BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between SUPERIOR FEDERATION OF TEACHERS LOCAL 202, WFT and SCHOOL DISTRICT OF SUPERIOR	Case 118 No. 55151 MA-9910

Appearances:

Mr. William Kalin, Staff Representative, Wisconsin Federation of Teachers, appearing on behalf of the Union.

Mr. Kenneth Knudson, Attorney at Law, appearing on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and the District or Employer, respectively, were signatories to a collective bargaining agreement which provided for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance. A hearing, which was not transcribed, was held on July 17, 1997, in Superior, Wisconsin. The parties did not file briefs. Based on the entire record, the undersigned issues the following Award.

ISSUE

The parties were unable to stipulate to the issue to be decided in this case. The Union framed the issue as follows:

> Did the Employer violate the collective bargaining agreement by requiring driver's education instructors to teach classroom instruction in order to teach behind-the-wheel instruction?

The District framed the issue as follows:

> May the District make teaching assignments based on enrollment patterns and student demand in consultation with the Department Coordinator to address student needs?

Having reviewed the record and arguments in this case, the undersigned finds the Union's

proposed issue appropriate for purposes of deciding this dispute. Consequently, the Union's proposed issue will be decided herein.

The parties stipulated that in the event the arbitrator sustains the grievance, the monetary remedy for grievant Locken would be $2,757.55 (i.e., 174.75 hours times an hourly rate of $15.78 equals $2,757.55).

PERTINENT CONTRACT PROVISIONS

The parties' 1995-1997 collective bargaining agreement contained the following pertinent provisions:

ARTICLE V - WORKING CONDITIONS

. . .

Section I - Teaching Assignment and Duties

The parties agree that the exercise of the Board's responsibility to make teacher assignments should be a cooperative effort between the school administration and the school faculty, and that this philosophy is to be embraced in the implementation of the following procedure:

. . .

2. a. Teaching assignments, once defined by enrollment patterns and in the case of secondary schools, by student demand, shall be made by the administration in consultation with departments and/or with individual teachers. Preliminary assignments for the fall of any school year will be made no later than June 1 of the preceding year. Teaching assignments will be made final at such time as all full and part time positions within the building have been filled, however, not later than 15 days prior to the start of the school year. Notice of assignment changes will be sent to the affected teacher or teachers.

b. Teaching assignments (both preliminary and final) shall be made according to the following criteria:

A. certification
B. preparation (both formal and informal)
C. experience relative to the proposed assignment
D. teacher interest (expressed formally or informally)
E. department recommendation
F. overall program needs (within departments, building-wide, district-wide)

. . .

ARTICLE VIII - SALARY AND TEACHER WELFARE

. . .

Section C - Summer School

1. The rate of pay for teaching summer school shall be $15.00 per hour based on a 25 hour week. Where weekly hours are more or less than 25, the weekly rate shall be prorated up or down accordingly. During the four (4) hour summer school day, each teacher shall have thirty (30) minutes of paid preparation time.

2. Teachers not having taught at least one semester in the system shall not be hired until teachers in the system have been given an opportunity to teacher in the summer school program.

. . .

Section F - Driver Education

The Board shall pay the hourly rate of $15.78 per hour for behind-the-wheel driver education.

ARTICLE X - RULES GOVERNING THE AGREEMENT

. . .

Section B

With regard to matters not covered by this Agreement which are proper subjects of collective bargaining, in that they relate to matters of hours, wages or conditions of employment, and within its duration period, the Board agrees that it will make no changes in existing policies without appropriate consultations and negotiations with the Federation.

. . .

Section D - Management Rights

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

. . .

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

. . .

h. To determine the kinds and amounts of services to be performed as pertains to the school system operations and the number and kinds of classifications to perform such services.

. . .

3. The exercise of management rights contained in this clause during the term of this agreement that affect the teacher's wages, hours, or conditions of employment shall be subject to Article X, Section B of this Agreement.

FACTS

Grievant Tom Locken is a veteran guidance counselor with the District. In addition, he has been a driver's education instructor for many years. Driver's education is not considered a teaching assignment; rather, it is an extra-curricular assignment.

