

IN THE MATTER OF THE ARBITRATION BETWEEN

THE INTER FACULTY ORGANIZATION,)	UNION'S CASE NO. 07-MO-01
)	EMPLOYER'S CASE NO. 1095
)	
Union,)	
)	
and)	
)	
MINNESOTA STATE COLLEGES AND UNIVERSITIES,)	DECISION AND AWARD
)	OF
Employer.)	ARBITRATOR

APPEARANCES

For the Union:

Connie L. Howard
General Counsel
The Inter Faculty
Organization
Suite 8
Blair Arcade
165 Western Avenue North
St. Paul, MN 55102-4613

For the Employer:

Christopher Dale
System Director
of Labor Relations
Nancy J. Joyner
Assistant General Counsel
Minnesota State Colleges
and Universities
350 Wells Fargo Place
30 East Seventh Street
St. Paul, MN 55101-7804

RECEIVED BMS-

24 JUN 08 9:01

On January 29 and 30, 2008, in St. Paul, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The grievance alleges that the Employer violated the labor agreement between the parties by

refusing to permit the Union to appoint members of a search committee engaged in the process of selecting a University Assistant Vice President. Post-hearing briefs were received by the arbitrator on March 28, 2008.

FACTS

The Minnesota State Colleges and Universities (hereafter, the "Employer" or "MnSCU") is an agency of the government of the State of Minnesota. The Employer operates a system of technical colleges, community colleges and state universities that offer programs in post-secondary education. The Minnesota State University Moorhead, located at Moorhead, Minnesota, is one of seven universities in this system. These universities offer four-year and post-graduate programs.

The Inter Faculty Organization (the "IFO" or the "Union") is the collective bargaining representative of faculty members who teach in the seven universities that are part of the university system, including those who teach at the Minnesota State University Moorhead. At each of the seven universities in the system, the IFO has established a local affiliate, the members of which are faculty members employed at that university. The parties refer to these local affiliates as "Faculty Associations" or merely "Associations." Some of the faculty at each university have elected not to become members of the IFO. Although they are not members of the IFO, they are faculty within the bargaining unit for which the IFO is the certified collective bargaining representative, and, because they are considered to derive some of the benefits of IFO representation,

they pay a "fair share" of the dues paid by IFO members to the IFO. Hereafter, I may refer to faculty who are not members of the IFO as "fair share faculty" and to faculty who are members of the IFO as "IFO faculty" or "Union members."

The present grievance arose at the Minnesota State University Moorhead (sometimes, the "University" or "MSUM"). The parties agree that the issues raised in this proceeding are to be decided under the provisions of their labor agreement that was effective from July 1, 2005, through June 30, 2007 (herein, "the labor agreement").

In May and June of 2006, the University's Vice President for Academic Affairs, Bette Midgarden, began the hiring process for a new half-time administrative position, an Assistant Vice President for Assessment. Relevant parts of the vacancy notice are set out below:

. . . [the] purpose of this position is to lead the development of a student learning assessment plan for the University's general education program, the Dragon Core:

- Oversee data collection, data analysis, assessment and outcomes measurement of student learning in the University's academic programs, including the Dragon Core.
- Monitor the assessment program.
- Propose and work with faculty members and deans to implement program efficiencies and enhancements.
- Communicate the process and results both internally and externally.
- Facilitate and lead assessment related committees.
- Perform related duties as assigned. . . .

Early in the hiring process, Midgarden appointed six people to a search committee, which was to search for and recommend candidates for the new position -- though selection of the successful candidate would be made by University management.

(Hereafter, I may sometimes refer to this committee merely as the "search committee.") Of the six people Midgarden appointed to the search committee, one was a management representative, two were members of a union representing mid-level administrators, one was a member of a clerical union, and two, Ellen Brisch and Michael McCord, were faculty.

Brisch and McCord were members of the IFO, and indeed served or had served on the Association's Executive Council. Nevertheless, because they were appointed to serve on the search committee by management and not by the IFO or the Association, the IFO initiated the present grievance on August 30, 2006, in behalf of the Faculty Association at the University. Excerpts from the grievance are set out below:

Sections of Agreement Claimed Violated:

1. Article 6. Association Rights, Section B. Meet and Confer, Subd. 2 University Meetings.
2. Article 3. Recognition.
3. All such other Articles as may have been violated.

