BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

CHEQUAMEGON UNITED TEACHERS

and

SOUTH SHORE SCHOOL DISTRICT

Case 32
No. 51786
MA-8740

Appearances:

Mr. Barry Delaney, Executive Director, Chequamegon United Teachers, appearing on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., by Ms. Kathryn J. Prenn, appearing on behalf of the District.

ARBITRATION AWARD

The Employer and Union above are parties to a 1993-94 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the recall grievance filed by Diane Hanrahan.

The undersigned was appointed and held a hearing on March 7, 1995 in Port Wing, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, both parties filed briefs and reply briefs, and the record was closed on May 18, 1995.

Stipulated Issues:

1. Is the grievance procedurally arbitrable?

2. If so, did the District violate the collective bargaining agreement by recalling Renee Strand, rather than the grievant, to the Special Education Aide position currently held by Renee Strand?

3. If so, what is the appropriate remedy?

Relevant Contractual Provisions:

XV. GRIEVANCE PROCEDURE

A. Definitions:

1. A grievance shall be defined as any problem involving an employee'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 employee working day; thus weekend or vacation days are excluded.

3. The term "grievant" is defined as the employee, a group of employees with a common complaint, or the SSEA. The grievant is entitled to have an SSEA representative.

B. Initiation and Processing:

1. Step 1

a. The employee or the Union shall, within fifteen (15) days after the grievant knew or should have known of the occurrence giving rise to the grievance, submit a written grievance to the superintendent.

b. The superintendent shall give a written answer to the complaint within fire (5) days of the conference.

. . .

5. Step 4

Unless specified time limits are extended by mutual consent any grievance not processed within such limits shall be considered resolved in accordance

with the previous disposition. Failure to file a grievance in a similar, past situation shall not be considered a bar to a grievance filed upon subsequent recurrence of such conduct or situation.

XVI. LAY-OFF PROCEDURE

A. This procedure shall apply when the School Board reduces a position in part or in whole. The Board shall have the sole right to determine the position or positions to be eliminated. After the Board has determined which position shall be eliminated, the following procedure shall be used.

B. In the event that a lay-off is deemed to be necessary by the Board, the Board shall grant the employee to be laid-off twenty-one (21) calendar days advance notice.

C. For the purpose of lay-off, the non-instructional staff is divided into the following areas of classification:

1. Cook
2. Secretary
3. Custodian
4. Bus Driver
5. Aide

D. The selection of the employee to be laid-off shall be made according to the following guidelines:

1. Normal attrition resulting from dismissals, retirement or resignations will be relied upon to whatever extent possible.

2. Volunteers will be considered next.

3. If steps one and two are insufficient to accomplish the desired reduction of staff, the employee shall be laid off by the Board within the areas of classification and then in the inverse order of being hired within the District.

E. Recall Rights

Employees laid-off under the terms of this Article will be recalled to vacancies within the area of classification that they were laid-off from, for a period of three (3) years following their lay-off.

Reinstatement shall be made without loss and (sic) benefits accrued for prior year services in the District. Within ten (10) calendar days after an employee receives notice of re-employment, he/she must advise the District in writing, in person or by registered letter return receipt requested, that he/she accepts the position offered by such notice and will be able to commence employment on the date specified therein. Any notice shall be considered received when sent by registered letter, return receipt requested to the last known address of the employee in question as shown on the District records. It shall be the responsibility of each employee on lay-off to keep the District advised of his/her whereabouts. Any and all re-employment rights granted to the employee on lay-off shall terminate upon such employee's failure to accept within said ten (10) calendar days any position for which he/she is qualified which is offered to him/her by the District.

Employees on lay-off status shall have first right of refusal to any temporary or substitute positions that become available which they are qualified to perform. If two or more qualified employees are on lay-off status, the employee with the greatest seniority has first refusal rights with the second most senior person having second refusal rights, etc. Employees on lay-off status who fill temporary or substitute positions shall receive the Districts' (sic) normal temporary substitue (sic) wage rates.

Stipulated Facts:

At the hearing, the parties stipulated to the following:

1. Diane Hanrahan first worked as a Bus Aide in October, 1991. This work continued through the end of the 1991-92

school year at approximately one and one-quarter hours per day, on average.

2. Diane Hanrahan worked again as a Bus Aide in 1992-93, starting about October 27, 1992 and continuing until the student involved died about February 26, 1993. Thereafter, Diane Hanrahan performed approximately one-half hour per day of other aide work until the end of the 1992-93 school year.