The driver's education program consists of two separate parts: behind-the-wheel instruction and classroom instruction. Behind-the-wheel instruction does not require advance preparation by the instructor; classroom instruction does. Instructors are paid $15.00 per hour for classroom instruction and $15.78 per hour for behind-the-wheel instruction. Thus, instructors are paid more for behind-the-wheel instruction than they are for classroom instruction. For many years, driver education instructors were allowed to do behind-the-wheel instruction without having to do classroom instruction. For many years, Locken did just that, namely doing behind-the-wheel instruction but not classroom instruction.

In January, 1996, a memo was sent to all District staff concerning plans for the District's upcoming summer school program. Among other things, this memo invited teachers to serve as summer school instructors. The memo contained an application form for anyone interested in working in the summer school program. Locken completed the form wherein he indicated he desired to teach driver's education.

Sometime thereafter, the head of the driver's education department, Richard Smith, raised a concern to management about the existing student/teacher ratio in the department. While the driver's education student/teacher ratio is not contained in the record, witnesses characterized it (i.e., the ratio) as high. The reason for this is that driver's education is the District's most popular course. During summer school, the driver's education course has the highest enrollment of all courses offered. Smith recommended a change in the way duties are handled in the driver's education department. Specifically, he recommended that henceforth all driver's education instructors teach both parts of the driver's education program (i.e., both behind-the-wheel instruction and classroom instruction). Smith felt that if this change was implemented, the existing student/teacher ratio in the driver's education department would be reduced. The District ultimately adopted Smith's recommendation and decided that henceforth all driver's education instructors would teach both behind-the-wheel instruction and classroom instruction.

On April 30, 1996, those individuals who had expressed an interest in being driver's

education instructors in summer school received a memo from summer school directors Dennis Mertzing and Alan Nelson concerning their driver's education contract for the upcoming summer. This one-sentence memo provided as follows:

> Please note that all driver's education instructors will be required to teach in the classroom and behind-the-wheel.

After this memo was issued, Smith talked with all the driver's education instructors one-on-one about the change in the way duties would be handled in the department. In so doing, he told each instructor that in order to teach driver's education, they would have to teach both parts of the program: behind-the-wheel and classroom instruction; they could not do just behind-the-wheel instruction. When Smith talked to Locken about this, Locken told Smith he was not interested in being a driver's education instructor with the position as offered (i.e., doing both behind-the-wheel and classroom instruction). Locken later reiterated to Smith that he (Locken) would not do behind-the-wheel instruction if he also had to do classroom instruction.

All the employes who expressed an interest in working in the 1996 summer school program as driver's education instructors were offered employment in that capacity. Like the others, Locken was offered a position as a 1996 summer school driver's education instructor. Unlike the others, Locken declined the offered position. The reason Locken declined the offered position was because he did not want to do classroom instruction; he just wanted to do behind-the-wheel instruction.

All the instructors who taught driver's education in the 1996 summer school taught both parts of the program (i.e., both behind-the-wheel and classroom instruction). As previously noted, this was the first time driver's education instructors had to teach both parts of the program.

When the 1996-1997 school year commenced, the driver's education behind-the-wheel instruction was a continuation of the instruction begun in summer school. The driver's education instructors who taught in the 1996 summer school also taught driver's education during the 1996-1997 school year. Locken did not teach driver's education during the 1996-1997 school year because he did not teach driver's education in the 1996 summer school.

In September, 1996, Locken grieved not being allowed to teach just the behind-the-wheel part of driver's education. His grievance was processed to arbitration.

The record indicates that the Union did not receive a copy of the April 30, 1996 memo referenced above. The record further indicates that the District did not notify the Union or consult with it before it made the change in the driver's education program referenced above.

POSITIONS OF THE PARTIES

The Union views this as a past practice case. Consequently, it makes the arguments traditionally made in such cases, namely that a binding past practice exists which the Employer unilaterally changed. The Union contends that for the last 20 years driver's education instructors have been allowed to teach just the behind-the-wheel part without also having to do classroom instruction. According to the Union, this constitutes a past practice. As the Union sees it, this practice "relates to matters of hours, wages or conditions of employment" within the meaning of Article X, B, so it is covered by the Maintenance of Standards clause and entitled to contractual enforcement. The Union argues the District unilaterally changed this practice without any notification to the Union when it notified driver's education instructors in April, 1996, that henceforth they had to teach both parts of driver's education. The Union avers that the District did not negotiate this change in the driver's education program or the impact of this change with the Union before it implemented same. The Union contends this change in the driver's education program deprived Locken of the opportunity to teach just the behind-the-wheel part of driver's education in the 1996-97 school year. Responding to the District's contention that its unilateral change in the driver's education program is within its management rights, the Union asserts that it never agreed to such an unrestricted view of management rights. The Union submits that if the arbitrator denies the grievance, he will be upsetting a long historical relationship between the parties wherein the parties have addressed numerous matters which "relate to matters of hours, wages, or conditions of employment." The Union therefore contends that the District violated the collective bargaining agreement by requiring driver's education instructors to teach classroom instruction in order to teach behind-the-wheel instruction. In order to remedy this alleged (contractual) breach, the Union asks that the arbitrator find in favor of the Union and award Locken backpay.