Nature and Facts of Grievance:

On Monday, August 21, 2006, the first duty day of the academic year, the Faculty Association, through its President, Cindy Phillips, was made aware that faculty had participated as members on the University search committee for the position of Assistant Vice President for Assessment. This search took place over the summer and not during the academic year. Upon inquiry, Phillips confirmed that the two faculty, Ellen Brisch and Mike McCord had been named to the search committee. . .

The Faculty Association was not notified of this position at Meet and Confer nor did it agree to an appointment of faculty as resource persons. Appointment of faculty to the committee by the administration is a violation of the contract.

Relief Requested:

1. President Barden and Vice President Midgarden reaffirm, on behalf of the administration, that the contract provides for the Faculty Association to

- appoint all faculty to Committees above the level of an academic department unless otherwise specifically agreed to, and
2. The President and Vice President agree, on behalf of the administration that they will convey this information to other administrators and ensure that it is followed, and
 3. The faculty members, Brisch and McCord, each be paid their duty day rate for each day they were not otherwise on duty and for which they performed services as members of the search committee.

During grievance processing, the Employer conceded that Brisch and McCord were entitled to the relief sought by the grievance in their behalf -- that they should be "paid their duty day rate for each day they were not otherwise on duty and for which they performed services as members of the search committee." In addition, during grievance processing, the IFO decided not to pursue the allegation made in the grievance that the Employer had violated Article III of the labor agreement, its "Recognition" provision.

The evidence at the hearing and the parties' arguments make the following definitions established by the labor agreement relevant to a resolution of the grievance:

ARTICLE 5
DEFINITIONS

Section B. P.E.L.R.A. P.E.L.R.A. [hereafter, merely "PELRA"] shall mean the Minnesota Public Employment Labor Relations Act of 1971, as amended.

Section K. Meet and Confer. Meet and Confer shall mean the exchange of views and concerns between employers and their respective employees at meetings scheduled for this purpose in accordance with Article 6 of this Agreement and the applicable provisions of PELRA.

Section L. Meet and Negotiate. Meet and Negotiate shall mean the performance of the mutual obligations between MnSCU and the IFO to meet at reasonable times, including where possible, meeting in advance of the budget making process, with the good faith intent of entering into an agreement on terms and conditions of employment without compelling either party to agree to a proposal or to make a concession.

Section 5. Minnesota State Colleges and Universities System (or MnSCU or System). System or Minnesota State Colleges and Universities System shall mean System of Minnesota State Colleges and Universities (also known as MnSCU).

Article 6, Section B, of the labor agreement is entitled, "Meet and Confer." Its first subdivision, which is entitled, "State IFO Meet and Confer," establishes conditions relating to meet and confer discussions between the IFO and the Employer at the System level, i.e., on matters that relate not to a single university, but to the operation of the entire system of universities.

Subdivision 2 of Article 6, Section B, which is entitled, "University Meetings," is the provision of the labor agreement that is primarily at issue in this proceeding. Though the dispute centers on interpretation of its first paragraph, I set out all four of its paragraphs below:

The Association may establish a local committee to meet and confer with the President, or when the President is not on campus, his/her designees, at least monthly for the purpose of discussing matters of mutual concern. Additional committees which deal with meet and confer issues or which are appointed via the meet and confer process may be established as mutually agreed to by the Association and the President. The Association and the President shall confer on the need for faculty to serve on college and university-level committees, after which the Association shall appoint the faculty. By mutual agreement between the Association and the President, an agreed-upon number of additional faculty members may be appointed by the President to serve ex officio as resource persons based on professional expertise. Faculty members appointed to committees in an ex officio capacity will not serve as representatives of other faculty.

The Administration shall provide the facilities and set a mutually acceptable time and place for such conferences upon request of either party. A written agenda shall be submitted by the party requesting the meeting whenever possible at least five (5) duty days in advance of the scheduled meeting. Additional matters may be placed on

the agenda upon notice by either party. When the subject of meet and confer involves any one of the areas provided below, the other party shall have the right to ten (10) duty days from the time of the meet and confer in which to respond in writing. Implementation of new policies or changes in existing policies affecting any of the listed areas shall not occur until the opportunity to meet and confer and respond to the proposals has been provided to the Association. Either party may request a meet and confer for a response, the meeting to be held ten (10) duty days after the meet and confer session at which the topic was introduced. In such case no action shall be taken on the topic under consideration prior to the conclusion of this second meet and confer.