3. Diane Hanrahan has not performed aide work since the end of the 1992-93 school year.

4. Diane Hanrahan has also worked as a teacher since 1985, always part-time. In 1991-92, she was contracted for 72 1/2 percent FTE as a teacher. For 1992-93, Hanrahan was contracted for 75 percent FTE as a teacher. For 1993-94 Hanrahan was contracted for 83 percent FTE as a teacher. For 1993-94, Hanrahan taught four subject areas: health; physical education; gifted and talented elementary resource teacher; and adaptive physical education. In the spring of 1993-94, Hanrahan was non-renewed from the adaptive physical education time (.2 FTE) due to lack of certification. In the spring of 1993-94 the District also eliminated the gifted and talented position, effective at the beginning of 1994-95 (.125 FTE). This constituted a layoff.

5. Also in the spring of 1993-94, the health and physical education portions of Hanrahan's position were reduced for 1994-95, because another teacher had greater seniority. The remainder has been .175 FTE of teaching time.

6. Renee Strand was first hired as a regular employe on March 1, 1992 as a Special Education Aide for three and three-quarters hours per day, five days per week. For the 1992-93 school year, Strand worked as a Special Education Aide for five days per week, and between two and three-quarters and three and three-quarters hours per day. For 1993-94, she worked three and three-quarters hours per day, five days a week. This was from 8:15 a.m. to noon. In May, 1994, Strand received a notice of complete layoff for the 1994-95 school year. About August 22, 1994,

Strand was recalled to a three and a half hour Special Education Aide position, five days per week. Diane Hanrahan is qualified to be a Special Education Aide.

7. In February, 1993 Diane Hanrahan resigned her position as volleyball coach, effective the following fall.

8. During 1994-95, Hanrahan has worked as a teacher in adaptive physical education for CESA District #12, twice a week for four hours on Mondays and Wednesdays, 8:00 a.m. to 12 noon, or 9:00 a.m. to 1:00 p.m. All of this work has been performed at Oulu School. This began about November, 1994. Hanrahan has also performed work as a substitute teacher and substitute aide in 1994-95.

9. Diane Hanrahan did not apply for unemployment compensation benefits during 1992 or 1993. In 1994, she did apply for unemployment compensation benefits.

Two additional stipulated facts presented during the testimony are that Renee Strand is married to the Board's president, and that from 1991 through 1993, the South Shore Education Association represented both support staff and teachers at the District. In 1993-94, the support staff's bargaining agent was changed to Chequamegon United Teachers.

The remaining facts are also not significantly in controversy. It is undisputed that the grievant was originally hired as an aide because of a specific problem involving a specific student, in which altercations had taken place between the student's parent and the driver assigned to drive the student as part of a regular bus route. In the fall of 1991, the grievant was assigned to ride the bus with the student in question, essentially as a way of averting further bus-related disputes with the parent involved. This assignment continued for the remainder of the year, but for the first two months of 1992-93, Aide Hope DioRio performed this work. While the grievant in her testimony was not precise as to the reason for the switch, then-interim Superintendent Don Anderson testified that he recalled that when the grievant finished her active period as volleyball coach, it was about the end of October, and that that was why she began performing the bus aide work at that time.

It is clear from all of the testimony that neither the grievant nor others thought much about the fact that she was employed as an aide during most of the time period involved. When she was originally employed, like other support staff employes no individual contract was issued. She was given to understand that the work would continue indefinitely, but was informed via a secretary when the student involved died about February 26, 1993 that it was no longer necessary for her to ride the bus. Yet thereafter, she continued to perform aide work until the end of the 1992-93 school year. Exhibits presented jointly by the parties demonstrate that on the District's March,

1992 and November 15, 1993 non-certified seniority lists, the grievant is included, with a "date Board approved" of October 17, 1991. It is also undisputed that after the grievant's assignments as an aide ended at the end of the 1992-93 school year, she took no action to assert her continued aide status until the matter arose which led to this grievance, in August, 1994. It is undisputed that while working as an aide, the grievant paid dues in that capacity to the Union, and also undisputed that laid off employes do not pay dues. It is further undisputed that the District made payments to a retirement annuity plan, unique to the bargaining unit support staff, on the grievant's behalf in 1991-92 and 1992-93.

