

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

SOUTH SHORE EDUCATION ASSOCIATION

and

SOUTH SHORE SCHOOL DISTRICT

Case 31  
No. 51637  
MA-8680

Appearances:

Mr. Barry Delaney, Executive Director, Chequamegon United Teachers, Box 311, Hayward, Wisconsin 54843, for the Association.  
Weld, Riley, Prenz & Ricci, S.C., 715 Barstow Street, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, by Ms. Kathryn J. Prenz, for the District.

ARBITRATION AWARD

South Shore Education Association (the Association), and South Shore School District (the District), are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to the parties' request for the appointment of an arbitrator, the Wisconsin Employment Relations Commission, on November 8, 1994, appointed Jane B. Buffett, a member of its staff, to hear and decide a dispute regarding the interpretation and application of the agreement. Hearing was held in Port Wing, Wisconsin, on January 24, 1995. The parties filed briefs and reply briefs, the last of which was received March 22, 1995.

ISSUE

The parties stipulated to the following statements of the issues:

1. Is the grievance procedurally arbitrable?
2. If so, did the District violate the Collective Bargaining Agreement when it reduced Grievant's employment contract for the 1994-95 school year?

The parties stipulated that the appropriate remedy would be reinstatement to the disputed assignment.

## BACKGROUND

Diane Hanrahan is a teacher employed by the District since September, 1985. Over the years she has taught gifted and talented, physical education and adaptive physical education. She has also had various substitute positions and coaching positions. She has not supervised a study hall or a lunch room. During the 1993-94 school year, she was employed 82.5% of a full-time equivalent teacher. On March 25, 1994, she received a preliminary Notice of Layoff for the 1994-95 school year. On April 22, 1994, she received her Final Notice of Layoff. Ultimately she was assigned a 17.5% FTE position for the 1994-95 school year. She filed a grievance, alleging that she should have been assigned work for which she was qualified that was assigned to less senior employees. The grievance was denied and is the subject of this arbitration award.

## RELEVANT COLLECTIVE BARGAINING AGREEMENT PROVISIONS

### III. GRIEVANCE PROCEDURE

#### A. Definitions:

1. A grievance shall be defined as any problem involving a teacher's wages, hours or conditions of employment or the interpretation, meaning or application of the provisions of this agreement or Board policies affecting wages, hours and working conditions.
2. The term "day" when used in this Article shall, except where otherwise indicated, mean scheduled teacher working day; thus weekend or vacation days are excluded.
3. The term "grievant" is defined as the teacher, a group of teachers with a common complaint, or the SSEA. The grievant is entitled to have an SSEA representative.

#### B. Initiation and Processing:

1. Step 1
  - a. An effort shall first be made to settle the matter informally between the grievant and his principal.

- b. If the matter is not resolved, the teacher shall within fifteen (15) days after the grievant knew or should have known of the occurrence giving rise to the grievance, submit a written, signed grievance to his immediate principal on the subject previously discussed. The immediate principal shall in turn give a written answer within five (5) days of receipt of the teacher's written grievance.

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X. GENERAL FACTORS RELATING TO CONTRACTS FOR THE INSTRUCTIONAL STAFF

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F. Teacher Welfare

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4. Lay-Off Clause

If a reduction in the number of employees or in the number of hours in any position (partial lay-off) is necessary, the provisions set forth in this subsection shall apply. The Board can lay-off employees for valid reasons. Timelines for possible lay-offs for the following year shall be that the District shall issue the affected teachers a preliminary notice by April 1 and shall issue the final notice by May 1.

Prior to any lay-off, the Board shall develop a seniority (within the District) list and such list will indicate the certification of each teacher. A copy of this list will be given to the President of the Association at least ten (10) days prior to the Board taking action in notifying individual teachers that they will or may be laid-off.

Through the Association's President, or his/her designee, the Association shall notify the Board of any errors, (if there are any) on the seniority list, prior to the board taking action on who will be laid off.

a. Selection for Reduction

Step 1, Attrition. Normal attrition resulting from employees retiring or resigning will be relied upon to the extent it is administratively feasible.

Step 2, Seniority. If further reduction is still necessary, the Board shall select teachers, to be laid off, in the inverse order of length of service in the District (those with the shortest length of service shall be laid off first). This order of lay-off shall be used to every extent possible while filling the remaining positions with employees who are certified for those positions.

Step 3, Voluntary Lay-Offs. At any time prior to thirty days from when the lay-off will take effect, an employee, who has not been laid off, may volunteer and must be permitted to be laid off provided that a teacher who has been laid off is certified for the position and will accept the position.

Step 4, Refusal of Partial Lay-offs. Any employee who is selected for a reduction in hours (partial lay-off) under step 2 may choose to be fully laid off, without loss of recall rights.

b. Recall

If the District has a vacant position available for which a laid off employee is certified according to the District's records, the employee shall be notified of such position and offered employment in that position,

commencing as of the date specified in such notice. Under this paragraph, employees on lay-off will be contacted for a position in reverse order of their lay-off. Within ten (10) days after an employee receives a notice, pursuant to recall, he/she must advise the District, in writing, that he/she accepts the position offered by such notice and will be able to commence employment on the date specified therein. Any notice pursuant to this Section, shall be mailed, certified return receipt requested, to the last known address of the employee in question as shown on the District's records. It shall be the responsibility of each employee on lay-off to keep the District advised of his/her current whereabouts.

Any and all recall rights granted to a teacher on lay-off shall terminate upon:

1. the expiration of such employee's recall rights period, or
2. such employee's failure to accept within ten (10) days an offer of recall, as provided in this section.

For the purposes of this section, the term "employee's recall rights period" means the period of time from when the employee is laid off to three (3) years from the date on which such employee received notice of lay-off.

c. Definition of "Qualified"

For the purposes of this "lay-off clause", "qualified" means certified by the Wisconsin Department of Public Instruction if such

certification is required by the position. If DPI certification is not required for the position, "qualified" shall mean prior experience that indicates that the individual can successfully perform the assignment.

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G. Part-Time Employees

1. A part-time teacher will be paid according to the following formula:

Legend

NMPT - Number of minutes with students per day - part time teacher

NMFT - Number of minutes with students per day - full time teacher

%TWD - Percent of time worked per day

Base - Appropriate step/lane on pay schedule

FTDP - Full time teacher - daily pay rate

Formula

(A)  $\frac{NMPT}{NMFT} = \%TWD$

(B) Base divided by 188 = FTDP

(C) Number of work days for part-time teacher

(A) x (B) x (C) = part-time teachers pay

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## POSITIONS OF THE PARTIES

### The Association

The Association asserts Grievant properly complied with the contractual grievance procedures. It refers to Grievant's unsuccessful efforts to meet with her Principal and District Administrator, Paul Prevenas. It points to Dr. Prevenas' response to reading her grievance letter, "Go for it." It points out that only the School Board, and not Dr. Prevenas, would have had the power to resolve the grievance. Finally, it points to two arbitration awards in which the arbitrator found the dispute arbitrable despite procedural irregularities. As to timeliness, the Association argues that the time for the filing of the grievance did not begin to run until Grievant received her final notice of layoff on April 22, 1994, thus bringing the grievance within the timelines.

The Association contends that the lunch supervision assigned to teacher Paul Gilbert and the eight-hour study hall assigned to teachers Jeff Hyma and Steven Warren, all three of whom have less seniority than Grievant, should have been assigned to Grievant. It argues that she is qualified and the layoff provision of the contract applies to study hall and lunchroom assignments as much as to teaching assignments. It argues that Grievant could be assigned the fifth period lunch hour supervision even though she could have not taught Mr. Gilbert's entire assignment. It asserts it is possible to separate the lunchroom supervision from the remainder of Mr. Gilbert's position and the District acknowledges that it used study hall assignments as "fill ins." In the Association's view, the District's understanding of the layoff provision would render meaningless a teacher's rights to the layoff procedure in cases of partial layoffs.

The Association asserts the layoff provision of the contract applies to non-teaching duties of teachers as well as teaching assignments. The District's requirement that study halls be supervised by certified teachers, and the statement in the teacher's handbook that study block is as important as a classroom, indicate that the assignment of study halls must be governed by the layoff provision. The Association finds the cases cited by the District inapplicable because these other districts do not require the study hall and lunchroom supervisors to be certified teachers. According to the Association, there is no past practice to support the District's position. The fact that study halls have not been assigned by seniority does not determine the proper application of the contract in circumstances of a layoff and since there has been only one layoff in 28 years, there is no evidence as to how layoffs were implemented in the past. Former high school principal Paul McGillivray testified that study hall and lunch time supervision were assigned to teachers so that they could have a full-time position. The Association argues these assignments should have been given to Grievant. Finally, the Association again challenges the District position that there were no positions at issue that could be assigned to Grievant.

### The District

Addressing the arbitrability issue, the District finds the grievance procedurally defective because Grievant did not initiate the grievance within 15 days after she received the Preliminary Notice of Layoff on March 25, 1994, and because she did not have an informal discussion with her principal but instead moved immediately to Step 1.b., the written notice.

Regarding Grievant's reduction in hours, the District asserts it has that authority under the management rights clause of the contract. Moreover, it asserts the District has authority to decide to staff the library and media program with a person having the qualifications of a library and media specialist, qualifications not held by the Grievant. The District also argues that Grievant was not entitled to the hours of work available by supervising the fifth period lunch hour or the eighth period study hall because the layoff provision applies only to teaching positions. The past practice shows that study halls have been assigned to teachers after classes have been assigned and were not based on seniority but on the availability of teachers. Furthermore, study hall assignments have been dropped from some schedules without triggering layoffs. As to lunch supervision, in all but Mr. Gilbert's case, it was assigned to the teachers who were willing to help.

## ADDITIONAL FACTS AND DISCUSSION

### A. Procedural Arbitrability

The District argues the grievance is procedurally defective because Grievant neglected the first step of the grievance procedure, the informal meeting between a grievant and the principal. In this case, Grievant had delivered a letter challenging her reduction in hours to Principal Paul Prevenas who is also the District Administrator. The text of the letter identified it as fulfilling Step 1.b. of the grievance procedure. However, since the letter was given in person by Grievant to Dr. Prevenas, he could have easily remedied the defect by asking to discuss the matter with her either at that time or at a later time. Instead, he did not make such a suggestion, but rather responded, "Go for it," which Grievant took to be an indication that the grievance procedure was available to her and if she wanted to challenge the District's action, she should follow the process. The record does not indicate that she misunderstood his response. I conclude, therefore, that Step 1.a. of the procedure was fulfilled at the same time that the 1.b. written signed grievance was delivered to the principal.

Turning to the District's assertion that the grievance is untimely, the undersigned first notes that the fifteen-day time period for filing the grievance begins to run not at the time of the preliminary notice of layoff, but at the issuance of the Final Notice of Layoff, dated April 22, 1994. Grievance time periods are not triggered by the management's statement of possible action, for the employe cannot at that time know that the management will, in fact, take the contemplated

action. The administration must meet preliminary notice deadlines before final enrollment and other variables are known and therefore preliminary notices of layoff are broader than final notices. To require employees to grieve preliminary notices in order to preserve their rights would create more grievances than those that ultimately will have to be resolved.

It is not necessary to address the Association's argument that the grievance did not really ripen until after school started and the assignment of supervisory duties was definite. Even if the time for the filing of the grievance began to run with the Final Notice of Layoff, calculations pursuant to ARTICLE III.A.3., which excludes weekends, show that the grievance letter was delivered to Dr. Prevenas on the fifteenth day after the Final Notice of Layoff was issued.

Having found that Step 1.a. of the grievance procedure was, in fact, fulfilled and the grievance was initiated within the prescribed time period, the undersigned concludes that the grievance is procedurally arbitrable.

#### B. The Merits

In its brief, the Association dropped its assertion, made at the hearing, that Grievant was entitled to the position of supervising study hall which is performed by Cela McGinnis while she acts as the library-media specialist. The Association still maintains, however, that Grievant was entitled to have her hours increased by being assigned supervision of fifth-hour lunch and eighth-hour study hall.

The layoff clause, cited above, does not explicitly address the question of whether supervisory assignments, such as study hall and lunchroom duty, are subject to assignment by seniority when there are layoffs and reductions in hours. A conclusion regarding the parties' intent must be reached by inference.

It is understandable that the parties did not deliberately consider this question in their bargaining, for there are few study halls, approximately four among the approximately one-hundred teacher-periods during the day, and only two, half-hour lunch periods. Frequently, the handful of students scheduled for study hall are assigned to study in a room where a class is being taught. On the record in this dispute, supervisory duties of lunch and study halls are not ordinarily a major concern.

As a point of departure, the undersigned declines to assume that supervisory assignments and teaching assignments should necessarily be treated as if they are identical kinds of assignments. In other words, the seniority rights in the event of a layoff does not automatically cover supervisory assignments. Aside from the obvious, common sense differences between these two kinds of work, there is the fact the State Department of Public Instruction (DPI) does not require that supervision be conducted by a certificated teacher, as indicated by the fact that in the

elementary schools, lunch supervision is performed by support staff, 1/ and the fact that in the high school, supervision is sometimes performed by an administrator, an employe outside the bargaining unit, as when former Principal Paul McGillivray 2/ supervised the lunchroom.

The reference to "Study Block Supervision" in the teachers' handbook does not obliterate this major distinction between teaching assignments and student supervisions. Although the handbook emphasizes the value of a "study block" as a time to promote study habits and offer individual guidance, it is clear that even that enhancement of study hall supervision recognizes the difference between a class assignment and a study hall supervision. That difference is reflected in the following sentences from the handbook:

A study block must be supervised. If one, however, establishes correct control early in the year, it is possible to make other use of the time you spend during the period. (Underlining in the original.)

Being satisfied that teaching assignments and supervisory assignments are significantly distinct and supervisory assignments cannot be assumed to be covered by the layoff provision, the undersigned turns to closer scrutiny of the provision. Examination reveals that it is replete with references to certification and qualification. Those references to certification strongly suggest that the layoff provision covers only those assignments which require certification, that is, class assignments, and not supervisory assignments. On the other hand, the Association points out that ARTICLE X Subsection c. Definition of "Qualified" provides that if the State Department of Public Instruction does not require certification for a given position, "qualification" means "prior experience that indicates that the individual can successfully perform the assignment." The Association argues that the only assignments which do not require certification are supervisory assignments, and therefore, this subsection can only have any meaning if supervisory assignments are found to be covered by the layoff clause.

However, this analysis misses the mark because there are assignments other than supervisory duties that do not require DPI certification, such as the Gifted and Talented resource person. The reference to "qualified" can be construed to refer to those courses which require certification but not a specific certificate, thereby giving the subsection meaning without finding that it covers supervisory assignments.

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- 1/ Notwithstanding DPI's lack of requirement, the District uses only teachers or administrators to supervise study halls and lunchrooms in the high school.
  - 2/ Mr. McGillivray left the District in the fall of 1994 to accept a position at a neighboring district.

Finding no explicit references in the layoff provision to supervisory duties and finding several references to certification and qualification, I conclude that the layoff provision does not cover supervisory assignments.

In reaching this conclusion, the undersigned has considered the Association's argument derived from ARTICLE X, Section G. Part-Time Employees. On its face, that section indicates that the compensation of part-time employees is based on the amount of time the teacher has contact with students, regardless of whether the time is spent in classroom courses or supervision. The Association reasons that this formula indicates that class assignments and supervisory duties are equivalent and therefore supervisory duties are covered by the layoff provision. That argument was not raised at the hearing and the parties offered no evidence of how that section is implemented and the relationship between its implementation for teachers who have always been part-time and those who were reduced in hours. Indeed, a review of the 1994-95 class schedule indicates that no part-time teachers were given supervisory assignments.

In fact, the only evidence in that area was the testimony of Dr. Prevenas that when a shift in the student population causes a study hall to be eliminated from a teacher's schedule after the school year has begun, there has been no corresponding reduction in the teacher's compensation.

Consequently, the part-time teacher provision is not a sufficient basis to infer that another section, the layoff provision, was intended to cover study halls despite the other indications that it was intended to cover only teaching assignments.

Finally, contrary to the Association's contention, the conclusion reached herein does not affect the contract's reference to partial layoffs. The facts of this case do not involve a teacher who claims part of the class assignments of another teacher during a layoff. This award determines only that a teacher who had not previously had a supervisory assignment cannot claim one in order to increase her percentage of employment.

In the light of the record and the above discussion, the Arbitrator issues the following.

AWARD

1. The grievance is arbitrable.
2. The District did not violate the Collective Bargaining Agreement when it reduced Grievant's employment contract for the 1994-95 school year.
3. The grievance is denied and dismissed in its entirety.

Dated at Madison, Wisconsin, this 13th day of July, 1995.

By Jane B. Buffett /s/  
Jane B. Buffett, Arbitrator