Failure of the Association to meet and confer or to respond shall not prevent the Administration from implementing decisions. The Association shall have the right to make policy recommendations, including but not limited to the following areas: curriculum; evaluation of students; graduation requirements; admission policies; budget planning and allocations; the reallocation of positions that had previously been filled by tenured or probationary faculty members from one department or program to another; programs and program development; long-range planning; development of campus facilities and procedures for the selection of personnel.

Also, subject matters for meet and confer meetings may include matters such as implementation of this Agreement. Nothing in this Section shall be construed to preclude other components of the university or System from making policy recommendations.

Article 7 of the labor agreement, which is entitled,

"Management Rights," is set out below:

Except as expressly limited in this Agreement, the Employer reserves all management rights and management functions as provided by law to the State of Minnesota. The State and the Employer have the responsibility to make and enforce rules and regulations, subject to limitations of statutes, governing the affairs of the universities consistent with express provisions of this Agreement, recognizing that the primary obligation of the Board [of Trustees of MnSCU] is to provide higher education opportunities.

The primary issue raised by the parties is whether the Employer violated Article 6, Section B, Subd. 2, of the labor

agreement by unilaterally appointing two members of the faculty to the search committee.

The parties' arguments make the following provisions of PELRA relevant to this issue:

Minn. Stat. Section 179A.07, Subdivision 1:
Inherent managerial policy. A public employer is not required to meet and negotiate on matters of inherent managerial policy. Matters of inherent managerial policy include, but are not limited to, such areas of discretion or policy as the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure, selection of personnel, and direction and the number of personnel. No public employer shall sign an agreement which limits its right to select persons to serve as supervisory employees or state managers under section 43A.18, subdivision 3, or requires the use of seniority in their selection.

Minn. Stat. Section 179A.07, Subdivision 2:
Meet and Negotiate. (a) A public employer has an obligation to meet and negotiate in good faith with the exclusive representative of public employees in an appropriate unit regarding grievance procedures and terms and conditions of employment, but this obligation does not compel the public employer or its representatives to agree to a proposal or require the making of a concession. . . .

Minn. Stat. Section 179A.07, Subdivision 3:
Meet and Confer. A public employer has the obligation to meet and confer under section 179A.08, with professional employees to discuss policies and other matters relating to their employment which are not terms and conditions of employment.

Minn. Stat. Section 179A.07, Subdivision 4:
Other Communications. If an exclusive representative has been certified for an appropriate unit, the employer shall not meet and negotiate or meet and confer with any employee or group of employees who are in that unit except through the exclusive representative. This subdivision does not prevent communication to the employer, other than through the exclusive representative, of advice or recommendations by professional employees, if this communication is a part of the employee's work assignment. This subdivision does not prevent communication between public postsecondary employers and postsecondary professional employees, other than through the exclusive representative, regarding policies and matters that are not terms and conditions of employment.

Minn. Stat. Section 179A.08, Subdivision 1:
Professional Employees. The legislature recognizes that professional employees possess knowledge, expertise, and dedication which is helpful and necessary to the operation and quality of public services and which may assist public employers in developing their policies. It is, therefore, the policy of this state to encourage close cooperation between public employers and professional employees by providing for discussions and the mutual exchange of ideas regarding all matters that are not terms and conditions of employment.

Minn. Stat. Section 179A.08, Subdivision 2:
Meet and Confer. The professional employees shall select a representative to meet and confer with a representative or committee of the public employer on matters not specified under section 179A.03, subdivision 19 [which defines "terms and conditions of employment"], relating to the service being provided to the public. The public employer shall provide the facilities and set the time for these conferences to take place. The parties shall meet and confer at least once every four months.

In addition, the following definitions given in PELRA are relevant:

Minn. Stat. Section 179A.03, Subdivision 10.
Meet and confer. "Meet and confer" means the exchange of views and concerns between employers and their employees.

Minn. Stat. Section 179A.03, Subdivision 11.
Meet and negotiate. "Meet and negotiate" means the performance of the mutual obligations of public employers and exclusive representatives of public employees to meet at reasonable times, including where possible meeting in advance of the budget making process, with the good faith intent of entering into an agreement on terms and conditions of employment. This obligation does not compel either party to agree to a proposal or to make a concession.

Minn. Stat. Section 179A.03, Subdivision 19.
Terms and conditions of employment. "Terms and conditions of employment" means the hours of employment, the compensation therefor including fringe benefits except retirement contributions or benefits other than employer payment of, or contributions to, premiums for group insurance coverage of retired employees or severance pay, and the employer's personnel policies affecting the working conditions of employees. In the case of professional employees the term does not mean educational policies of a school district. "Terms and conditions of employment" is subject to section 179A.07.

The parties agree that members of the faculty bargaining unit represented by IFO are "professional employees" as that term is used in PELRA.

DECISION

Interpretation of Contract Language.

The Union makes the following arguments about interpretation of the five sentences of the first paragraph of Article 6, Section B, Subdivision 2. (Hereafter, for simplicity, I may refer to this paragraph as the "First Paragraph" or merely as the "Paragraph" and to its five sentences by their numerical order within the paragraph.) The first sentence of the Paragraph, which I repeat here, provides for the establishment of meet and confer discussions, held at least monthly, between the Association at each university within the system and the President of that university:

The Association may establish a local committee to meet and confer with the President, or when the President is not on campus, his/her designees, at least monthly for the purpose of discussing matters of mutual concern.

The primary relevance of the first sentence of the Paragraph is to establish a predicate to the word "additional" in the opening phrase that forms the subject of the Paragraph's second sentence -- "additional committees which deal with meet and confer issues"

As I understand the Union's position, it concedes that the Employer was under no contractual obligation to use the search committee -- that the Employer could have used some other process to determine the best candidate to be selected as the

new Assistant Vice President for Assessment. Indeed, the Union also concedes that, even after making the decision to use a search committee, the Employer was under no contractual obligation to appoint any faculty members to it.

The Union argues, however, that, if the Employer decides to use a search committee with faculty members as participants, it must do so in compliance with one of the two processes established by the last four sentences of the Paragraph. Thus, the Union argues that the Employer could decide to use one or more faculty as "ex officio" members of the search committee, but it could only do so "by mutual agreement" with the Association, as provided in the fourth and fifth sentences of the Paragraph:

By mutual agreement between the Association and the President, an agreed-upon number of additional faculty members may be appointed by the President to serve ex officio as resource persons based on professional expertise. Faculty members appointed to committees in an ex officio capacity will not serve as representatives of other faculty.

The Union argues that an alternative process, established by the second and third sentences of the Paragraph, permits the Employer to confer with the Association and agree to have faculty members serve on a search committee, not as ex officio members, but as full participants. It argues, however, that, when the Employer uses this process, it must permit the Association to appoint the faculty members who will so serve, as provided in the second and third sentences of the Paragraph:

Additional committees which deal with meet and confer issues or which are appointed via the meet and confer process may be established as mutually agreed to by the Association and the President. The Association and the

President shall confer on the need for faculty to serve on college and university-level committees, after which the Association shall appoint the faculty.

Implicit in this argument is the Union's interpretation of the second and third sentences of the Paragraph -- that the search committee at issue falls within the description of a "university-level" committee (a requirement of the third sentence) "which deals with meet and confer issues" (a requirement of the second sentence).

The Employer disagrees with the Union's interpretation of the second and third sentences of the Paragraph. The Employer argues that the search committee at issue was neither a university-level committee nor one that dealt with meet and confer issues. Thus, for the Employer, the second and third sentences, properly interpreted, impose no constraints on its right to establish a search committee. It was free to decide unilaterally 1) to use a search committee, 2) to have faculty serve on it and 3) to appoint the faculty who would so serve.

I note that, though the Employer's first-step response to the grievance took the position that Brisch and McCord were appointed to the search committee as ex officio members, the Employer no longer takes that position. Rather, its position is the one described just above -- that it was not constrained by the second and third sentences (or by any other contract provision) from appointing faculty of its own selection to participate fully on the search committee and that Brisch and McCord were so selected.

The dispute that underlies the parties' disagreement about the right of the Employer to select faculty participants

on the search committee, is the Employer's objection to the Union's policy that it will appoint only faculty who are Union members, excluding all fair share faculty as committee participants. As I discuss below, the Employer regards that policy as adversely discriminatory to fair share faculty.

In support of their arguments about interpretation of the second and third sentences of the Paragraph, the parties presented evidence relating to bargaining history and past practice. As I describe below, that evidence includes an agreement reached in the fall of 2004, in which the Association and MSUM categorized the committees in use at the University.

The evidence about bargaining history shows that the second, third and fourth sentences of the Paragraph appeared in the labor agreement first in its 1991-93 version. During bargaining for that agreement, the parties exchanged several draft proposals about these provisions, but the evidence does not show that either side addressed expressly the subject of search committees. The evidence about bargaining in subsequent years shows several efforts by the Employer to revise the Paragraph. Those proposals were designed either to eliminate any right of the Union to select faculty participants on college or university-level committees or, later, to require faculty to be selected without consideration of their fair share status. The Union successfully resisted those efforts. (The parties did agree to add the fifth sentence during their 1997-99 bargaining.)

The Employer argues that nothing in the First Paragraph (or in any other part of the labor agreement) expressly grants

the faculty, or the Union as their representative, a role in the search committee process and that the lack of such an express grant implies that the parties did not intend to include search committees in the committees covered by the Paragraph. The Employer argues that, elsewhere in the contract, when the parties intend to authorize faculty participation in some kinds of personnel selection, they use express language to state that intention -- citing as examples Article 20, Section D, Subdivision 2(c), which gives faculty in a department the right to select the department's chair, and several other contract provisions. Thus, the Employer argues that bargaining history is consistent with its reading of the First Paragraph -- that, even though, on its face, it provides the Union with the right to appoint faculty participants in stated circumstances, the right to appoint to a search committee is not included in those stated circumstances.

Below, I summarize the evidence about practice. Cynthia A. Phillips, testified that she is President of the Association and a Vice President and member of the Executive Board of the IFO. She testified as follows. Faculty members are normally included on search committees for most administrative positions because of the impact incumbents in those positions have on the entire University, and, when faculty are included on such search committees, the Association selects the faculty. As examples, the Union presented documents relating to several such searches in recent years -- for a Dean of Education in 1999, a Director of Instructional Resources in 2004, a Dean of Arts and

Humanities in 2004, a Director of Campus Security in 2007, and a Vice President for Facilities and Administration in 2007.

On May 3, 2007, at a monthly meet and confer meeting between the Association's Executive Council and University administrators, including Roland E. Barden, President of the University, one of the administrators suggested forming a search committee for an Associate Dean in Arts and Humanities with faculty representatives not selected by the Association. The minutes of that meeting show that Phillips said, "you will be grieved on that immediately; if faculty serve on search committees, we appoint them," and that Barden then said, "our response is that this is a MSUASF position so there doesn't need be any faculty on the committee; that will take care of that." Barden also said that the University would defer presentation of the issue thus raised until the arbitration of the present grievance, which was then pending.

On March 14, 2005, the Union grieved the decision of the University to use a search committee with faculty participants not selected by the Association in the process of hiring an Associate Dean for Arts and Humanities. In processing that grievance, the parties raised issues similar to those raised in the present grievance. On May 22, 2007, Patrice Arsenault, the Union's Acting Director of Labor Relations, sent Christopher Dale, the Employer's System Director for Labor Relations, a letter withdrawing the grievance of March 14, 2005, stating that the decision to do so was based on the representation by the Employer that the search was "a limited, internal

search that did not involve the formation or participation of a search committee including any faculty members." Arsenault's letter also stated that the Union "will grieve any future efforts by MnSCU to circumvent the IFO's right to designate faculty representatives to college and university-level search committees at [MSUM] by characterizing bodies including faculty representatives as something other than search committees."

On May 27, 2007, Dale sent Arsenault a letter rejecting the "stated rationale" for the Union's withdrawal of the grievance and denying that the Employer had described its search as a "limited, internal search." In subsequent correspondence between Arsenault and Dale, they expressed their disagreement whether the Union's withdrawal of the grievance was without prejudice or "non-precedent setting."

During grievance processing, on March 28, 2005, Midgarden made the following argument, among several others, in her first response to the grievance of March 14, 2005:

In Article 6, the FA [the Association] is permitted to establish a local committee to meet and confer with the President to discuss matters of mutual concern. The Agreement also provides that additional committees dealing with meet and confer issues, or which are appointed through the meet and confer process, may be established as mutually agreed upon by the FA and the President. Moreover, the President and the FA will agree on the need for faculty to serve on college or university-level committees, after which the FA shall appoint the faculty. Last fall, at the November meet and confer, President Barden and the FA completed the meet and confer discussion that ultimately finalized proposed revisions to the [MSUM] committee structure and appointment process. The entire document is included as Attachment A to this response. Five categories of committees were agreed upon, which are described below:

- University Committees consider areas and activities which have the potential to affect the entire academic community, faculty appointed by the FA.
- Programmatic Committees are charged to consider curricular issues of multi-departmental programs or are responsible for monitoring compliance under federal guidelines and/or federal law, appointed by the President.
- Departmental Committees deal with issues internal to the department or make recommendations on behalf of the department, appointed by the department.
- Student Affairs Committees make recommendations in areas and activities that are of primary importance to students, appointed by the President/designee in consultation with the Student Senate.
- 19A Peer Review Committees are established by the President under Article 19A of the Agreement to provide recommendations for the award of 19A funds, departments appoint.

Search committees do not deal with meet and confer issues. Individual search committees have no ongoing charge; they are not standing committees. Search committee recommendations are limited to identifying an individual or individuals who should be considered for appointment to a University position. Search committees are not included among the five categories of committees mutually agreed upon by the President and the FA through the meet and confer process. In short, search committees, at least at this level, are not college or university-level committees within the meaning of Article 6. Moreover, I find nothing in Article 6 to support the FA's claim that they have a contractual right to appoint faculty members to search committees.

In this case, the chairpersons [those whose selection by the administration the Union grieved] are not being asked to function as a search committee. Instead, the chairpersons are performing a steering function by providing the University with their opinions on candidates for the associate dean position. Thus, the FA's claims are based on a faulty assumption. . . .

On March 2, 2006, the Union grieved the appointment of a fair share faculty member, Katherine Uradnik, to a search committee for the position of Dean of the College of Social Sciences, after her appointment to the committee by administrators at St. Cloud State University ("SCSU"), one of the other six universities in the university system. The Employer's

response to this grievance raised procedural issues -- that the matter had been disposed of by a grievance brought in behalf of Uradnik eight months previously -- and substantive issues substantially similar to those raised in the grievance now before me.

On June 5, 2007, Arsenault sent Dale the following letter withdrawing the grievance of March 2, 2006:

This is to advise you that the Inter Faculty Organization considers the above referenced grievance resolved and we are withdrawing the grievance at this time. Due to the unique procedural history of the grievance and the atypical factual circumstances surrounding the appointment of Dr. Uradnik to serve on the COSS dean search committee in resolution of a prior grievance, we regard resolution of the above referenced grievance as non precedent setting.

Also on June 5, 2007, Dale responded to Arsenault as follows:

We have reviewed your letter dated June 5, 2007, withdrawing the above referenced grievance. While we are delighted that the IFO has withdrawn this grievance, we reject the IFO's characterization of that action as "non precedent setting." Indeed, given the procedural history of this grievance and the resolution of [the previous Uradnik grievance], it is clear that the Union's action is precedent setting. The IFO can anticipate that the Employer will argue that the resolution of [the previous Uradnik grievance] is grounded in the proper interpretation of the IFO Agreement with respect to the appointment of faculty to university committees; the IFO may not discriminate against fair share faculty members in appointments to university sponsored committees which are not actively engaged in negotiations over terms and conditions of employment or are not representing the IFO in an actual meet and confer. By withdrawing the instant grievance, the IFO has waived its right to challenge the interpretation.

If the IFO does not accept the Employer's interpretation of the Union's withdrawal, the Employer remains willing to arbitrate this matter. If the Union does not indicate

its desire to proceed to arbitration within 10 days, we will assume that this matter is closed and resolved on the terms we have outlined.

On June 12, 2007, Arsenault responded to Dale's letter of June 5, 2007:

We have reviewed your letter of June 5, 2007 regarding the Union's withdrawal of the above grievance. Please be advised that the Union reserves its right to challenge the Employer's interpretation of the parties' collective bargaining agreement with respect to appointment of faculty to university committees. The Employer cannot unilaterally determine the consequences of the withdrawal of the grievance. The IFO stands by its June 5, 2007 letter.