The grievant's non-certified status during 1993-94 is by all accounts unclear. Anderson testified that the grievant was never laid off, but that she never resigned either, and that the Board did not terminate her. The grievant appears to have regarded her cessation of aide work as related to the increase in her teaching duties during that period, and to have thought no more about it. Strand testified that during 1993-94, the grievant spent a considerable portion of her time at Oulu School where Strand was working, that discussions about impending layoffs were a common occurrence between them as well as involving other employes there, and that Hanrahan never asserted a right to aide work during these discussions. The grievant did not deny this testimony. Also during the spring of 1994, Paul Prevenas, the Administrator newly hired in August, 1993, caused a new seniority list to be drawn up. Prevenas testified, and Union Unit Director Mark Hoefling confirmed, that a draft seniority list was circulated to Hoefling, and to other employes through him, for corrections. The draft did not include Hanrahan's name, and no one suggested adding it. That list, subsequently given a date of January 26, 1994, was subsequently relied on by Prevenas. Hoefling agreed with Prevenas' testimony that Hoefling had told Prevenas that the list was accurate, but he added that at the time he had merely been thinking about the accuracy of the names on the list and it had not occurred to him that there might be names missing entirely. Strand testified without contradiction that in January and February 1994, Hanrahan was on a maternity leave, though she on occasion came into the school.

Hanrahan testified that for 1993-94, she did not exercise seniority over Strand for Aide work, because that would have conflicted with her teaching time, stating that she believes that part or all of Strand's work was during her teaching time. Hanrahan testified that in effect she volunteered for layoff in the spring of 1992-93, citing Article XVI(D)(2). About August 19, 1994, Hanrahan learned informally that an Aide already retained for 1994-95 had resigned. Hanrahan testified that she learned this directly from the Aide involved, on the same day, and still on the same day, went to see Prevenas about obtaining this position. Prevenas confirmed Hanrahan's testimony that when Hanrahan expressed an interest in the position, it had not been filled. Prevenas showed her a seniority list which did not have her name on it, and said she should talk to the Union President about this. Prevenas indicated that he believed Renee Strand should be the first person recalled from layoff for the position, but did not firmly decide this for a day or two thereafter. The grievance was initiated by letter from Delaney to Prevenas dated August 29, 1994.

The Union's Position:

The Union contends that during 1991-92 and 1992-93, both parties considered Diane Hanrahan to be in the support staff bargaining unit as well as the teacher bargaining unit. The District deducted fair share dues within that status, and union dues, and made contributions to the retirement annuity plan which applies only to bargaining unit support staff members. These contributions totalled $181.47 during 199192, and $155.20 during 1992-93. Hanrahan was listed on the District-supplied seniority list for support staff dated March 1992, as well as an early 1993 list.

The Union contends that for 1993-94, Hanrahan was on a layoff status, despite the fact that the Employer argues that she was not laid off. The Union contends that since she did not quit, did not resign, was not fired, and was not working, there was no other status she could have fit. The Union contends that the language of the collective bargaining agreement's layoff provision allows the Board the sole right to determine whether a position is to be eliminated, and notes that there was one fewer aide position in 1993-94 than in the preceding year. The Union contends that this was Hanrahan's position. The Union argues that there is no evidence of any mutual agreement between the District and Hanrahan that would end her eligibility to remain part of the support staff bargaining unit, or otherwise waive her seniority rights as claimed in a September 1, 1994 letter from Prevenas. There is no evidence, the Union argues, of any discussions with the District concerning the elimination of her position or of her seniority rights.

The Union contends that the grievant has not waived, and is not estopped from, filing this grievance, particularly because of the last sentence of the grievance procedure, which specifically states that past failure to file shall not be considered a bar to a future grievance based on recurrence of the situation. The Union contends that the grievant did not waive her future recall rights by not grieving her layoff or possible recall rights prior to August 1994, and that recall rights of an employe under this agreement are terminated only if the three-year recall period has expired or if the employe has failed to accept a permanent position. The Union argues that neither of these conditions applies to the grievant, and therefore her recall rights have not been terminated or waived. The Union further argues that the District never informed the grievant that she might be giving up seniority rights to an aide position if she did not exercise seniority rights over Renee Strand immediately for aide work. The Union contends that the grievant's absence from the January 1994 seniority list cannot vitiate these rights, because the District had been informed of the error prior to the recall of Renee Strand. The Union contends that the list inaccuracy was not partially attributable to Unit Director Hoefling because he was told by Prevenas to "check with the people on the list" to see if the dates and categories were right "because there is going to be a layoff." The Union contends that it was natural for Hoefling not to look further into the fact that someone might be missing from the list, given the reasons for which he was asked to check it, which involved layoff but not potential recall. Finally, the Union contends that the grievant had seniority over Strand.

In its reply brief, the Union contends that the District's argument that the grievance is

untimely is incorrect, because the instances relied on by the District to support an inference that the grievant had abandoned her rights to aide work do not relate to the present grievance, which was timely filed with respect to the August, 1994 vacancy. The Union argues that the last sentence of Step 4 of the grievance procedure also supports the Union's contention. The Union contends that, contrary to the District's brief, the grievant did apply in writing on September 12, 1991 for the aide work, that this was a regular position entitled to recall rights, and that there is no occasion in the evidence upon which either the Union or Hanrahan waived those rights.

The District's Position

The District contends that there were two occasions in 1992 and 1993 during which the grievant lost aide work time while Renee Strand retained her aide work time, that Union President Hoefling as well as the grievant knew this, and that neither the grievant not the Union grieved either occurrence. Instead, only after fifteen months following the second occasion on which the grievant had failed to file, a position opened up upon which the grievant claimed recall rights. The District contends that there is no bumping language in the agreement and that therefore the District is obligated to select the correct employe for a layoff, and if it selects the wrong person, the Union's choices are limited to either timely filing of a grievance, or waiver of that right through inaction. The District contends that the Union is attempting to invent a third choice, i.e., unilateral preservation of the right to file a grievance for more than a year after the fact.

The District argues that the grievant was not, in fact, laid off as an aide. The District contends that the grievant was not issued any document by the District confirming the assignment to ride on the bus with a student, and argues that she had filed no application for the work and did not know whether the assignment had ever been presented to the Board. The District contends that there is no evidence in the record that the District ever created a regular position for a Bus Aide, and that creation of such a position would have required that the position be posted within the unit and that bargaining unit members have priority for it. The District contends that for these reasons, it is apparent that the District never created a regular Bus Aide position, and that this explains why there was no use of the word "layoff" by any party when the grievant's Bus Aide work ended upon the death of the student involved. The District points out that if this had been a regular support staff position, Section B of Article XVI would have required 21 days of advance notice of a layoff, and no such notice was provided. The District also notes that the grievant worked closely with Strand at Oulu School in 1992-93, but did not deny Strand's testimony that the grievant had never referred to her cessation of aide work as a layoff or claimed a further interest in such work. The District contends that whether the grievant paid some dues to the support staff union and/or received an additional annuity contribution does not dispose of the issue, because there is no evidence in the record for any action by the Board, and therefore the grievant could not have been the subject for a layoff in the spring of 1993. The District contends that the grievant also could not have been subject to a "voluntary layoff" in the spring of 1993, because there was no discussion with interim District Administrator Anderson concerning any such term, and because Hoefling admitted that the first time he ever heard the term "voluntary layoff" applied to the

grievant was on the day of the hearing itself.

The District contends that both the Union and the grievant have waived their right to raise a challenge in the instant case, because of their consistent conduct from the spring of 1993 until August of 1994. This included "tacit consent" by the Union as well as by the grievant to the disappearance of the grievant from the seniority list during that period. The District contends that Strand's aide hours in 1993-94 were from 8:15 a.m. until noon, while the grievant's teaching day did not start until 9:45 a.m., and notes that the grievant could have sought to bump into some of Strand's hours. The District contends that to all intents and purposes, when the bus aide work ended, the grievant was almost simultaneously offered and accepted an increase in her teaching contract for the 1993-94 school year, and the discussion never evolved to a discussion of a layoff.

In its reply brief, the District contends much of the Union's argument in its brief is premised on the erroneous assertion that the bus aide work the grievant had performed constituted a regular position. The District contends that the Board never created such a position, and the fact that the grievant performed some such work does not necessarily give rise to the creation of a regular position. Supporting this, the District argues, is the failure to post such a position, and the lack of any grievance protesting such failure. The District argues from this that when the Union argues that there was one less aide position in 1993-94 than in the previous year, this is not true, because no position existed to be eliminated. The District contends that the Union mis-characterized Hoefling's testimony as to the seniority list prepared in January 1994, and argues that he testified that he understood the list would also be used for recall purposes. The District contends that the Union, through Hoefling, verified the accuracy of the list and the District was entitled to rely on it. The District requests that the grievance be denied.

Discussion

The first issue that must be resolved is whether the grievance is procedurally arbitrable. I conclude that it is, principally because of the effect of the last sentence in the grievance procedure.

