BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between SUN PRAIRIE EDUCATION ASSOCIATION and SUN PRAIRIE AREA SCHOOL DISTRICT	Case 94 No. 54028 MA-9527

Appearances:

Mr. A. Phillip Borkenhagen, Executive Director, Capital Area UniServ-North, 4800 Ivywood Trail, McFarland, Wisconsin 53558, appearing on behalf of the Association.

Godfrey & Kahn, S.C., Attorneys at Law, 131 West Wilson Street, Suite 202, P. O. Box 1110, Madison, Wisconsin 53701-1110, by Mr. Jon E. Anderson, appearing on behalf of the District.

ARBITRATION AWARD

The Sun Prairie Education Association, hereafter Association, and Sun Prairie Area School District, hereafter District or Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Association requested, and the District concurred, in the appointment of a Wisconsin Employment Relations Commission staff member to hear and decide the instant dispute. The undersigned was so appointed. The hearing was conducted in Madison, Wisconsin, on September 17, 1996. The hearing was transcribed and the record was closed on December 26, 1996, upon receipt of post-hearing written argument.

ISSUES:

The Association frames the issue as follows:

> During the 1995-96 school term, did the District violate the collective bargaining agreement when it increased the work load of the elementary music teachers above the previous standard of the parties?
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> If so, what is the appropriate remedy?

The District frames the issue as follows:

> Did the District violate the collective bargaining agreement when it increased the number of instructional minutes for music teachers?
>
> If so, what is the appropriate remedy?

The undersigned adopts the District's statement of the issue.

RELEVANT CONTRACT LANGUAGE:

> II. MANAGEMENT RIGHTS
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> 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.
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> In exercising its powers to contract out for goods and

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

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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.

C. Unless the parties mutually agree on an arbitrator, either party may ask the Wisconsin Employment Relations Commission to submit to both parties the names of five (5) disinterested persons. On receipt of these names, the parties shall alternately strike names until only one remains, and the remaining person shall be the arbitrator of the dispute.

D. The arbitrator shall decide whether the employer may effectuate the proposed change. In making such decision, the arbitrator shall be governed by the criteria enumerated in Section 111.70(4)(cm)7., Wisconsin Statutes.

E. The arbitrator's decision shall be deemed a term of this agreement and shall remain in effect until its expiration.

F. Each party shall bear its own expenses in the arbitration proceeding. The parties will equally share the cost of the arbitrator.

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XXVI. WORKING CONDITIONS

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B. School Day

The school day for bargaining unit members shall consist of eight (8) consecutive hours to be determined daily on the basis of each bargaining unit member's assigned schedule, except on Fridays and days preceding nonschool days (on Fridays and on days preceding nonschool days, the teaching bargaining unit member may leave following completion of his/her assigned instructional and supervision schedule.)

Within the aforesaid eight (8) consecutive hour day,

the bargaining unit member agrees to be in school a minimum of fifteen (15) minutes prior to the start of class and a minimum of fifteen (15) minutes following the conclusion of his/her assigned instructional and supervision schedule. The eight (8) hours include a minimum of thirty (30) continuous, duty-free minutes for lunch.

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Instructional assignment for the purpose of this article is defined by Article XXVI. C. of the contract and the following:

1. Assigned instructional schedule shall mean classroom teaching and assigned supervision.

2. On Fridays and days preceding nonschool days, teachers, counselors, and librarians who have the last period assigned for preparation may leave fifteen (15) minutes following the end of the previous assigned period (whether that be a face-to-face instructional period or a preparation period). All other bargaining unit members may leave at the end of the regular student day.

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) (sic) period per day within the six (6) hours of classes stated above.

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D. Overloads

1. A bargaining unit member may contract for a maximum of one (1) extra section or class per semester and two (2) extra sections or classes per school year. A bargaining unit member will not be assigned any extra duties during the semester she/he is carrying an overload.

2. Compensation - An individual assigned for a one semester, one section/class overload shall be paid as a one and eight hundredths (1.08) FTE. An individual assigned for a two semester overload shall be paid as a one and eighteen hundredths (1.18) FTE.