On June 13, 2007, Dale wrote to Arsenault, reasserting the Employer's position that the Union's withdrawal of the grievance served as a precedent showing the Union's acceptance of the Employer's interpretation of the labor agreement.

The Employer argues that the Union's withdrawal of the MSUM grievance of March 14, 2005, and of the SCSU grievance of March 2, 2006, negates the Union's argument here -- that previous Association appointments to search committees indicate that the the parties have had a mutual understanding of the First Paragraph in accord with the Union's interpretation. In addition, the Employer argues that, irrespective of any implication that may arise from the Union's withdrawal of the two grievances, the Union's evidence about practice is not sufficient to show a consistent mutual understanding. The Employer urges that past examples in which the Association was permitted to select the faculty on search committees show only the University's willingness to cooperate with the Association and are not indicative of a mutual understanding of the Paragraph. In addition, the Employer argues that the evidence

about practice relates only to MSUM and that, for that reason, it shows, at most, only a local practice at one university, one that is not binding on the Employer.

The parties presented in evidence an agreement reached in the fall of 2004 during meet and confer discussions between the Association and the University by which they categorized committees in use at the University (hereafter, the "MSUM Committee Agreement"). In the part of Midgarden's response to the grievance of March 14, 2005, that I have set out above, she referred to this agreement and listed five committee categories described in it -- University Committees, Programmatic Committees, Departmental Committees, Student Affairs Committees and 19A Peer Review Committees. The MSUM Committee Agreement also describes a "task force" as follows (though it lists task forces as entities different from committees):

A group of people appointed to make recommendations to the President about an institutional concern. Upon submission and acknowledgement of recommendations a task force ceases to exist.

The MSUM Committee Agreement lists by name the committees within each of the five committee categories and within the task force category (but it entitles the latter list as "Task Force Committees"). The MSUM Committee Agreement does not state that search committees are included in any of the committee or task force categories, nor does it state that search committees are not so included. Rather, the MSUM Committee Agreement does not use the words "search committee," and it makes no reference to the concept of a search committee.

The Employer also makes the following argument. The Union's interpretation of the First Paragraph is contrary to law, and such an interpretation is void and unenforceable. The Employer cites Minn. Stat. Section 179A.07, Subdivision 1, set out above, which provides that "no public employer shall sign an agreement which limits its right to select persons to serve as supervisory employees or state managers under section 43A.18, subdivision 3," The position of Assistant Vice President for Assessment is a managerial position within the meaning of this statute. The Employer argues that its right to select the successful candidate for the position would be limited if the Employer is required to permit the Association to select faculty participants on the search committee.

In response to this argument, the Union concedes that the position at issue is a managerial position, and, indeed, the Union's arguments about practice, discussed above, assert that in the past it has consistently selected faculty participants on search committees for managerial positions. The Union argues, however, that search committees have no authority to select the successful candidate. They do nothing more than recommend -- usually several candidates -- and the Employer always retains the authority to select one of those recommended or to reject all recommendations. Further, the Union argues that nothing in the labor agreement requires the Employer to use a search committee in the selection process or, if it does decide to use one, to appoint any faculty participants to it. The Union urges that the interpretation of the First Paragraph it seeks here -- to

require the Employer to allow the Association to select the faculty on a managerial search committee if the Employer decides to use a search committee with faculty participants on it -- does not limit the Employer's right to select the manager appointed. It argues that to permit the Association to select whatever faculty are to be used to advise the Employer on selection of managers is a matter that falls within the scope of the statutory definition of "meet and confer" and that, because the Union's interpretation of the Paragraph seeks only the right to advise rather than the right to select, it is not contrary to law.

The Employer also makes the following argument. The search committee at issue was not one included in the phrase, "college and university-level committees" which appears in the third sentence of the Paragraph. Because neither Barden nor Midgarden thought that the search committee at issue was a college or university-level committee, their view of what they were undertaking should prevail. Nothing in the labor agreement or in the MSUM Committee Agreement requires the Employer to use a search committee. The evidence about practice is insufficient to establish search committees as college or university-level committees because it shows neither consistency nor mutual agreement about the practice the Union would use to interpret the language of the First Paragraph, including what is meant by the phrase "college and university-level committees" in its third sentence.