Were it not for that sentence, I would be inclined to find that the grievant had abandoned her rights to be considered as an aide by her consistent conduct following the 1993 cessation of such work. It is apparent from the record as a whole that until August of 1994, the grievant was not much concerned with claiming such work, apparently because her teaching work went up to close to full-time in the interim, and when that work was sharply cut back at the close of the 1993-94 school year, similar cutbacks appeared in store for aides. Meanwhile, there is merit in the District's assertion that the Union's conduct was entirely consistent with the grievant's in this respect. Simply, no one appears to have thought of the grievant primarily as an aide at any time, and while she had worked as an aide, the fact that her name was removed from the seniority list sometime between November, 1993 and January 26, 1994 did not appear to trouble anyone who saw that list. The District's testimony that the list was widely distributed was not contradicted, though it has not been established that the grievant herself, on maternity leave at the time, was

supplied with a copy. The effect of all of this evidence would be, in the absence of contractual language to the contrary, to convince me that the grievant had indeed abandoned any further claim to aide work by her conduct, and that the Union acted consistently with that abandonment.

This evidence, however, is not entitled to any weight where any specific contractual provision conflicts with its import. Here, there is a contractual provision which explicitly provides that an employe who has failed to act in precisely the manner that the grievant has failed to act is nevertheless entitled to assert a contractual claim upon a reoccurrence of the same kind of situation. Thus the grievant's failure to claim available work as an aide upon the two

occasions cited by the District does not vitiate her rights to claim such work in 1994. While it is notable that the grievant claimed that work, and indicated the contractual basis of her claim, prior to the time the District awarded the work to Strand -- thus providing the District with an opportunity to avoid any financial harm and avoiding any claim of surprise -- that is not dispositive in this determination. Instead, I conclude simply that under these circumstances the grievant cannot fairly be said to be "estopped" from a right to file such a claim or the related grievance as of August, 1994 without removing the last sentence of the grievance procedure from the collective bargaining agreement. 1/ I therefore find the grievance is procedurally arbitrable.

While as noted, the District's argument that the grievant had abandoned her interest in aide work in 1993 might be persuasive but for the contract language cited, I am not persuaded by the District's argument that the grievant never occupied an aide "position" in the bargaining sense. The District established and maintained seniority lists for bargaining unit employes, which included the grievant in 1992 and as late as November, 1993. The District contributed to a retirement annuity account which according to the evidence was available only to bargaining unit support staff employes, on behalf of the grievant, for hours she worked as an aide. And the grievant paid dues to the Union as an aide, which the District deducted and forwarded. These facts outweigh any implication that a position had not been created which might be derived from the District's failure to follow through on its own organizational requirements that the Board explicitly act to create a position.

The District's contention that the grievant was never formally laid off is subject to the same reasoning, because it is evident that if the grievant performed work for a period of time and no longer performs such work, the choices as to her status are realistically limited: Since it is clear that she was not discharged and did not quit, and is not still performing the work, the District's contention that she was not laid off would leave her in a descriptive limbo, and the explanation that she was, in fact, laid off fits the circumstances under which she lost the work (i.e., job

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1/ While both parties have used the term "waiver" in their arguments, a waiver customarily must be demonstrated by clear and unmistakable evidence. The inaction of the grievant does not constitute waiver. "Estoppel", a related concept, would, as noted above, fit the facts here, and would have the same effect as a waiver -- but for the last sentence of the grievance procedure, which effectively denies the "estoppel" defense.

performance was not the issue) and is a logical conclusion. While the equities of the situation favor the District as much as the Union, because the Union certainly did nothing to warn the District until August, 1994 that the grievant might still be considered an aide, this again cannot be considered controlling without vitiating the apparent purpose of the last sentence of the grievance procedure. Inasmuch as that sentence clearly grants employes the right to raise a claim anew even after the expiration of considerable time, I am without authority to withdraw that right from the Union and grievant here.

With respect to the remedy, I note that the record is insufficient to determine exactly what work the grievant would be entitled to in 1994-95 and whether this would be co-extensive with the work Strand was actually given, and will therefore retain jurisdiction.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the grievance in this matter is procedurally arbitrable.

2. That the District violated the collective bargaining agreement by recalling Renee Strand rather than the grievant to the Special Education Aide position in 1994-95.

3. That the District shall, forthwith upon receipt of a copy of this award, make the grievant whole for all losses suffered by the District's action referred to above, and that the undersigned reserves jurisdiction for at lease sixty days from the date of this award, in the event of a dispute concerning the remedy.

Dated at Madison, Wisconsin this 17th day of August, 1995.

By Christopher Honeyman /s/
Christopher Honeyman, Arbitrator