BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
HOWARD-SUAMICO EDUCATION ASSOCIATION	:	Case 50 No. 48490 MA-7621
and	:	
HOWARD-SUAMICO SCHOOL DISTRICT	:	

Appearances:

Mr. Lawrence J. Gerue, Director, United Northeast Educators, 1136 North Military Avenue, Green Bay, Wisconsin 54303, for the Association.

Godfrey & Kahn, S.C., 333 Main Street, Suite 600, P.O. Box 13067, Green Bay, Wisconsin 54307-3067, by Mr. Dennis W. Rader, for the District.

ARBITRATION AWARD

Howard-Suamico Education Association (the Association), and Howard-Suamico 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 January 14, 1993, 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 Suamico, Wisconsin, on March 16, 1993. A transcript was taken and received March 23, 1993. The parties filed briefs and reply briefs, the last of which was received May 11, 1993.

ISSUES

1. Is the grievance arbitrable?

2. Did the District violate the collective bargaining agreement by reducing the contract of Joan Remmel from one-hundred percent in 1991-92 to 83.75 percent in 1992-93, while less senior high school teachers were assigned a supervisory duty and assigned a one-hundred percent contract? If so, what is the appropriate remedy? 1/

1/ The parties stipulated to the statement of the issue as to the merits of the dispute. The District, but not the

Association, proposed the issue regarding arbitrability. On April 1, 1993, the parties agreed to request the Arbitrator to provide a decision on the merits even if the grievance is ruled to be not arbitrable.

BACKGROUND

Grievant Joan Remmel is a teacher employed by the District in the business education department. During the 1991-92 school year she was employed full-time, including five classes of teaching and one supervision. Her 1992-93 assignment was for four classes and one supervision period to constitute an 83.75% contract. On October 8, 1992, based on information that came to light during the processing of grievances involving two foreign language teachers, the Association filed a grievance on behalf of Ms. Remmel, asserting that she should be assigned a second supervisory period in order to be returned to full-time status. That grievance was rejected by the Board and is the subject of this arbitration award.

RELEVANT COLLECTIVE BARGAINING AGREEMENT PROVISIONS

ARTICLE IV -- GRIEVANCE PROCEDURE

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C. Procedure --

1. An earnest effort shall first be made to settle the matter informally between the teacher and his building principal or in the instance where there is not a building principal involved, the immediate supervisor. The supervisor should be made aware that this complaint may result in a grievance.

2. If the matter is not resolved, the grievance shall be presented in writing by the teacher to the immediate supervisor within ten (10) days after the facts upon which the grievance is based first occurred or became known. The immediate supervisor shall give his written answer within (10) days of

the time the grievance was presented to him in writing. Grievances shall be filed on forms set forth in Appendix "D".

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ARTICLE VI -- SALARY

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Q. High school teachers assigned a seventh duty shall receive compensation based upon one-sixth of the pro-rata daily rate of the BA base salary.

If an 8-period day is implemented, all teachers shall be assigned to six duties and two duty-free preparation periods. Duties shall be defined as either a period of teaching class, supervision of students (homeroom excluded), or department head activities.

No teacher will be assigned six classes until all teachers in that department have been assigned at least five classes. This prevents assigning a 6th class to several teachers to create a layoff.

If assignment of more than five classes becomes necessary, teachers with the most seniority would be given first choice as to whether or not they are assigned additional classes.

Middle School teachers assigned to teach during a seventh (7th) class period shall receive compensation based upon one-sixth (1/6th) of the pro rata daily rate of the BA base salary.

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ARTICLE XII -- STAFF REDUCTION

B. Layoff Procedures - The Board shall rely on the following criteria:

1. All layoffs shall be considered on the basis of seniority as defined

under paragraph (3) below, within respective areas. Areas are defined as:

a. Grades K-8
b. Grades 7-12
c. Special teachers in areas of K-12 certification.

. . .

8. A teacher who is notified of layoff will have the right to displace the least senior teacher in that area providing the teacher possesses the necessary certification and has a major in the area to be taught.

POSITIONS OF THE PARTIES

The Association

The Association argues that the grievance was timely filed because it was filed as soon as discussions between the parties in late September, 1992 revealed the District's theory that a full-time contract was based on the number of duties, not class assignments. The Association argues in the alternative that the grievance involves a continuing violation and the grievance could be filed at any time that the violation continues. The Association argues that the plain language of Article VI, Section Q referring to the assignment of six duties entitles Grievant to additional supervisory assignments in order to create a schedule of six duties. The Association asserts the reduction in hours is the same as a layoff which is required by contract to be implemented by seniority. The Association acknowledges that certification requirements prevent Grievant from being assigned classes outside of business education, but points out there are no certification requirements for the supervisory assignments. The Association believes its position is supported by statements by the District Administrator and the High School Principal that nothing in the contract prevents the District from making multiple supervisory assignments in order to allow teachers to maintain their earlier level of employment.