3. Acceptance or rejection of an overload teaching assignment shall be at the discretion of the bargaining unit member. A participant who has agreed to a two semester overload may opt out of the second semester overload assignment provided notice has been given to the individual's principal, in writing, by the end of the first quarter. An overload assignment shall not carry over to the next school year without consent of the participant.

E. 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 bargaining unit members shall receive preparation time per day according to the following schedule:

   a) Grades 1-6, thirty (30) minutes, continuous whenever possible.

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G. Duty Free Lunch

Each bargaining unit member shall be assured of at least thirty (30) continuous free minutes for his/her lunch period. A relatively uniform cafeteria supervision policy will be followed in the elementary schools.

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BACKGROUND:

In September of 1995, a grievance was filed on behalf of Sheryl Renslo and Faye Gailfus in which it was alleged that the District violated Article IX by changing a past practice when the District assigned these two music teachers face-to-face instructional time exceeding 1,200 minutes per week. The grievance requested that the affected employes, Sheryl Renslo and Faye Gailfus, be made whole. The grievance was denied at all steps and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES:

Association

A forty (40) classes, 1,200 minute standard, was recognized and co-established by the District and Association prior to the 1988-89 school year. District administration has recognized this standard when it adjusted schedules, transferred elementary teachers, and hired additional teachers to maintain this standard. The District Administrator also recognized the standard when, in 1994-95, he unhesitatingly paid Renslo an overload stipend. The standard was also recognized by the parties when Association Representative Meyer and District representative Rosenthal met to negotiate a settlement of the issue. The standard is a past practice which may not be changed unless the District complies with the requirements of Article IX. It has not done so.

The management rights language and the arbitration awards relied upon by the District are not controlling. The District's reliance on the language contained in Article XXVI is misplaced because this language, on its face, does not apply to elementary music teachers. Such a conclusion is further supported by the evidence of bargaining history.

The District may assign above or below the standard. However, when assigning above the standard, the District must compensate the affected teacher. Since the overload section of the contract does not apply, the prior practice of providing $1,000 per class is controlling until the parties negotiate otherwise.

Article XXVIII provides the arbitrator with complete discretion to determine the appropriate award. The Grievants deserve to be made whole, which would include compensation for lost prep time, as well as overload pay.

District

Articles II and III specifically reserve to the District the authority to determine the work assignments and schedules of work for music teachers at the elementary level. These management rights may be limited only by express contract language.

Article XXVI, Section C.5, which is applicable to elementary music teachers, provides the District with the right to assign up to six hours of contact time per day, i.e., 360 minutes. If this section would not apply to elementary music teachers, then their day would be defined in Article XXVI as eight consecutive hours, less the 30 minute lunch period and guaranteed prep time, i.e., 420 minutes.

The past practice clause in Article IX, relied upon by the Association, is not applicable because the matter is specifically covered by this agreement and, under Wisconsin Employment Relations Commission case law, the number of minutes of instruction is not primarily related to compensation, hours or conditions of employment.

While the music teachers have been given more work, they have not been given more work than the contract permits. Thus, the change does not "reduce the previous conditions to less than the highest minimum standards in effect."

The record does not demonstrate that the 1,200 minute guideline was established by the parties acting mutually. Rather, it is evident that the establishment of the 1,200 minute guideline involved the exercise of management discretion under Article II. Acceptance of the Association's argument would negate the District's express contractual rights.

The Association's remedial request is inappropriate. The $1,000 payment made in 1994 was not precedent setting and, thus, does not create a practice deserving of the protections of Article IX. Should the Arbitrator find a violation, the remedy should be a cease and desist order directing the Board not to exercise authority that it has ceded away.

DISCUSSION

The grievance, on its face, challenges the District's right to assign more than 1,200 minutes of face-to-face instructional time per week to the Grievants. However, in its brief, the Association acknowledges that the District has the right to assign more than 1,200 minutes of face-

to-face instructional time per week to the Grievants. 1/ In dispute, is the District's right to assign more than 1,200 minutes of face-to-face instructional time per week without providing additional compensation.