The District acknowledges that it changed how it handles driver's education work duties. As it sees it, both the contract language and its management rights allow it to make this change. The contract language which the District relies on to allow the change is Article V, Section I (the Teaching Assignment and Duties clause). The District believes that clause allows it to make teaching assignments based on enrollment patterns and student needs. The District concedes that until now, this clause only applied to regular classroom assignments and not summer school assignments. The District further concedes that this provision was originally intended to deal with regular classroom assignments, and not summer school assignments. Be that as it may, the District submits it is not unusual for contract language to be read more broadly than originally intended. The District asks the arbitrator to do that here and apply Article V, Section I (the Teaching Assignment and Duties clause) to summer school assignments. However, in the event the arbitrator accepts the Union's argument that Article V, Section I does not apply to summer school assignments, and thus does not apply that language here, the District avers there is no contract language which governs the exact situation involved here. The District also submits there

is no contract provision which allows employes to opt out of certain duties (such as classroom instruction in driver's education) or pick and choose what part of their job they will do. Next, the District argues that Article X, Section D (the Management Rights clause), gives it the authority to make the change in question. To support this premise, it cites the language found in that article which empowers it to decide upon the means and methods of instruction and to determine the kinds and amounts of services to be performed. The District asserts that in this case, it exercised its management right reasonably when it decided that driver's education teachers were to henceforth teach both parts of the program. The District also contends it never waived its management right to make this decision nor did it ever agree to be bound by any informal practice which restricted the exercise of its management rights. Responding to the Union's contention that this is a past practice case and that the District violated a practice, the District asserts that previous summer school driver's education assignments where instructors were allowed to do just behind-the-wheel instruction resulted from past exercises of management prerogatives. That being so, the District believes it did not have to bargain with the Union or get its permission prior to making the instant change in the driver's education program. The District therefore requests that the grievance be denied.

DISCUSSION

This case involves the change which the District made in handling driver's education work duties. Previously, driver's education instructors were allowed to do just behind-the-wheel instruction without also doing classroom instruction. The District decided that henceforth driver's education instructors had to teach both parts. In other words, driver's education instructors had to do both behind-the-wheel instruction and classroom instruction. The Union challenges this action. The grievant, who had previously done just behind-the-wheel instruction, wants to continue to do so without having to also do classroom instruction. At issue is whether the District's action comports with the labor agreement or violates same.

My discussion begins by noting that no contract language explicitly relates to the assignment of driver's education work duties. While two provisions deal with pay for performing driver's education work (namely Article VIII, Section C which specifies the pay rate for instructional work and Article VIII, Section F which specifies the pay rate for behind-the-wheel work), neither provision specifies how these driver's education work duties will be handled or assigned. That being so, there is no contract provision which explicitly addresses the handling or assignment of driver's education work duties.

Recognizing that there is no contract language which is directly on point, the District relies on Article V, Section I (the Teaching Assignment and Duties clause) to support its position here. As the name implies, that clause specifies the criteria by which teaching assignments are made by the administration. The phrase used by the District in their framing of the issue (i.e., "make

teaching assignments based on enrollment patterns and student demand") is taken almost word for word from that clause. As the District sees it, that provision allows it to make the change it made in handling driver's education work duties. Thus, the District asks the arbitrator to apply that clause to the summer school driver's education assignment in issue here. The undersigned believes there are several problems with doing so. First, the record indicates that the Teaching Assignment and Duties clause has never previously been applied to summer school assignments; it has only been applied to regular school year assignments. This means that the District is trying to apply this contract provision to a situation where it has never previously been applied. Second, the District acknowledged that this provision was originally intended to deal with regular classroom assignments and not summer school assignments. Third, the Union expressly opposes extending that clause to summer school. Given the circumstances just referenced, I decline the District's invitation to apply Article V, Section I to summer school assignments. This case will therefore be decided on other grounds.

