's desire to reallocate limited funds and to preserve guidance counseling at the elementary level, the Administration recommended, and the Board agreed, to cut health instruction at grades 1 and 2. Some of the health topics which previously were covered in the health curriculum were to be addressed by guidance counselors who come into the classroom for a 30 minute period each week. Other health topics were to be incorporated into the regular classroom teachers' curriculums where possible.

During the 1994-95 school year, when guidance counselors would come into the classroom for the 30 minute period of guidance, the classroom teacher was required to remain in the classroom to assist. During the 1995-96 school year, however, the Administration released classroom teachers from the responsibility of remaining in the classroom when the guidance counselors came to their room.

Prior to the 1989-90 school year, by practice and agreement, specialists were provided to all Grades 1 and 2 teachers in the areas of music, art and physical education. Health education for first to sixth grade children of the District as a prescribed curricular subject was instituted in September, 1990, following a jointly appointed committee of Administration and Association members, who recommended such be initiated. Association witnesses testified that one of the mutually accepted and major elements of this modification was to allow those primary grade elementary teachers additional classroom preparation time. However, Superintendent Allen Rosenthal and Judy Gomoll, a former teacher and chief negotiator for the Association, testified that there was not a great deal of discussion concerning the inclusion of the term "health" within the listing of subjects which the grade 1 through 6 classroom teacher would be relieved from. Superintendent Rosenthal did, however, indicate that there was no discussion, nor was it the Board's intent, that it would be abrogating its right under the management rights/board functions clauses to determine whether a particular subject like "health" would, in fact, be taught.

The above change was reflected for the first time in the parties' 1991-92 and 1992-93 collective bargaining agreement. In said agreement, the parties changed Article IX, Section C. 2. to include "health" along with music, art and physical education that classroom teachers in grades 1 through 6 "will be relieved from teaching . . . and will be provided with specialists to teach in these special areas." The word "health" has remained in said clause at all times since. The practice remained in place until the Fall of 1995 as noted above.

The grievance was processed through the contractual grievance procedure and was denied at each step in the process. The grievance was appealed to arbitration by the Association after efforts to resolve the dispute failed. An arbitration hearing was held in the matter as noted above. At hearing, the parties agreed that there were no procedural issues that would prevent the Arbitrator from rendering a decision on the merits of the grievance.

PERTINENT CONTRACTUAL PROVISIONS:

II. MANAGEMENT RIGHTS

The School Board, on its behalf, hereby retains and reserves unto itself, all powers, rights, authorities, duties, and responsibilities conferred upon and vested in it by applicable law, rules and regulations to operate the school system. These rights include, but are not limited to, the right to direct all operations of the school system; establish work rules and schedules of work; hire, promote, transfer, schedule and assign employees in positions within the school system; suspend, demote, discharge or take other disciplinary action against employees for cause; relieve employees from their duties because of unavailability of work or any other reason not prohibited by law or this agreement; maintain the efficiency of school system operation; take whatever action is necessary to comply with state and federal law; to introduce new or improved methods or facilities; to contract out for goods or services; to establish and supervise the program of instruction and to determine after consultation with the appropriate department means and methods of instruction, selection of textbooks and other teaching materials, the use of teaching aids, and class schedules; to take whatever action is necessary to carry out the functions of the school system in situations of natural disasters or similar catastrophes.

In exercising its powers to contract out for goods-and (sic) services, (except in those cases relating to exceptional children which is covered in the next paragraph), the Board may contract only for services a total of which constitutes less than a full-time bargaining unit position, but in no event will such contracting out result in a reduction in the then existing bargaining unit staff.

In exercising its powers to contract out for goods and services in order to comply with federal and/or state mandates relative to exceptional children, the Board will, whenever possible, utilize bargaining unit personnel. If it is not possible to utilize the aforesaid bargaining unit personnel, the Board is then free to contract with

nonbargaining unit personnel.

The exercise of the foregoing powers, rights, authorities, duties and responsibilities by the Board; the adoption of policies, rules, regulations and practices in furtherance thereof; and the use of judgment and discretion in connection therewith shall be limited by the Wisconsin Constitution, applicable state law, rules and regulations of the Department of Public Instruction, and the express terms of this agreement. The Board will be guided, but not unreasonably bound, by established Board policies and administrative decisions in forming the framework of school policies and projects.

III. BOARD FUNCTIONS AS PROVIDED BY LAW

A. The Board's right to operate and manage the school system is recognized, including the determination and direction of the teaching force; the right to plan, direct, and control school activities; to schedule classes and assign workloads; to determine teaching methods and subjects to be taught; to maintain the effectiveness of the school system; to determine bargaining unit member complement; to create, revise, and eliminate positions; to establish and require observance of reasonable rules and regulations; to select and terminate bargaining unit members, and to discipline and discharge bargaining unit members for cause.

B. The foregoing enumeration of the functions of the Board shall not be deemed to exclude other functions of the Board not specifically set forth, the Board retaining all functions not otherwise specifically nullified by this Agreement.

. . .

IX. GENERAL CONDITIONS -- CHANGES IN PAST PRACTICE

A. In the event the employer desires to change a past

practice not specifically covered by this agreement which primarily relates to compensation, hours, or conditions of employment and which change would reduce the previous conditions to less than the highest minimum standard in effect in the district at the time this agreement is signed, it shall notify the Association of its proposed change and, if the Association so requests within ten (10) calendar days of said notice, the employer shall enter into negotiations with the Association in respect to said proposed change.

In the event the time for the Association to request bargaining falls during winter or spring recess, its time to make such request is extended to the Friday of the school week immediately following each respective recess. In the event the time for the Association to request bargaining falls during the summer vacation, its time to make such request is extended an additional ten (10) calendar days. All notices by the employer to change a past practice shall be in writing and mailed to the Association President and Chief Negotiator by certified mail.

B. If the matter is not settled by such negotiations and impasse is reached, rather than implement, an arbitrator will be selected who will hold a hearing promptly and will issue his/her decision within thirty (30) calendar days. The arbitrator's decision will be in writing and will set forth findings of fact, reasoning, and conclusions of the issues submitted, and the decision shall be binding. The arbitrator will be without power or authority to make any decision which required the commission of an act prohibited by law or which is violative of the terms of this agreement.

. . .

XXVI. WORKING CONDITIONS

. . .

C. Class Loads

1. Kindergarten Level - Kindergarten teachers shall be required to have formal classroom instruction a maximum of one hundred fifty (150) minutes per session (2-1/2 hours). A full teaching load would consist of two sessions per day.

2. Grades 1 through 6 - Classroom teachers will be relieved from teaching music, art, health and physical education and will be provided with specialists to teach in these special areas.

3. Grades 7 through 8 - The normal teaching load shall consist of a minimum of five (5) classroom assignments and one-and-a-half (1-1/2) additional or extra assignments per day, per year.

4. Grades 9 through 12 - The normal teaching load for the departmentalized academic classroom teacher, including physical education, will consist of:

   5 Instructional class periods per day, per year plus one supervision period either first semester or second semester

   or

   4 instructional class periods per day, per year
   2 extra or additional periods per day, per year
   6 total period assignments

   This practice covers the following departments or staff: Agriculture, Art,

Business Education, English, Family and Consumer Education, Foreign Language, Health, , (sic) Industrial Technology, Math, Physical Education, Science, Social Studies, and Special Education.

5. The normal and expected teaching assignments of instructors of music, driver education, guidance, Library, reading, W.E.C.E.P./ W.O.W. and S.C.O.R.E. shall consist of the following:

   6 hours of classes, counseling, individual or group lessons or supervision assignment(s) within their respective areas.

   If need arises, the above named teachers could be assigned supervision duty outside of their department for one (1) period per day within the six (6) hours of classes stated above.

6. Bargaining unit members who are working in more than one building shall not be assigned supervision duties.

7. The above described teaching loads would be the MAXIMUM teaching loads. If supervision duty could be reduced, the administration would be expected to reduce the load in the following manner:

   a) Bargaining Unit Members with the largest number of class preparations.

   b) Bargaining Unit Members with the largest cumulative class size.

D. Preparation Time

> All teaching programs are to be scheduled so that maximum continuous preparation time is provided daily during the student's day whenever feasible.
>
> 1. All teachers shall receive preparation time per day according to the following schedule:
>
> a) Grades 1-6, thirty (30) minutes, continuous whenever possible.
>
> . . .

ASSOCIATION'S POSITION: 1/

In its brief, the Association initially argues that the clear and unambiguous language of Article XXVI, C. 2. limits management's decision-making authority by specifying that:

> Grades 1 through 6 - Classroom teachers will be relieved from teaching music, art, health and physical education and will be provided with specialists to teach in these special areas.

The Association maintains that the District violated this provision when it eliminated health education by certified health teachers to first and second grade children in the District for the 1995-96 school term and beyond. The Association adds that as a result of not having specialists provide health education for first and second grade children teachers lost 30 minutes of valuable preparation time they had previously enjoyed. As a consequence, according to the Association, teachers were forced to teach other subjects during this 30 minute period and additionally forced to spend hours of time over the year preparing for the added teaching requirement.

The Association next argues that the District's reliance on its management rights and/or board functions clauses of the agreement is misplaced since both clauses waive management rights nullified by express language (i.e. Article XXVI, C. 2.) found elsewhere in the agreement. In addition, the Association points out that arbitral standards for interpreting contract language clearly indicate that a specific provision of the contract such as Article XXVI, C. 2. supersedes a more generally stated provision such as Articles II or III citing How Arbitration Works, Elkouri and Elkouri, 4th Edition, p. 356 (1985) in support thereof.

1/ Because of the parties' excessive use of underlining and for clarity purposes, the Arbitrator will eliminate "Emphasis added" or "Emphasis supplied" wherever underlining occurs when stating the parties' positions.

The Association also argues that the parties' bargaining history promotes a mutual agreement to give additional elementary prep time as a health education by-product. In this regard, the Association first notes that in the 1989-90 and 1990-91 collective bargaining agreement health education was *excluded* from the listing of those special areas of instruction for which Grades 1 through 6 teachers would be relieved of teaching that specific class and be provided with specialists. The Association next points out that three of its witnesses testified unrebutted by the District that during the contract term of 1989-91 a special Elementary Prep Time Committee, which incorporated a Health Curriculum Committee, comprised of teaching staff and Administration, worked out a deal to transfer the teaching of health education from the classroom teacher to the certified health instructor at the elementary level, including Grades 1 and 2. Furthermore, according to the Association, the rationale used by these Committees was

to release primary teachers from the classroom to allow 30 minutes more of elementary prep time per week. The Association notes the deal was consummated in the Spring of 1990 and immediately implemented when school opened in August, 1990.

According to the Association, when the agreement was reopened for the 1991-93 biennium, both parties generated initial bargaining proposals which automatically included "health" into the spectrum of special classes under Article XXVI, C. 2. The Association rejects any assertion by the District that since there was little or no discussion at the time, the insertion of the word "health" into the paragraph allows the District to place a meaning behind it other than that proposed by the Association. In this regard, the Association notes that its negotiator Gomoll "aptly explained" that the additional term "health" was inserted into Article XXVI, C. 2. to reflect what the parties mutually agreed to and enacted a year earlier. Consequently, the Association points out, the successor contract for the 1991-92 and 1992-93 school terms was amended to *include* health in the listing of subjects to be taught by specialists, thereby allowing Grades 1 and 2 teachers to be relieved from that duty and to have their classes taught by certified health instructors. The same held true for the disputed successor contract, 1993-94 and 1994-95. The Association concludes that if the District was considering eliminating the teaching of health to first and second graders and cutting 30 minutes of prep time from the teachers' schedules, it could have proposed to amend this section of the contract at any time during this period.

The Association further argues that health instruction by guidance counselors "miserably fails the requirement of certified health instructors in Article XXVI, C. 2." The Association adds:

> . . . when the District attempts to deliver health education via guidance counselors, it sadly misses the targets of a good program and at the same time, decries the requirement of Article XXVI, C, 2 by not providing classroom teachers with certified health instructors.

The Association concludes by claiming:

> The basic nature of the grievance, espoused by Union Witnesses Kathy and Sue Perino on behalf of all of the Grievants, is that: THE TEACHERS (AND THE CHILDREN) ARE NOT GETTING 30 MINUTES OF HEALTH CLASS PER WEEK BY CERTIFIED HEALTH SPECIALISTS!

The Association additionally argues that teachers worked additional time without compensation when the District eliminated health instruction from the first and second grade levels. In support thereof, the Association alleges that all of the aforesaid teachers lose 30 minutes of valuable prep time from their total quota. The Association also alleges that "extra time attributed to added preparation associated with the 30 additional minutes of face-to-face time was between 30 to 75 minutes." The Association points out that teachers have not received any additional compensation for this extra work. The Association also points out that the District's reliance on the minimum contractual provision that a Grades 1 - 6 teacher is guaranteed 30 minutes per day during the student day in support of its actions flies in the face of the parties' recent history to move in the direction of granting more prep time for elementary teachers, not less, and of contractual mandates which require the District to compensate teachers for their additional work.

The Association adds that the District's assertion that it has met its contractual requirement of minimum prep time fails on equitable grounds.

Finally, the Association argues that the District's arguments and positions taken at hearing are "bogus." For example, the Association claims the District's attempts at including guidance counselors into the "specialist" category since they are not classroom teachers is not supported by the record facts. The Association also points out that the record does not contain any evidence the District hired any additional staff or spent any funds thereon in regular education classroom situations as a result of its action despite the District's assertion that this was a reason for its action. Third, the Association claims that the District's changes are contrary to DPI standards, and standards it told the District's students and parents that it was following. Lastly, the Association notes that the District has bowed at the altar of the almighty dollar by rebuffing "the cries of its staff to reinstate health education for the youngsters' humanistic and developmental growth."

In its reply brief, the Association makes the following rebuttal arguments:

Statement 1. "Some of the health topics which previously were covered in the health curriculum are being addressed by guidance counselors who come into the classroom for a 30 minute period each week." (ErIBr at p. 1)

Response Article XXVI, C. 2. does not give the District partial clearance to provide classroom teachers with part-time specialists or health education installments; it says classroom teachers will be provided with fully certified specialists in health!

Statement 2. "The Management Rights clause is a 'reserved' rights clause, which means that the rights of the Board are limited only to the extent expressly provided in the Collective Bargaining Agreement." (ErIBr at p. 8)

Response That statement is probably true for open-ended assignment-type situations, but the express language of Article XXVI, C. 2. mandating two criteria: teachers will be relieved from teaching health and will be provided specialists limits the District's authority in this area.

Statement 3. "… that certain health topics be covered in the developmental guidance curriculum. This action was taken to preserve guidance counseling at the elementary level." (ErIBr at p. 9).

Response In reality, the District's action did not preserve the guidance curriculum, it added to it. The District also violated its management rights clause by failing to consult with the appropriate department before taking said action.

Statement 4. "This article, admittedly, does provide some measure of limitation on Board authority …. . The language of this quoted provision is designed to do two things. First, it is designed to ADVISE (emphasis added) classroom teachers that they will not be required to teach in the areas noted … Secondly, the language goes on to indicate that teachers will be provided with specialists to teach in these special areas. (ErIBr at pp. 10-11).

Response "Will" mandates, not "advises" the District to do two things. The District ignores and fails to address the second criterion that specialists be provided to the classroom teacher. Article XXVI, C. 2. does not say "if health is taught" at Grades 1 and 2. If it is taught at Grades 3 - 6, it must also be taught at the lower grades.

Statement 5. "… it is not requiring classroom teachers to teach health. ….. It does not state that health must be taught at that level." (ErIBr at p. 12).

Response To the contrary, the contract requires that health specialists be provided for classroom teachers at Grades 1 - 6, not just Grades 3 - 6. The District's statement at page 12 substantiates this, by stating if the Board chooses to require health instruction at Grades 1 - 6, that instruction shall be provided by specialists.

Statement 6. "Arbitrator Updegraff stated in John Deer Tractor Co. 5 LA 631, 632 (1946) that:

> It is axiomatic in contract construction that an interpretation which tends to nullify or render meaningless any part of the contract should be avoided because of the general presumption that the parties do not carefully write into a solemnly negotiated agreement words intended to have no effect." (ErIBr at p. 13).

Response The above quotation is inapplicable because "health" was inserted with meaning to an already-interpreted and applied provision. It is a ridiculous conclusion which the District desires of this Arbitrator that yes: health instructors must be provided, but no: health instruction does not have to be taught.

Statement 7. "It is interesting that teachers are complaining of being assigned the very activity for which they have been hired -- to teach students." (ErIBr at p. 14).

Response They do not mind teaching; they just want to get paid for it.

Statement 8. "… they have been relieved of an equal amount of time to use when the guidance counselor is present." (ErIBr p. 14).

Response Not all teachers get "relieved on (sic) an equal amount of time," because some of the teachers simply had the time for preparation anyway prior to the 1995-96 school year.

Statement 9. "It (the Board) established a prep time committee and it has been responsive." (ErIBr p. 15).

Response The Prep Time Committee was formed to determine ways to reasonably give elementary teachers more prep time, not less.

For a remedy, the Association requests that the Arbitrator sustain the grievance and reinstate health education by certified health instructors and provide compensation for all of the additional work performed by the classroom teachers at Grades 1 and 2.

DISTRICT'S POSITION:

The District basically argues that the School Board has the right to determine which subjects will be taught, when those subjects will be offered, and by whom they will be taught, subject only to the terms of the labor contract. In support thereof, the District maintains that the Board and Administration have broad supervisory authority over the educational programs of the District and in matters of staff deployment pursuant to the District's authority reserved under the management rights and board functions clauses of the contract. The District claims that its actions in dispute herein are the very types of management decisions contemplated by the aforesaid articles. The District argues that since these rights of management are specifically enumerated, the Association must identify specific and express limitations on that authority found "squarely within the four corners of the labor contract." Moreover, the District claims that the Association must establish a clear violation of such a limitation which the District feels that it has failed to do.

The District concedes that the language of Article XXVI "limits but does not abrogate Board authority." In this regard, the District notes that since Article XXVI reflects various agreements between the Board and the Association concerning working conditions it does provide some measure of limitation on Board authority. However, the District believes that said article does not provide the limitation that the Association seeks in this case.

The District explains this conclusion by noting that the language of Article XXVI is designed to do two things. First, according to the District, it is designed to advise classroom teachers that they will not be required to teach in the areas noted. The District argues that teachers are not being required to teach health. Secondly, the language goes on to indicate that teachers will be provided with specialists to teach in these special areas. The District opines that this language naturally follows the earlier phrase and compliments it by establishing who will teach in these special areas. The District notes that we know, based on the first phrase of the clause, that it will not be the classroom teacher. A natural follow-up question, according to the District, is the question "who will be teaching in a particular area." The District concludes that significantly, the contractual language does not state that a particular specialty area must be taught, and argues that the disputed language "simply states that teachers will be relieved from teaching in the special areas noted." The District argues that its management rights clause reserves to the Board the authority to determine which subjects will be taught, and to the Administration the authority to schedule and to determine the teachers' workloads and what and when subjects will be taught.

The District next argues that Article XXVI can be harmonized with the broad management authority of the Board. In this regard, the District argues that the disputed language establishes that classroom teachers will be relieved from teaching health and certain other specialty areas and that the District has not violated this clause because it is not requiring classroom teachers to teach health. The District also argues that the Association's case centers on the language "will be provided with specialists to teach in these special areas." The District claims that this language addresses the work load of an individual teacher by addressing what cannot be included in the class load of a classroom teacher at grades 1 through 6. The District also claims that it does not state that health must be taught at that level, said decision being reserved to the Board pursuant to the board functions clause.

The District cites Riley Stoker Corp., 7 LA 764, 767 (Platt, 1947) for the proposition that labor contract terms and provisions are to be read as a whole so that all parts of the contract are given meaning in light of their context. Applying that standard to the facts of the instant case, the District argues that the class load language of the contract can be harmonized clearly with the responsibilities and obligations of the Board to determine what classes will be taught and by whom. The District again states that it is the Board's right to determine whether health will be taught, but if the Board determines that health will be taught, it will not be taught at Grades 1 through 6 by classroom teachers, said instruction must instead be provided by specialists. The District argues that this interpretation is consistent with bargaining history since witnesses for both parties testified that there was not a great deal of discussion concerning the inclusion of the term

"health" within the listing of subjects which the grade 1 through 6 classroom teacher would be relieved from, but that there was no discussion, nor was it the Board's intent, that it would be abrogating its right under the management rights/board functions clauses to determine whether a particular subject would, in fact, be taught. The District concludes, on the other hand, that the Association's interpretation that health must be taught renders the Board's clear authority to determine what will be taught as meaningless.

Finally, the District argues that the Board has not violated contractual provisions concerning the amount of work that can be assigned to teachers and the amount of preparation time guaranteed by the contract. In support thereof, the District first notes that the Association's complaint that the impact of this change was that teachers would have an additional 30 minutes of time in front of students is interesting because "teachers are complaining of being assigned the very activity for which they have been hired – to teach students." Secondly, the District points out that the record evidence indicates that although teachers at grades 1 and 2 no longer have the freedom to determine what they will do during the time that health instruction was provided by the health instructor, they have been relieved of an equal amount of time to use when the guidance counselor is present. The District concedes, however, that the Association's argument is premised on the fact that in the past guidance counselors were also present, but teachers had no responsibility to prepare for the time that they were required to be in the classroom. Now, however, although teachers can leave when the guidance counselor is present, they must prepare for the 30 minutes of instruction which will fill up the time previously taken by the certified health instructor. The District asserts, however, that the Association's appeal is based on emotion and not contract language. The District also asserts that the contract does not limit the number of minutes of instruction and the parties' agreement on prep time is clear, each bargaining unit member at grades 1 through 6 will have 30 minutes of prep time per day (continuous whenever possible), and said agreement has not been violated. The District adds that no Association witness has identified any specific contract provision which the Board has violated in relation to defining the parameters of the teachers' day including instruction, lunch, preparation, or work load.

In its reply brief, the District first repeats its basic argument that clear contract language supports its position.

The District next argues that the Association cannot rely on bargaining history to support its position while at the same time claiming that the contract language in dispute is clear and unambiguous. The District also argues that this case does not turn on bargaining history, but rather on what the language of the contract means. The District claims any arguments relating to bargaining history must be dismissed.

The District also argues that the Association's argument concerning equity is not compelling since the dispute is not about equity, but rather about whether the collective bargaining agreement has been violated.

The District further argues that the Association makes a mockery of the contract statement on preparation time by suggesting that the clear language of the contract concerning preparation time really does not mean what it says. The District points out that the contract requires teachers at grade levels 1 through 6 to receive 30 minutes of preparation time per day and that requirement has been met in every instance as demonstrated through the testimony of Association witnesses. The District concludes by stating that while the Association may wish to believe that it has bargained for more than 30 minutes of preparation time, the clear language of the contract defeats that argument.

The District next maintains that the Association cannot rely on practice to support its position since any practice is defeated by the express language of Article IX as interpreted by two previous arbitrations involving these same parties. In this regard, the District notes that Article IX expresses the agreement of the parties concerning the extent to which past practices will be enforced. The District opines that Article IX applies only to practices not specifically covered by the agreement which primarily relate to compensation, hours or conditions of employment. The District concludes that neither of the conditions, which would trigger the application of the past practice clause, are present.

In support of the above, the District first argues that the contract clearly addresses the number of minutes of prep time for the affected teachers in Article XXVI, therefore, the contract is not silent on the issue and by its own terms, Article IX is not applicable. See School Board for Jt. School District No. 2, City of Sun Prairie, et al, Case 59, No. 38897, MA-4641 (McLaughlin, 1988).

More significantly, in the District's opinion, is the fact that the number of minutes of preparation time has been held to be a permissive subject of bargaining by the Commission. The District claims that the language of Article IX, protecting past practices, does not apply to permissive subjects of bargaining. The District also claims that the number of minutes of preparation time is not compensation, hours or condition of employment, rather, it is an educational policy decision reserved to the clear discretion of the Board. See Sun Prairie Area School District, Case 85, No. 49565, MA-7986 (Greco, 1994).

The District further maintains that the Association's claim that the District has violated the law is without support in the record.

Finally, the District argues that the Association's remedial request for additional compensation is not appropriate. In this regard, the District claims that there is no contractual basis for awarding additional compensation for teachers for doing what they are employed to do within the workday that they are employed for.

The District concludes by noting:

> The Board was faced with a difficult decision. Working within limited resources, the Board determined to cut back on direct health instruction at grades 1 and 2 to preserve guidance counseling time at the elementary level. The Administration was aware of the impact that this would have. The Administration, while taking away the 30 minutes of health, restored an equal number of minutes by releasing the classroom teachers from the obligation of remaining in their classrooms when the guidance counselors are present. Is this a preferred solution? Perhaps or perhaps not. This case, however, is not focused, as the Union suggests, on the wisdom or propriety of the decisions of the Board and the Administration, but rather on whether their decisions have violated the collective bargaining agreement.

Based on all of the foregoing, the District requests that the grievance be denied.

DISCUSSION:

At issue is whether the District violated Article XXVI, Section C. 2. when it eliminated health instruction by certified health personnel at the first and second grade levels. For the reasons discussed below, the Arbitrator finds that the District violated the aforesaid contract provision by its actions herein.

The Association initially argues that the clear language of Article XXVI, Section C. 2. supports its position by specifying that classroom teachers will not be required to teach in the areas noted and that specialists will be provided to teach in those special areas. The Arbitrator agrees. Contrary to the District's assertion, the language of Article XXVI, Section C. 2. expressly mandates two criteria: teachers will be relieved from teaching in certain areas including health and will be provided with specialists to teach in those areas. (Emphasis added) It is significant that the parties used the word "will," and not the word "may." "Will" imposes a requirement on the District to do something; 2/ in other words, the District will not require classroom teachers to teach in the areas noted (health) and the District will provide said teachers with specialists to teach in these areas including health. (Emphasis supplied) "May," on the other hand, indicates a possibility or likelihood of something happening, but it does not require something to happen. 3/

2/ The American Heritage Dictionary of the English Language, New College Edition, (10th Ed. 1981), p. 1382.

3/ Supra, at 774.

The District may, for example, decide to provide health instruction by specialists, but it is not required to provide instruction in this area.

Such a conclusion is consistent with the language of the management rights and board functions clauses of the agreement which provide that the School Board has the right to determine which subjects will be taught, when those subjects will be offered, and by whom they will be taught, subject only to the express limits on management's authority contained in the agreement. (Emphasis added) Contrary to the District's assertion, Article XXVI, Section C. 2. expressly limits the Board's authority in the two areas noted above. Such an interpretation harmonizes the specific language of Article XXVI with the more general language of Articles II and III.

An interpretation of the disputed contract provision in this manner is supported by past practice and bargaining history.

The record is undisputed that health education taught by specialists for first to sixth grade children of the District as a prescribed curricular subject was instituted in September, 1990, following a jointly appointed committee of Administration and Association members, who recommended such be initiated. The record is also clear that one of the mutually accepted and major elements of this modification was to allow those primary grade elementary teachers additional classroom preparation time. This practice continued until the Fall of 1995. It was in effect over two collective bargaining agreements and four school years.

Likewise, bargaining history supports the Association's position. In this regard, the Arbitrator points out that three Association witnesses testified, unrebutted by the District, that during the contract term of 1989-91, a special Elementary Prep Time Committee, which incorporated a Health Curriculum Committee, comprised of teaching staff and Administration, worked out a deal to transfer the teaching of health education from the classroom teacher to the certified health instructor at the elementary level, including Grades 1 and 2. Furthermore, one rationale used by these Committees was to release primary teachers from the classroom to allow 30 minutes more of elementary prep time per week. The deal was consummated in the Spring of 1990 and immediately implemented when school opened in the Fall of 1990. Then, when the collective bargaining agreement was reopened for the 1991-93 biennium, both parties generated initial bargaining proposals which automatically included "health" into the spectrum of special classes under Article XXVI, C. 2. reflecting what the parties had mutually agreed to and enacted earlier. Consequently, the successor agreement for the 1991-92 and 1992-93 school terms was amended to include health in the listing of subjects to be taught by specialists thereby allowing Grades 1 and 2 teachers to be relieved from that duty and to have their classes taught by certified health instructors. (Emphasis added) The same held true for the successor agreement.