The District

Pointing to an earlier arbitration award which addressed the issue of timeliness, the District argues that the time for the filing of the grievance began to run when the final assignment was made to Grievant on August 27, 1992. The District argues there is

no contractual restriction on the management's right to assign supervisory duties. The description of a normal workload is not a guarantee to a full workload. The District points out that the Association acknowledged that the parties did not consider the effect of supervisory assignments when the eight-period day was negotiated and the layoff language does not affect the assignment of supervisory duties. Finally, the District argues the Association's position could lead to the absurd result of having a teacher do nothing but perform supervisory duties in order to maintain a full-time position.

DISCUSSION

I. Timeliness

The District argues that the grievance is not arbitrable because the October 8, 1992 filing did not meet the ten-day limit established by the contract. The District preserved its objection when District Administrator Frederic Stieg, in his October 19, 1992 response to the Association, asserted the grievance was untimely.

The first step in determining whether or not the grievance was filed within the contractual time limit is to ascertain the date when "the facts on which the grievance is based first occurred or became known." The District argues that the ten-day grievance filing period began to run on the first day of school, August 27, 1993. It supports this position by citing two decisions issued by Arbitrator Jones, who, in deciding another dispute between these parties, concluded that the time for filing a grievance regarding a class assignment begins to run on the first day of school, the day when the class assignments become definite. 2/ The Association argues that in this case the grievance did not ripen until late September when the District made an adjustment in the assignment of Arlis Urcavich and explained to the Association that a full-time contract consisted of six duties.

This Association argument must fail because a grievance must be based upon an act which is alleged to violate the contract. The legal theory supporting the labor organization's position is not the event or occurrence that triggers the grievance. In the words of the collective bargaining agreement, the grievance is based upon a "fact." In this case, the "fact" is the District's failure to assign Grievant to a second supervision. Therefore, the time for filing this grievance began to run on the day the

2/ Howard Suamico School District, (Jones, 5/91, Cases 36 & 37, both issued on the same day.)

school year started, August 27, 1992.

Nor can this grievance be found timely based on a theory that the District's act was a continuing violation. A continuing violation is one in which the employer repeats the contract violation on more than one occasion. The most common continuing violation is the miscalculation of pay rates. In this case, the pay rate was not miscalculated. There is no allegation that Grievant was not paid properly for her assignment. It was the assignment itself which was alleged to be incorrect. Since the assignment was a single act, it could not be considered a continuing violation, even though the effect of that act, a salary which is less than it would have been for the greater assignment, had continuing effect. (This situation is akin to that of a discharge where the termination of the employe had, to say the least, continuing effect, but was the result of a single act by the employer.)

Having found that the District preserved its rights by challenging the timeliness at the appropriate time, and that the time for the filing of the grievance began to run on the first day of school, rather than when the Association developed a new legal theory, and that the District's act was not a continuing violation that can be filed at any time, the undersigned concludes that the grievance is procedurally defective and cannot be arbitrated under the contract.

Notwithstanding the above conclusion, since the parties stipulated that even if the grievance is found to be not arbitrable, the Arbitrator should address the merits of the case for prospective enforcement of the contract, the undersigned now turns to that consideration.

II. Merits

In supporting its theory that Grievant is entitled to a second supervisory assignment in order to protect her employment status, that is, maintain a full-time contract, the Association relies upon two contract provisions. The first of these is a portion of ARTICLE VI-SALARIES Section Q, which provides:

> If an 8-period day is implemented, all teachers shall be assigned to six duties and two duty-free preparation periods. Duties shall be defined as either a period of teaching class, supervision of students (homeroom excluded), or department head activities. (underlining added.)

The Association argues that plain meaning of the words "all"

and "shall" call for an interpretation that requires the District to assign a more senior teacher six duties even if more than one of those duties is a supervision.

This view must be rejected, for although "all" and "shall" by themselves have clear meanings, in the context of this provision, their meaning is unclear. The lack of clarity is created by the fact that the asserted plain meaning runs counter to clear evidence: all teachers do not have six duties since there are teachers with partial contracts. Consequently, it is evident that the parties understand this provision to have a meaning different from what its "plain meaning" would be in a different context.

The explanation for the parties' understanding is that the provision is in a section which defines workloads and related matters such as the components of a full workload and methods of assigning a more than normal workload and the impact of such an assignment. Seen in this light, the paragraph is merely a description of a full workload if the eight period day should be established. (At the time when this provision was negotiated, the high school had a seven-period day, but the change to eight periods, since implemented, was being considered.) The reference to all teachers, then, is a reference to all full-time teachers. As a workload definition, it describes the normal workload but does not operate as a work guarantee. It cannot be used to either assure work to a teacher or require the District to create work for a teacher. Grievant, then, is not entitled to a second supervisory assignment based on ARTICLE VI-SALARY Section Q.

The Association also relies upon the layoff provision found in ARTICLE XII-STAFF REDUCTION especially Section B, paragraphs 1 and 8. Paragraph 1 provides:

> ARTICLE XII -- STAFF REDUCTION
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> . . .
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> B. Layoff Procedures - The Board shall rely on the following criteria:
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> 1. All layoffs shall be considered on the basis of seniority as defined under paragraph (3) below, within respective areas. Areas are defined as:
>
> a. Grades K-8
> b. Grades 7-12
> c. Special teachers in areas of K-12 certification.

. . .

The Association relies upon this paragraph, as well as the central use of seniority in the design of the salary schedule, to demonstrate that seniority is a key element in the collective bargaining agreement.

Standing by itself, however, ARTICLE XII Section B, paragraph 1 is only definitional, setting forth the employe groups in which seniority hierarchies are to be established. This paragraph exists to describe the group in which seniority rights can be exercised, but it does not, in itself, create a seniority right.

Such a specific seniority right is created by ARTICLE XII Section B, paragraph 8 which provides, in pertinent part:

> A teacher who is notified of layoff will have the right to displace the least senior teacher in that area providing the teacher possesses the necessary certification and has a major in the area to be taught. (Underlining added.) 3/

According to the Association, this provision establishes seniority rights in a teacher to displace a less senior teacher in any area for which the teacher is certified or for which there is no certification requirement.

To the contrary, the undersigned finds the presence of the language regarding certification and the "area to be taught" is an indication that a senior teacher's right to displace a more junior teacher prevails for assignments requiring certification but not in an assignment which does not require certification. The reference to "the necessary certification," as opposed to the possible alternative phrasing of "any necessary certification" indicates that the parties intended to grant seniority rights to displace junior teachers in an area that required certification. Even more forceful evidence is provided by the phrase "area to be taught" which indicates that the seniority rights created in paragraph 8 are applicable to teaching assignments. Nothing in paragraph 8 indicates that the right to displace less senior teachers can be used to bump into non-teaching, supervisory assignments.

3/ The parties do not dispute the Grievant's reduction in hours is considered a layoff under their collective bargaining agreement.

Finally, it is necessary to examine the September 1, 1992, memo from High School Principal Larry Dunning to Association Grievance Chairperson Richard Schadewald. Mr. Dunning was writing to Mr. Schadewald in response to the Association's grievance regarding two foreign language teachers who were not assigned supervisions and were given less than full contracts. Although the District argues that the memo is irrelevant to this particular grievance, it is evidence of the District's argument on an earlier grievance and evidence of a position statement that the Association might have relied upon in withdrawing that earlier grievance. The memo stated, in the portion which the Association believes supports its position:

> The assignment of supervisory duties has been discussed at the administrative level and in consultation with our district attorney. Supervisory duties shall be assigned to more senior teachers first until all supervisory duties are exhausted. That practice may result in the least senior teachers being given classroom assignments only without any supervisory duties.

This statement by Mr. Dunning, however, does not support the Association's position, for although it acknowledges the principle of assigning supervisions by seniority, it does not validate the proposition that a single teacher is entitled to more than one supervision. Rather it does not address in any way the question of the number of supervisions that are to be assigned by seniority. Furthermore, the grievance being addressed at that time did not involve the assignment of more than one supervision. This memo, then, does not support the Association's position on the assignment of multiple supervisions.

In summary, this Arbitrator concludes that the District is not obligated by Article VI - Salary, Paragraph Q, or Article XII - Staff Reduction, or any other contract provision or agreement between the parties, to provide a teacher with more than one supervisory assignment. Consequently, the grievance must be denied.

In spite of the foregoing conclusion that no contract provision provides for assignment of supervision by seniority, it is important to state that the parties have nevertheless established for themselves a binding practice of assigning up to one, but not more than one, supervision on a seniority basis. The record indicates that for at least the last five years, and possibly since 1986, no teacher was been assigned more than one supervision. However, those supervisions have been assigned on a seniority basis with the less senior teachers not receiving a

supervisory assignment after the available supervisory assignments were exhausted. This practice has been most recently affirmed in the District's action regarding Arlis Urcavich. In the 1992-93 academic year, Ms. Urcavich had not been assigned a supervision and therefore had been reduced to a less than full-time contract. When, in the course of discussions of the earlier grievance involving foreign language teachers, it came to light that a teacher less senior than Ms. Urcavich had a supervision, Ms. Urcavich was assigned a supervision in accordance with the District's understanding of its practice. This history, then, indicates that the parties have a practice of assigning up to one supervision each to teachers based on seniority.

In the light of the evidence, the argument of the parties, and the above discussion, the Arbitrator issues the following

AWARD

1. The grievance is not arbitrable.

2. At the parties' request that the Arbitrator reach a decision on the merits of the dispute notwithstanding any finding that the grievance is not arbitrable, the Arbitrator also concludes:

The District did not violate the collective bargaining agreement by reducing the contract of Joan Remmel from one-hundred percent in 1991-92 to 83.75 percent in 1992-93, while less senior high school teachers were assigned a supervisory duty and assigned a one-hundred percent contract.

3. The grievance is denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 3rd day of August, 1993.

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