Having held that there is no contract language which explicitly relates to the handling or assignment of driver's education work duties, and that the Teaching Assignment and Duties clause will not be applied here, attention is turned to the Union's argument that an alleged past practice governs the assignment of driver's education work duties.

Before addressing the threshold question of whether there is or is not an applicable past practice, it is noted at the outset that past practice is primarily used or applied in the following circumstances: (1) to clarify ambiguous language in the parties' agreement; (2) to implement general contract language; (3) to modify or amend apparently ambiguous language in the agreement; or (4) to establish an enforceable condition of employment where the contract is silent on the matter. Circumstances (1), (2) and (3) are inapplicable here. This is because there is no contract provision that the alleged "practice" is suggested as clarifying (#1), implementing (#2), or modifying (#3). Consequently, this is a category (4) case since the Union seeks to have the alleged "practice" supplement the contract so as to be binding on the parties and become an enforceable condition of employment. In situations such as this where a party wishes to clothe a course of conduct with contractual status, that practice must reflect as many elements of the contract as possible. Simply put, the practice must be the understood and accepted way of doing things over an extended period of time. Additionally, it must be understood by the parties that there is an obligation to continue doing things this way in the future. This means that a "practice" known to just one side and not the other will not normally be considered as the type of mutually agreeable item that is entitled to arbitral enforcement.

That said, the focus turns to whether the Union established the existence of a practice governing the assignment of driver's education work duties. To support its contention that a practice exists, the Union relies on the fact that prior to April, 1996, the District allowed driver's education instructors to do just behind-the-wheel instruction without also having to do classroom

instruction. The Union submits this action established a binding past practice governing the assignment of driver's education work duties which the District was obligated to continue. The District obviously disagrees.

Based on the rationale which follows, I find that the District's previous handling of driver's education work duties is not sufficient to establish a binding past practice which is entitled to contractual enforcement. The Union's underlying theory that this is a past practice case overlooks the fact that not every pattern of conduct amounts to a binding past practice, particularly when the pattern of conduct arises from the exercise of a management right. That is precisely the case here. The District's previous handling of driver's education work duties was not the result of bargaining with the Union but rather the District's unilateral act. The District had previously made the educational decision that driver's education instructors could teach just behind-the-wheel without also doing classroom instruction. That was their right. The District had the right to make this educational decision because it reserved to itself, via the Management Rights clause, the right to manage its programs, activities and services. This means that previous driver's education work assignments were the product of management prerogatives. Said another way, they arose from the exercise of a management right.

Since previous driver's education work assignments resulted from the District exercising its management function, the Union had the burden of showing that the District knowingly waived its management rights and agreed to be bound in the future by a practice concerning the assignment of driver's education work duties which restricted its management rights. There is no proof in the record of same. Accordingly, it is held that the Union did not prove that the District waived its management right to change how driver's education work duties are handled. Since the District never waived its right to change the handling of driver's education work duties, it follows that it could change same.

Having held that the District could change the way driver's education work duties were handled, the remaining question is whether the District acted in an arbitrary or capricious manner when it decided in April, 1996, that henceforth driver's education instructors had to teach both classroom instruction and behind-the-wheel. I find it did not. The record indicates that the reason the District made this change in the way driver's education work duties were handled was to reduce that department's student/teacher ratio, which was characterized by witnesses as high. The undersigned finds this reason to be eminently reasonable and therefore neither arbitrary nor capricious. The District's exercise of its management rights therefore passes muster.

As a practical matter, this decision also disposes of the Union's remaining argument concerning the Maintenance of Standards clause. By its express terms, that clause applies solely to those matters "which are proper subjects of collective bargaining. . ." I have already found that the District's previous handling of driver's education work duties involved an educational decision.

In my view, an educational decision cannot involve a "proper subject of collective bargaining" within the meaning of the Maintenance of Standards clause. It is therefore held that the Maintenance of Standards clause is inapplicable here.

In light of the above, I issue the following

AWARD

That the Employer did not violate the collective bargaining agreement by requiring driver's education instructors to teach classroom instruction in order to teach behind-the-wheel instruction. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 15th day of August, 1997.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator