

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

WHITE LAKE SCHOOL DISTRICT

and

NORTHEAST EDUCATION COUNCIL

Case 14  
No. 52740  
MA-9087

Appearances:

Godfrey & Kahn, S.C., by Mr. Robert W. Burns, Attorney at Law, 333 Main Street, Suite 600, P.O. Box 13067, Green Bay, Wisconsin 54307-3067, on behalf of the District.

Ms. Dee Simmons, Executive Director, Northern Teir UniServ, P.O. Box 9, 200-A South Lake Avenue, Crandon, Wisconsin 54520, on behalf of the Union.

ARBITRATION AWARD

According to the terms of the 1993-95 collective bargaining agreement between White Lake School District (hereafter District) and Northeast Education Council (hereafter Union), the parties jointly requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as impartial arbitrator of a dispute between them regarding the assignment of History teaching duties during the Summer of 1994 to District Administrator Brennan. The Commission appointed Sharon A. Gallagher to hear and resolve the dispute. A hearing was held at White Lake, Wisconsin on August 17, 1995. A stenographic transcript of the proceedings was taken and received by the undersigned on August 29, 1995. The parties submitted their initial briefs to the undersigned by October 12, 1995 which were thereafter exchanged by the undersigned. The parties reserved the right to file reply briefs and those were received by November 20, 1995. The record was thereupon closed.

Issues:

The parties were unable to stipulate to the substantive issues in this case. In addition, the Employer raised a timeliness issue which the Union resisted. However, the Employer and the Union agreed to the phrasing of the timeliness issue in this case and agreed that the question of timeliness should be determined initially before the undersigned can proceed to decide the substantive issues. The parties' stipulated timeliness issue reads as follows:

- 1) Was the grievance timely filed?

The Employer suggested the following substantive issue to be determined, should the undersigned reach the substantive issue in this case:

- 2) Did the District violate the collective bargaining agreement in the Administration's provision of a Summer tutorial to certain students? If so, what is the appropriate remedy?

The Union suggested the following substantive issue:

- 3) Did the District violate the collective bargaining agreement by not offering the 1994 Summer School History course to Grievant Dennis Highfield? If so, what is the appropriate remedy?

The parties agreed to allow the undersigned to frame the substantive issue based on the relevant evidence and argument in this case, should the undersigned find the grievance timely filed. Based upon the relevant evidence and argument in this case, I find that the following substantive issue shall be determined herein:

Did the District violate the collective bargaining agreement by not offering the 1994 Summer tutorial in History to the Grievant? If so, what is the appropriate remedy?

Relevant Contract Provisions:

ARTICLE III

BOARD RIGHTS

The Board, on its own behalf and on behalf of the electors of the District, retains and reserves unto itself, without limitation, all powers, rights, authority, duties and responsibilities conferred and vested in it by the Laws and Constitution of the State of Wisconsin, including but not limited to the right:

. . .

- C. To establish grades and courses of instruction, including special programs, and to provide for athletic, recreation and social events for students, all as deemed necessary or

advisable by the Board.

...

- E. To determine class schedule, the hours of instruction, and the duties, responsibilities and assignments of teachers.

...

## ARTICLE VI

### GRIEVANCE PROCEDURES

#### A. Definitions:

1. A "Grievance" is a claim based upon an event or condition which affects the wages, hours and conditions of employment of a teacher or group of teachers as it pertains to the interpretation, meaning or application of any of the provisions of this agreement. A grievance must be initiated within fifteen (15) days after the occurrence or event upon which a grievance is based.

...

3. The term "Days" when used in this article shall, except where otherwise indicated mean working days; thus, weekend or vacation days are excluded.

...

## ARTICLE XII

### PROFESSIONAL QUALIFICATIONS AND ASSIGNMENTS

...

- B. Summer school courses shall be under separate contract, (sic) not obligatory, but with the consent of the teacher. Preference in offering such contracts will be made on the basis of seniority gained through the years of local experience in the assignment, assuming equal qualifications among applicants. Summer contracts shall be at pro-rata

pay. If no Association member is available, summer contracts may be offered to any certified teacher at the rate of fifteen (\$15.00) per hour.

. . .

### ARTICLE XIII

#### VACANCIES

- A. Notices of vacancies will be posted in a conspicuous place in the Teacher's Lounge bulletin board and mailed to all teachers currently on leave or layoff as soon as the Administration is aware of the existence of such vacancies.

. . .

#### Stipulations of the Parties:

The parties stipulated that there has been no change in either the grievance article (Article VI) or in the language of Article XII, Section B, from the prior labor agreement through the 1993-95 labor agreement. The parties also stipulated that former District teacher Kim Koelzer was not informed of a History tutorial class held in the Summer of 1994. Ms. Koelzer's son could have taken that tutorial in order to make up certain History classes that he had not completed.

#### The Timeliness Issue:

Initially, it must be noted, that the collective bargaining agreement between the parties contains no language regarding how Summer School classes will be announced. Also, the agreement fails to state how teachers become involved in Summer School except to state that separate contracts must be issued therefor and that the teachers must consent to teach the courses.

The Association presented several witnesses who testified regarding a past practice concerning this issue. Teachers Lois Anderson, Kayle Wahleithner and Marge Pence stated that in the past the District has put announcements regarding Summer School courses on the District bulletin boards or it has put announcements in the teachers' mail boxes at the District. These teachers' experience has been that after noticing a bulletin board announcement or receiving an announcement in their mail boxes, the teachers who are interested then contact District Administrator Harold Brennan or the Summer School Coordinator (if the latter has been designated) to indicate their interest, in teaching a Summer course.

In addition, although the collective bargaining agreement makes no reference to "tutorials" or "independent study classes", these have been offered by the District in the past. The evidence

showed that regarding independent study classes, the student in need of help normally contacts the teacher who they wish to assist them and the teacher will then refer that student to Mr. Brennan in order to get approval for an independent study class. Similarly, regarding Summer tutorials, these have been offered in the past and District teachers have performed work, normally for pay or comp time, by working out the details of a tutorial with District Administrator Brennan in advance.

District Administrator Brennan stated that he has normally decided what the needs of the District are for Summer School each year. Brennan noted however that Drivers' Education is offered every Summer and that a regular individual teacher contract is approved and issued by the Board for that class every year. Brennan stated that it is not always necessary for him to receive advance Board of Education approval for teachers to engage in tutorials and independent study classes in the Summer. Brennan stated that because he was not paid for the Summer tutorial in 1994, he believed no approval by the Board of Education was necessary and none was sought by him.

However, Brennan stated, whenever the District has offered structured Summer School courses, with a specific beginning date and ending date, the Board of Education has formally approved and offered individual teacher contracts for these courses, it has offered these individual contracts according to the provisions of Article XII, Section B, and the Finance Committee of the Board of Education has approved the issuance of pay checks regarding these Summer School courses. It should be noted that Grievant Dennis Highfield taught a regular Summer School course in Social Studies in 1992. Highfield stated that he received a notice of the offering of the class in his District mailbox and that he then filled out an interest form and turned that into the office. His course had a specific beginning and ending date, confirmed by letter from the District. The letter also listed the compensation Highfield received for teaching the course.

Facts:

Sometime during the Spring of 1994, District Administrator Brennan was approached by certain parents of High School students at the District who were concerned about their children getting caught up with their History courses. In one case, the parents threatened to take the child out of the school and go elsewhere for the child's education. Brennan then volunteered to teach History to that student so that the student would have a choice of more than one teacher in the District. 1/ Brennan stated that later, a couple of other parents requested that he help their

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1/ There are twenty-six teachers employed by the District. There are 100 high school students in the District. Grievant Dennis Highfield has been employed by the District for twenty-six years and is currently the only certified Social Studies teacher for grades seven through twelve at the District. The District's Guidance Counselor has also taught Social Studies over the years whenever Mr. Highfield has a full schedule and there is a need for a seventh class during each semester.

children with their History requirements. As a result, Brennan taught five students History during the Summer of 1994. Two of these students were expected to graduate the following year (the 1994-95 school year) and three of the students were underclassmen. Of the three underclassmen, the parents of one underclassman wanted their child to get caught up quickly in History and the parents of the other two students came to Brennan and stated that they had heard that he would be teaching during the Summer of 1994 and they wanted their children to join the group. Brennan stated that his intent was to teach these five students United States History so that they would be done with the class by the end of the Summer of 1994 and get credit for the class entered in District grade books in the Fall of 1994. However, Brennan stated that he was unable to put in enough time with these students during the Summer of 1994, so that they did not complete their work until January, 1995. Ultimately, Brennan turned in these students' grades on January 17, 1995 for recording by the Guidance Counselor in grade books and transcripts.

Brennan stated that he never formally advised the Board that this tutorial would be offered, and the Board never formally approved of this tutorial in History for the Summer of 1994; that he received no compensation for his work during the Summer of 1994 with these five students; and that he received no stipend or other payment from the Board for this work. 2/ In addition, the Board did not establish any formal structure or beginning and ending date for Brennan's Summer

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2/ At its May 16, 1994 regular School Board meeting, the Board of Education considered the approval of the Summer School Program at the District. The minutes from that meeting read in relevant part as follows:

. . .

- a. Driver education will be offered because of the cost savings (by not having it during the regular school year) and also because we get State aids and fees from students (\$58/student). General math will possibly be offered: however, this may be offered during the regular school year if it can be fit into the schedule. Band will be run one or two weeks prior to the 4th of July celebration. No other programs will be offered due to cost controls/considerations.
- b. Moved by Kolpack, seconded by Tackett to authorize instrumental music, general math, and driver education for the 1994 Summer School. . . . Motion carried.

tutorial work with these students. Brennan stated that he strictly volunteered to perform these services for no compensation. As a result, Brennan stated that the Board never offered a Summer School contract for this tutorial work.

Although Brennan stated that he made no secret of the fact that he was working with students during the Summer of 1994, he could recall no specific conversations with any teachers regarding the specifics of his work, except for two encounters he had during the Summer with teacher Lois Anderson. Both Anderson and Brennan confirmed that Anderson came to the school building during the Summer on random personal errands and saw Mr. Brennan working in the cafeteria with a History text book, making notes. Both Brennan and Anderson stated that they had a brief conversation regarding the difficulty of extracting competencies or objectives out of the History text that Brennan was working on. Anderson admitted that she noticed that the text that Brennan was working with was a High School History book. Brennan made no mention that he was actually teaching students U.S. History in his conversation with Anderson.

Later during the Summer of 1994, Anderson returned again to the school building to retrieve something from her classroom and she saw District Administrator Brennan in a room with students on a Saturday. Anderson stated that Brennan was not lecturing at the time she saw him and that there was no blackboard in the room. Anderson stated that she had no idea what Brennan was doing in the building that day, and that she did not ask Brennan any questions.

Brennan stated that teacher Marge Pence also had an independent study class (ISC) during the Summer of 1994 for one student, which Brennan alone approved. Ms. Pence was not issued an individual employment contract for that class, Brennan never informed the Board of this ISC and therefore, the Board never approved Ms. Pence's ISC. Pence also agreed to take compensation time rather than pay for the class.

Briefs:

Union:

The Union asserted that the grievance was timely filed because the Union, through no fault of its own, was unaware that Superintendent Brennan had taught a Summer History tutorial until March 9, 1995. Indeed, the Union urged that because the District never advertised the position to the public, never posted it as a vacancy and never contacted the Grievant, (the most senior employe in the assignment) to offer him the assignment, and because Brennan normally taught this tutorial when teachers were not present in the school building, it is neither fair nor reasonable to assume that the Union was put on notice of the tutorial before March 9, 1995. The Association observed that the usual and customary procedures which had been followed in the past regarding the offering of Summer classes, tutorials and independent study courses were not followed in this case. Thus, in these circumstances, the Union contended that the undersigned should not construe Article VI to work a forfeiture of the Union's right to process the instant grievance. In addition,

the Union noted that despite the District's early objection to the timeliness of the instant grievance during the processing thereof, the parties ultimately agreed to jointly submit this case to arbitration. In the Union's view, such a joint submission normally indicates that there is no dispute regarding arbitrability.

Regarding the merits of the case, the Union argued that the District violated Article XII, Section B, by its actions in this case. The Union noted that although Article III, Board Rights, Section E, gives the District the right, *inter alia* to "determine . . . the duties, responsibilities and assignments of teachers", this general language is limited by the specific language of Article XII, Section D, which requires "Summer school courses" to be offered first to the most

senior Union member in the assignment by individual contract and that if no Union member is available for the position it may then be offered to any certified teacher, at listed compensation rates.

The Union also found it significant that the contract makes no provision for volunteerism. Thus, in the Union's opinion, the District also violated Article IV, Association Rights, Section G, by its failure to negotiate with the Union a change in Article XII, Section D, to allow for volunteerism. Of further significance, in the Union's view, is the fact that the effective labor agreement does not contain a subcontracting clause. This silence, according to the Union, means that whether the District's actions are construed as volunteerism or subcontracting, the District was not privileged under this contract to pass over the Grievant for the 1994 Summer tutorial.

Finally, the Union urged that the District's actions also violated Article V, Teacher Rights, Section D, because only Highfield was denied the opportunity to teach the Summer tutorial in 1994 while other teachers both in the past and during the Summer of 1994 were offered Summer work in accordance with the past practice regarding Summer courses, tutorials and independent study courses. Therefore, the Union urged that the undersigned sustain the grievance and make the Grievant "whole for wages for the Summer of 1994 and the 1995-96 school year."

District:

The District urged that the instant grievance must be dismissed without consideration of the merits herein, because the grievance was untimely filed. The District asserted that District Administrator Brennan made no "secret" of the fact that he was teaching a History tutorial during the Summer and Fall of 1994; that at least two bargaining unit members witnessed his teaching these students during the Summer of 1994. Furthermore, the District contended that if the undersigned were to find the grievance timely, such a decision would essentially modify the terms of the agreement in violation of Article VI, Section D, of that contract. The District also noted that the contract does not provide any period for discovery regarding grievances and that it is the Union's responsibility (not the District's) to police the labor agreement.



Even if the grievance were found arbitrable, the District asserted that the grievance should be dismissed on the merits. Initially, the District argued that the tutorial Brennan taught during the Summer of 1994 was not a formal, Board-approved "Summer school course" and therefore was not covered by Article XII, Section B of the contract. In this regard, the District noted that Brennan's tutorial had none of the characteristics of a contractual "Summer School course": It was not planned in advance, it met at haphazard times and had no formal beginning and ending dates, and Brennan was not compensated in any way for teaching the tutorial. In addition, the District observed that nothing in the contract requires that all educational opportunities during the Summer must be organized as Article XII "Summer School courses". The District asserted that it also is significant that the contract makes no reference to tutorials or independent study classes which have not been treated the same as formal Summer School

courses in the past. The District noted that in the past, District Administrator Brennan has approved alternate study programs on his own based on his judgement of student , District and parental needs and that the Union has never objected to these.

The District also urged that the Union's requested remedies are both unclear and inappropriate in this case. In this regard, the District proved that Brennan never received any compensation for the Summer tutorial. The evidence also failed to show that had Brennan not taught the Summer tutorial in 1994, Highfield would not have received additional compensation in 1994-95 for absorbing these tutored students into his regular classes. Also, the District noted, Highfield admitted in this case that he would not have taught the 1994 Summer tutorial on a haphazard schedule without compensation, and that Brennan's teaching of the Summer tutorial had no affect on his 100-percent 1994-95 teaching contract. Thus, in the District's view, no backpay is due in this case under any circumstances.

In addition, the District argued that the Union's additional request for an Order requiring the District to cease and desist from assigning unit work outside the bargaining unit and its request that Highfield be returned to a full-time position for the 1995-96 school year are neither supported by the grievance, the contract, the Grievant's claims nor by the evidence of this case. Thus, the District sought denial and dismissal of the grievance in its entirety.

#### Reply Briefs:

##### Union:

The Union urged that the District failed to prove that it could not have afforded to offer the 1994 History tutorial to Highfield for pay and that the District failed to prove that the students involved in the tutorial, therefore, would not have received their History credits in 1995. The Union asserted that Brennan's actions -- in teaching the tutorial on the weekends and in the evening, on an intermittent schedule -- showed that the Union could not reasonably have known

that Brennan was teaching a class. Thus, the Union urged that it had timely filed the grievance herein.

The Union noted that the contract does not distinguish between formal Board-approved Summer School courses and tutorials and independent study classes. Therefore, the Union urged that all Summer courses must be administered pursuant to Article XII, Section B. Here, because proper procedures were not followed for either Ms. Pence's independent study class or Brennan's Summer tutorial, the District clearly violated the contract.

Finally, the Association speculated that three of the five students Brennan taught in the 1994 Summer tutorial might have had to wait until the 1995-96 school year to make-up their History credits. In the Union's view, this might have impacted Highfield's 1995-96 teaching load.

District:

The District argued that the Union's contention that the grievance must be deemed to have been timely filed is without merit. In this regard, the District noted that the Union is attempting, by this grievance, not only to write into the contract a "knew or should have known" standard where such language does not exist, but also to press a "stale claim" and to collaterally attack the District's legitimate move, effective in 1995-96, to reduce Highfield's teaching schedule. The District noted that the reduction in Highfield's schedule is not before the Arbitrator in this case and that contractual time limitations should not be extended simply because the Grievant did not think of filing a grievance sooner.

Regarding the merits of the case should the Arbitrator reach them, the District urged that the Summer tutorial was not a formal "Summer School course" and therefore was not covered by the clear terms of the contract. The District observed that there is nothing in the labor agreement which requires that all Summer educational opportunities be treated as contractual Summer School courses. In addition, the District urged that unit employees were aware and tacitly approved of the distinction made in the past between formal Summer School courses and other Summer classes. Thus, in the District's view, the Association's arguments regarding subcontracting, volunteerism, union security, and Highfield's seniority, must fail due to the traditional exclusion of Summer tutorials and independent study classes from the requirements of the contract.

In any event, the District contended, the facts of this case fail to prove that the District, by Brennan's actions, engaged in illegitimate subcontracting or volunteerism. In this regard, the District noted that the terms, conditions and offering of the 1994 History tutorial were never negotiated, discussed and finalized between the Board of Education and the Association, and the Board never sought a volunteer for the position in order to avoid the financial cost of paying the Grievant pursuant to a previous agreement. Furthermore, the District asserted, the facts of this case fail to show that the District unlawfully subcontracted with a third party outside the bargaining unit for work specifically described in the contract as unit work. Here, in the District's

view, Brennan was issued no contract for this work, he was already on staff and performed the work along with his other duties for no additional compensation, and, in any event, the tutorial was not unit work.

Discussion of the Timeliness Issue:

Article VI of the effective labor agreement states that a grievance is a claim based upon "an event or condition which affects the wages, hours and conditions of employment of a teacher or group of teachers. . . ." Section A goes on to state that a grievance "must" be initiated within fifteen days after the "occurrence or event upon which a grievance is based" (emphasis supplied). The facts of this case demonstrated that the District never formally or informally notified the Union or the Grievant that a History tutorial would be offered during the Summer of 1994. Indeed, it should be noted that no announcement regarding History during the Summer of 1994 was posted on District bulletin boards or placed in teacher mail boxes as had been done over many years in the past. In addition, Mr. Brennan admitted that he never informed the Board that he planned to teach a History tutorial during the Summer of 1994. Finally, given the fact that at the District's May 16, 1994 Board meeting, Brennan and the Board discussed the Summer School offerings for 1994, and that no discussion or reference was made to any tutorial in History during the Summer of 1994, it is unrealistic to believe that the Union or the Grievant could have or should have known from all the circumstances, that a class in History was being offered during the Summer of 1994 for which the Grievant was qualified.

Thus, on this record, I can find no evidence that the Union or the Grievant was negligent by his delay in filing the instant grievance. Furthermore, the evidence failed to show that Grievant Highfield was aware of or had knowledge of the actions on which the grievance was based prior to March 9, 1995, and that he or the Union, possessing this knowledge, failed to object. 3/ In the specific circumstances of this case it would be unreasonable to require strict compliance with the time limit expressed in Article XI A (1). Therefore, I find that the grievance was timely filed. 4/

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3/ Although there was some indication that an "M" team meeting had occurred in March, 1994, at which District Administrator Brennan had indicated that he might teach a History make-up class during the Summer of 1994, there was in fact no specific indication that this would occur. Marge Pence and Dennis Highfield were present at this "M" team meeting. District Administrator Brennan did not testify regarding this meeting.

4/ The District argued that a finding herein that the grievance was timely filed would essentially read into the labor agreement a "knew or should have known" discovery standard where one does not exist. I disagree. Even in cases where no provision is made in the contract for a period of discovery, many arbitrators have held that strict compliance to the time limitations of the contractual grievance provision will not be honored where the specific facts demonstrate that such would be unreasonable and/or unfair.

Substantive Issue:

Having found the grievance to have been timely filed, I now turn to the more difficult issue in this case -- whether a violation of Article XII, Section B has occurred herein. Initially, I note that the Union's argument regarding Article IV, Section G is not relevant to this case. It is significant that no evidence was proffered by the Union that it ever requested to negotiate or that the District ever refused to negotiate regarding any alleged changes made by the District in Article XII, Section D, during the term of the 1993-95 contract. Thus, in my view, the evidence herein is insufficient to show that the District violated Article IV, Section G, by its actions leading up to this grievance. 5/

Two articles of the contract, Article III and Article XII, hold the key to the proper analysis of this case. In Article III, the District reserved the right not only to determine the duties, responsibilities and assignments of teachers, it also reserved to itself (in Section A), the right to ". . . the executive management (sic) the administrative control of the school system. . . ." In Section D, the District reserved to itself the right ". . . to adopt the means and methods of instruction. . . ." Thus, the language of Article III as a whole, tends to support a view that the District has the right to determine whether a contractual "vacancy" under Article XII exists and whether that vacancy must be filled.

It is in this context that the applicability of Article XII, Section D must be considered. In this regard, the initial question must be whether or not the language of Article XII, Section D, clearly and unambiguously applies to the 1994 Summer tutorial provided by Administrator Brennan. On this point, it is significant that the contract does not refer to Summer tutorials or independent study courses. Based upon the plain meaning of the term "Summer school course", I do not believe that that term is synonymous with the term "tutorial" or the term "independent study course" as used in this District in the past. The record evidence showed that in the District, independent study courses have been offered to individual students who need to make-up missed or unsatisfactory work from classes the student took in prior semesters. In contrast, formal Summer School courses have normally been planned well in advance of the beginning of the Summer program, each course has had a specified beginning and ending date, and the teacher selected to teach each Summer School course has received written confirmation of the course, of the dates they are expected to teach as well as of the compensation for the course to be taught. The Board of Education has also formally approved each Summer School course and authorized the Finance Department to pay individual teachers for those courses.

The specific facts and circumstances surrounding Administrator Brennan's decision, on his

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5/ In addition, I note that the grievance made no reference to Article IV, Section G.

own, to teach the History tutorial to five students during the Summer of 1994 on an intermittent schedule and without compensation indicate that in at least Mr. Brennan's mind, the course he intended to teach was not a formal Summer School course. I note that District Administrator Brennan was approached by parents of High School students who were concerned about their children getting caught up in their History course work. In one case, the parents of the child threatened to take that child out of school entirely, unless Brennan volunteered to teach the History course to that student. Later on, other parents also requested that Brennan include their children in the History tutorial during the Summer of 1994. Brennan stated that two of the students he taught were expected to graduate at the end of the 1994-95 school year and that the other three students were underclassmen. Parents of one of these underclassmen wanted their child to get caught up quickly in History.

At the instant hearing, District Administrator Brennan also admitted that he never informed the Board of Education of his decision to teach the 1994 History tutorial beginning in the Summer.  
6/ The record also demonstrated that in the past, the Board of Education has

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6/ It is also clear on this record that no District Administrator or other non-unit administrative employe has ever previously taught a Summer tutorial to several students.

allowed District Administrator Brennan great latitude in approving Summer tutorials and independent study courses given by unit employees, such that the Board of Education has not formally issued contracts nor has it formally approved of the courses, despite the Board's contractual authority to the contrary.

The Union argued that Article V, Section D of the agreement should provide guidance in this case. Article V, Section D (which was not raised specifically in the grievance document) states that "rules and regulations" controlling "employee activities and conduct" shall be interpreted and applied uniformly by the District. As a general matter, these types of contractual provisions are designed to guaranty that an employer will avoid treating employees discriminatorily or disparately when the Employer applies its rules and regulations of conduct or misconduct of employees to various employees. I note specifically that no published rules or regulations of the District were submitted in this case and that no evidence was proffered to show that any rules or regulations were applied to the Grievant herein. Also, the independent study course Ms. Pence taught was clearly not similar to the tutorial taught by Brennan. Thus, I do not find Article V, Section D helpful in this case.

Based upon the above analysis of the contract and the evidence in this case, I find that the Board of Education never concluded that a vacancy had occurred which would require the issuance of a formal Summer School course contract pursuant to the labor agreement. It is axiomatic in labor relations that unless the contract specifically states otherwise, the employer is the party that determines when a vacancy has occurred and when and how to fill that vacancy. The evidence showed that the Board of Education was not involved in the decision not to deem the 1994 History tutorial as a vacancy. The record also stands undisputed that in the past, the Board of Education has (by its failure to oversee District operations for which it is ultimately responsible) effectively delegated to Mr. Brennan the authority to approve or disapprove all Summer tutorials and independent study courses. 7/

It is also a well-accepted principal of labor relations that if an employer attempts to assign what would otherwise be bargaining unit work to non-unit employees, resulting in the loss of bargaining unit work to unit members, the employer may risk running afoul of the labor agreement and/or the law. However, arbitrators have generally held that an employer may temporarily assign unit work to non-unit employees if such assignment is for a special purpose and if such assignment does not cause unit employees to be assigned extra tasks or result in the loss of

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7/ It is disturbing that the Board of Education, which has reserved to itself certain management rights (Article III), has apparently either allowed District Administrator Brennan to usurp some of those rights, or Brennan's failure to inform the Board of his actions in arranging Summer tutorials and independent study courses in the past, has left the Board unaware of the true breadth of District Administrator Brennan's authority.

work hours to unit employes.

In this case, the specific facts indicate that the 1994 Summer tutorial was intended to be a temporary assignment for the special purpose of bringing five students of the District up to date in their History credits. The record demonstrated that in this unique situation, District Administrator Brennan was personally approached by parents of students and asked to teach the 1994 History Summer tutorial. In addition, the parents of at least one child threatened to remove their child from the School District if Administrator Brennan did not intervene and teach their child History during the Summer of 1994. It is also significant, that in the past, although students had normally approached individual bargaining unit teachers and sought their agreement to teach them independent study courses or tutorials, Grievant Highfield was never approached by either parents or students to teach the 1994 History Summer tutorial. The record is clear that the fact that District Administrator Brennan taught the 1994 History Summer tutorial to the five students involved had no affect on the Grievant's 1994-95 (100 percent) teacher contract and did not result in his otherwise being over-burdened with extra duties. 8/ In addition, Highfield stated he would not have taught the 1994 Summer tutorial without compensation. The District's assertion that the five students could have easily been absorbed into Mr. Highfield's regular classes scheduled for the 1994-95 school year also stood unrefuted by the Union. 9/ All of the above factors tend to indicate that District Administrator Brennan acted in accord with the power conferred on him by

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8/ The record showed that in the first semester of the 1994-95 school year, Highfield taught a U.S. History make-up class and in the second semester of that year, Highfield taught a Geography make-up class.

9/ Whether or not Highfield's 1995-96 work schedule was properly reduced is not before me in this case.



the Board in the past in assuming the responsibility to teach the 1994 Summer History tutorial in the unique circumstances proven here.

Based upon the specific facts and circumstances of this case, 10/ I issue the following

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- 10/ The fact that the work in question was temporary; that Highfield suffered no loss of work hours in 1994-95 and suffered no increase in duties due to Brennan's teaching the tutorial; that the past practice evidence showed that this type of Summer tutorial had never been offered before, either by a unit employe or by a non-unit manager; that District Administrator Brennan, not Highfield, had been personally approached by parents with their request to fill the need for this Summer tutorial, all support a conclusion that in this unique situation, given the provisions of the effective labor agreement, and a need to fulfill parental and student requests in this instance, the District could reasonably utilize District Administrator Brennan to teach the 1994 History Summer tutorial without compensation.

AWARD

The grievance was timely filed. The District did not violate the collective bargaining agreement by not offering the 1994 Summer tutorial in History to Grievant Dennis Highfield. Therefore, the grievance is denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin this 29th day of December, 1995.

By Sharon A. Gallagher /s/  
Sharon A. Gallagher, Arbitrator