Essentially, the Association argues that the parties' "past practices" establish that elementary music teachers have a "normal" workload of no more than 1,200 minutes of face-to-face instructional time per week and, therefore, an assignment which exceeds 1,200 minutes of face-to-face instructional time per week is an overload for which the teacher must be paid additional compensation. 2/ The Association asserts that these "past practices" are protected by Article IX of the parties' collective bargaining agreement.

Article IX provides protection for "past practices" that "are not specifically covered by the agreement." 3/ As Arbitrator McLaughlin recognized in a prior award, if the "past practice" asserted in the grievance involves an issue for which the parties have bargained specific contract language, then it cannot be said that the asserted "past practices" are "not specifically covered by

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1/ Association's reply brief, p. 14.

2/ For the purposes of this discussion, a "normal" workload is any workload for which the teacher is entitled to receive only his/her regular salary.

3/ This provision provides a mechanism by which the District may change a past practice (1) which is not specifically covered by the agreement; (2) which primarily relates to compensation, hours or conditions of employment; and (3) which reduces the previous conditions to less than the highest minimum standard in effect in the district at the time the agreement is signed.

this agreement." 4/

In the present case, the Association relies upon "past practices" to establish a "normal" workload and entitlement to overload compensation. As discussed more fully below, workload and entitlement to overload compensation are specifically covered by Articles II, III, and XXVI, Sections B, C, D, and E. Accordingly, Article IX is not applicable to the "past practices" asserted herein.

The fact that the "past practices" relied upon by the Association do not fall within the scope of Article IX does not mean that the practices may not be relied upon for other purposes. Thus, the undersigned turns to the evidence of the parties' "past practices."

4/ In that award, the arbitrator found that the grievance involved the layoff process; that the parties had bargained layoff language; and, thus, it could not be said that the asserted past practices were not specifically covered by the agreement. Sun Prairie School District, June 2, 1988.

For at least twenty years prior to this grievance, the District hired new teachers, rearranged the schedules of existing staff, and transferred teachers between buildings to ensure that elementary music teachers would not be assigned more than 1,200 minutes of face-to-face instructional time per week. 5/ It is not evident that any elementary music teacher was assigned more than 1,200 minutes of face-to-face instructional time per week until the 1989-90 school year. At that time, Sheryl Renslo was assigned 1,210 minutes of face-to-face instructional time per week. It is not evident that Renslo protested this assignment. Nor is it evident that Renslo received any additional compensation for this assignment.

In the 1993-94 school year, Renslo was assigned more than 1,200 minutes of face-to-face instructional time per week, i.e., 41 thirty-minute classes. When Renslo protested this assignment, she was told that money was tight and that nothing could be done about her assignment. 6/ Renslo wrote a letter to District Administrator Rosenthal in which Renslo advised Rosenthal that Renslo considered the assignment to be an overload. Renslo does not claim, and the record does not indicate, that Renslo was relieved of the "overload" or that Renslo received any "overload" payment for her 1993-94 assignment.

In the 1994-95 school year, Renslo was assigned more than 1,200 minutes of face-to-face instructional time per week. When Renslo complained of this assignment, Association Grievance Chair Marjorie Van Handel contacted Rosenthal. Rosenthal offered to pay Renslo a $1,000 overload payment on a non-precedential basis. Van Handel accepted this offer on behalf of the Association. 7/ Since this payment was offered, and accepted, on a non-precedential basis, it

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5/ Prior to the 1988-89 school year, the other elementary specialists, i.e., art and physical education teachers, did not have a "standard" assignment. (T. at 29) Health, which was recently implemented as an elementary specialty, has always had a "standard" assignment of not more than 1,200 minutes of face-to-face instructional time per week. (T. at 144)

6/ T. at 80.

7/ T. at 137.

cannot be considered as evidence of any binding past practice. 8/

In summary, as the Association argues, prior to this grievance, the "standard" assignment for District elementary music teachers was no more than 1,200 minutes of face-to-face instructional time per week. Contrary to the argument of the Association, it is not evident that this "standard" assignment was developed bilaterally by the parties, rather than unilaterally by the District. Nor is it evident that the parties mutually agreed that an assignment which exceeded the "standard" would be compensated as an overload. 9/

8/ While Van Handel understood that only the amount was non-precedential, the offer of settlement does not express such a limitation.

9/ In a memo dated January 10, 1995, Wendy Wegenke, the music coordinator, did acknowledge that a music overload existed at Westside. It is not evident, however, that Wegenke ever acknowledged that this "overload" entitled teachers to additional compensation.

In 1988, Steve Meyer was a department coordinator in physical education. At that time, Meyer was approached by Principal Bob Demrow, the administrative liaison in physical education, and Director of Instruction Emmett Connery and asked to make recommendations on staffing for the 1988-89 school year to comply with changes in physical education requirements. 10/ Meyer consulted with various teachers and recommended a "standard" assignment of not more than 1,200 minutes of face-to-face instructional time per week for physical education. From the 1988-89 school year until at least 1992, when the department coordinator position was abolished, elementary physical education teachers were not assigned more than 1,200 minutes of face-to-face instructional time per week.

Since the Association did not participate in the process which led to the development of the "standard" assignment for elementary physical education teachers 11/, this "standard" assignment was not developed bilaterally between the parties. Rather, this assignment was developed unilaterally by administrators, and teachers acting on behalf of the administrators.

The evidence of the 1988 discussions involving Meyer, Demrow, and Connery does not demonstrate that the parties reached any agreement with respect to elementary music teachers. However, such evidence does support the District's assertion that the development of a "standard" assignment and the decision to apply a "standard" assignment are choices made by the District in the exercise of its management rights. 12/

In summary, contrary to the argument of the Association, the evidence of "past practices" does not demonstrate that the parties mutually agreed that elementary music teachers have a "normal" workload of no more than 1,200 minutes of face-to-face instructional time per week. Nor does this evidence demonstrate that the parties mutually agreed that elementary music teachers are entitled to receive additional compensation when assigned more than 1,200 minutes of face-to-face instructional time per week.

It is not evident that the 1,200 minute "standard" was the subject of negotiation between

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10/ T. at 31-32.

11/ T. at 33.

12/ District teachers often develop their own schedules. These schedules, however, are subject to approval by the building principal. (T. at 70)

the Association and the District until the parties negotiated their 1995-97 agreement. At that time, the Association proposed that elementary specialists have a "normal" workload of no more than 1,200 minutes of face-to-face instructional time per week. When the parties were unable to reach an agreement on the issue of the elementary specialists' class load, the parties agreed to sever the issue from the parties' contract negotiations. It was further agreed that District Administrator Rosenthal and Union Representative Meyer would meet after the collective

bargaining agreement was ratified to negotiate an agreement on elementary specialists' class loads. 13/ Each party understood that any such agreement was subject to ratification by the parties. 14/

Following the ratification of the 1995-97 contract, Rosenthal and Meyer agreed upon language on class loads for elementary specialists. While the record is not entirely clear on this point, apparently Rosenthal determined that this agreement was not acceptable to other District representatives and, thus, proposed alternative language. The alternative language was rejected by Meyer. Neither party requested further negotiations on the issue of elementary specialists' class loads. 15/ Thus, neither the evidence of the parties' "past practices," nor the evidence of the parties' bargaining history, demonstrates that the parties had any bilateral agreement concerning the workload of elementary music teachers other than that which is reflected in the language of the parties' collective bargaining agreement.

Turning to that collective bargaining agreement, Article II provides the District with the right to "establish work rules and schedules of work" and to "hire, promote, transfer, schedule and assign employes in positions within the school system." Article III provides the District with the right to "schedule classes and assign workloads." By the terms of the parties' collective bargaining agreement, these rights are subject to limitation by the express terms of the collective bargaining agreement.

One express limitation upon the District's right to assign work is found in Article XXVI, Section B, School Day, which defines the school day as consisting of eight hours, including a minimum of thirty (30) continuous, duty-free minutes for lunch. Other express limitations upon the District's right to assign work are found in Article XXVI, Section C, Class Loads.

Article XXVI, Sections C.1 through C.4, provide class load protections to kindergarten teachers, elementary class room teachers, and various teachers in Grades 7 through 12. These Sections do not provide any class load protection to elementary music teachers. It is reasonable to

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13/ T. at 12.

14/ T. at 24.

15/ The processing of this grievance had been held in abeyance pending the outcome of the negotiations between Meyer and Rosenthal. Following the collapse of these negotiations, the parties proceeded to arbitrate the instant grievance.

conclude, therefore, that the "normal" workload of elementary music teachers is not determined by a specific class load.

Article XXVI, Section C.1, recognizes that a kindergarten teacher's "full teaching load" is no more than 300 minutes per day. It is reasonable to conclude, therefore, that, if the parties had intended an elementary music teacher's "normal" workload to be determined on the basis of minutes of face-to-face instructional time, then the parties would have negotiated such language.

The District argues that Article XXVI, Section C.5, is applicable to elementary music teachers. Section C.5, is a "catch-all" provision, i.e., intended to define a workload for those teachers who do not have a workload which is expressly identified in preceding portions of Section C. Section C.5, however, does not "catch" all of the elementary teachers 16/, but does "catch" all of the high school teachers. 17/ Section C.5 references programs which are found only at the high school level. 18/ The six hour normal teaching load referenced in Section C.5 is common to the high school, but is not common to the elementary school. The undersigned is persuaded that Section C.5 applies to high school teachers, but does not apply to elementary teachers.

Article XXVI, Section D, Overloads, defines overloads in terms of extra sections or classes and provides compensation for defined overloads. Since the 7-12th grade teachers are the only teachers who have workloads defined in terms of sections or classes, it is reasonable to conclude that this section provides a mechanism for determining and compensating overloads in Grades 7 through 12, but does not apply to the elementary music teachers. By limiting overload payments to one group of employes, the parties have demonstrated that no other group of employes is entitled to overload pay.

In summary, construing the collective bargaining agreement as a whole, the undersigned is persuaded that the District has the management right to assign work to elementary music teachers throughout the contractual school day, except as limited by express contract language. 19/ The

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16/ For example, it does not reference the disciplines of the other elementary specialists, i.e., art, physical education and health.

17/ T. at 149.

18/ For example, S.C.O.R.E. was a high school program and, at the time that Section C.5 was negotiated, guidance was not part of the elementary school curriculum.

19/ For example, the District's management right to assign work throughout the contractual school day is expressly limited by Article XXVI, E(1.d), Preparation Time, which provides special teachers at the elementary level with thirty minutes of continuous preparation time per day, whenever possible. It is not evident that the Grievants have received less than the minimum prep time guaranteed by Article XXVI, E(1.d). Indeed, Association Grievant Chair Van Handel acknowledges that the Grievants have received their contractually guaranteed prep time. (T. at 155.) The District may, of course,

express contract language does not limit the "normal" workload of elementary music teachers to no more than 1,200 minutes of face-to-face instructional time per week. Nor does the express contract language require the District to provide additional compensation to the elementary music teachers who receive an assignment of more than 1,200 minutes of face-to-face instructional time per week. As the District argues, the District has the contractual right to assign more than 1,200 minutes of face-to-face instructional time per week to the Grievants without providing the Grievants with additional compensation.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The District did not violate the collective bargaining agreement when it increased the number of instructional minutes for music teachers.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 1st day of August, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Coleen A. Burns /s/
Coleen A. Burns, Arbitrator

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exercise its management discretion to assign more than the minimum prep time. Such an exercise of management discretion does not give rise to any practice which is binding upon the District.