It is true, as pointed out by the District, that Superintendent Rosenthal testified that there was no discussion, nor was it the Board's understanding, that health instruction would always be provided in the school district. (Emphasis supplied) However, it is undisputed that there was little

or no discussion at the time "health" was inserted into the disputed contract provision. It is also clear that the parties inserted the word "health" into said clause to reflect the parties' prior agreement and practice. It is significant that Superintendent Rosenthal did not specifically refute the Association's evidence on this point. Nor did the District offer any other testimony or evidence which would support a different conclusion. Based on same, and all of the foregoing, the Arbitrator finds that bargaining history supports the Association's position herein.

Contrary to the District's assertion, bargaining history, as well as clear contract language, obligates the District to provide health instruction by specialists for first and second grade students and to allow classroom teachers extra preparation time during said instruction.

The District does not really dispute the Association's contention that if its position is upheld classroom teachers must be provided with specialists to teach in the specified areas including health. Nor does the District really dispute that these specialists will not be classroom teachers or guidance teachers. (Emphasis supplied)

Based on all of the foregoing, and the contract as a whole, and absent any persuasive evidence or argument to the contrary, the Arbitrator finds that the answer to the issue as framed by the undersigned is YES, the District violated Article XXVI, Section C. 2. when it eliminated health instruction by certified health instructors at the first and second grade levels. A question remains as to the appropriate remedy.

For a remedy, the Association requests that the Arbitrator sustain the grievance and order the District to restore health education to first and second grade students by certified health teachers at the earliest time possible. The Association also asks for compensation for all of the additional work performed by the classroom teachers at Grades 1 and 2. In particular, the Association believes that "within the realm of equity," all first and second grade teachers deserve compensation for the entire period of time during which they lost preparation time since they were required to teach their regular curricular areas and/or perform other duties as a result of the District's action. The Association states this compensation covers at least 18 hours of assigned teaching duties per teacher. The Association also believes the District is responsible for full compensatory payment to the grievants for their extra work in preparing to teach those additional hours above and beyond their norm of duty established in 1994-95. Again, the Association believes "Equity dictates approximately 27 hours of compensation for each affected teacher." Finally, the Association asks for a cease and desist order "since all four special areas are equally cited within Article XXVI, C. 2. other special areas could equally be impacted in the future and/or that the elimination of the health program could be expanded."

The District, on the other hand, argues that there is no contractual basis for awarding the Association's request for additional compensation. In this regard, the District notes that the contract clearly defines the teachers workday as one of 8 hours less a duty free lunch period of 30 minutes and at least 30 minutes of prep time. The District adds that the contract does not, at the elementary level, define the number of minutes of instruction that elementary teachers can be assigned within their workday. According to the District, an award of additional compensation based on an increased assignment is not grounded in the contract. The District concludes that since the contract does not directly limit the number of minutes of instruction the Arbitrator should not when imposing a remedy.

While it is true, as pointed out by the Association, that the remedy listed on the grievance

form that was originally submitted to the District seeks that the grievants be made whole the grievance does not specify what is meant by this. 4/ Based on the record evidence, the Arbitrator agrees with the District's contention noted above that there is no contractual basis apart from Article XXVI, C. 2. for awarding the Association's request for additional compensation. In addition, the Arbitrator points out that during the 1995-96 school year classroom teachers were released from their responsibility of remaining in the classroom when guidance counselors came to their room. This, in the Arbitrator's opinion, makes up for the loss of preparation time "they had experienced for at least five to six years." Nor does the Arbitrator believe it would be appropriate to grant the cease and desist order sought by the Association since that request goes beyond the scope of the instant grievance. Nevertheless, it would be an appropriate remedial order, in the opinion of the Arbitrator, to make the affected staff "whole" by restoring the situation that previously existed prior to the District's improper action.

In view of all of the foregoing, it is my

AWARD

The grievance is sustained. The District is ordered to reinstate health education to first and second grade students by certified health teachers at the earliest time possible. The District is also ordered to relieve first and second grade teachers of extra classroom duties during this health instruction by instead granting them additional preparation time for the time in question.

Dated at Madison, Wisconsin, this 17th day of February, 1997.

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

4/ Joint Exhibit No. 2.