The Employer cites Arrowhead Public Service Union v. City of Duluth, 336 N.W.2d 68 (Minn. 1983). In that case, the

Minnesota Supreme Court upheld the vacation of two related labor arbitration awards that ruled 1) that a public employer had agreed to bargain about its inherent management right to establish its budget and to decide whether to reduce its workforce by layoff and 2) that, therefore, interpretation of contract provisions resulting from the alleged bargaining was a matter subject to challenge in grievance arbitration. The court recognized that such matters are not mandatory subjects of bargaining about which a public employer must bargain, though a public employer may undertake such bargaining, treating them as permissible subjects of bargaining. The court held, however, that the arbitrators' rulings that the public employer had agreed so to negotiate, thereby relinquishing inherent management rights, must be based on "clear and convincing evidence."

The Employer makes the following argument that the holding in the Arrowhead case is applicable here. The Union's interpretation of the First Paragraph requires a ruling that the Employer has ceded in negotiations the right to select the members of search committees. The Employer argues that the right to select the members of search committees for a managerial position is an inherent management right and, therefore, only a permissible subject of bargaining, if that. The Employer argues that Arrowhead requires clear and convincing evidence that it relinquished that right when it agreed to the First Paragraph. The Employer makes a similar argument based on Article 7 of the labor agreement in which the Employer has reserved all management rights "consistent with express terms of this Agreement."

As I understand the Union's response to this argument, it argues that the right to select faculty participants on a search committee is not an inherent management right because a search committee can only recommend candidates and has no authority to select the successful candidate.

I resolve the issues relating to contract interpretation, as follows. The most reasonable reading of the second and third sentences of the First Paragraph is the following. In the second sentence, when the drafters of the First Paragraph adopted it in bargaining for the 1991-93 contract, they intended 1) that the "additional committees which deal with meet and confer issues or which are appointed via the meet and confer process" would be committees that fit the "meet and confer" definitions given in the statute and in the contract and 2) that those additional committees "may be established as mutually agreed to by the Association and the President."

The drafters of the third sentence intended that, when faculty serve on college and university-level committees, those committees are engaged in a meet and confer process. The language of the third sentence and the context in which it appears imply that college and university-level committees may be or may not be meet and confer committees. A reading of the third sentence as having no relation to the meet and confer process is unreasonable because its drafters placed it among provisions that deal entirely with meet and confer processes. Thus, the third sentence appears 1) immediately after the second, which clearly describes meet and confer committees, 2) immediately before the fourth and fifth sentences, which also

describe faculty representation on meet and confer committees, 3) within Article 6, Section B, which is entitled, "Meet and Confer" and 4) with the three other paragraphs of Article 6, Section B, Subdivision 2, all of which clearly deal with the meet and confer process.

The language of the third sentence and its placement thus in the labor agreement imply the following meaning. College and university-level committees may be or may not be established as meet and confer committees. If faculty are to serve on a college or university-level committee, the sentence requires that the Association and the President (or his representative) confer about the need for such faculty service. The requirement that they confer implies that they must also agree, if faculty are to serve on a college or university-level committee. When they do confer and do agree to have faculty participation, the Association "shall appoint the faculty." Therefore, unless the Association agrees that faculty are needed on a college or university-level committee, the Employer does not have the right to appoint faculty to the committee, and no faculty may serve on the committee unless the Association appoints them. The Employer is not prevented from establishing a college or university-level committee, but if it seeks faculty as full participating members, it must accept appointment of the faculty by the Association, in accord with the third sentence. If the Employer wants ex officio faculty to advise the committee, it must have the agreement of the Association to do so, in accord with the fourth and fifth sentences.

From the language of the second sentence and, as described above, from the context in which the third sentence appears, the constraints on the Employer's right to appoint faculty to a college or university-level committee apply when the committee is a meet and confer committee -- or, as defined in the second sentence, a committee "which deal[s] with meet and confer issues or which [is] appointed via the meet and confer process." The parties' extensive post-hearing briefs are organized in two broad sections -- one addressing contract interpretation and the other addressing the Employer's argument that the Association's policy of excluding fair share members as appointees to college and university-level committees is unlawfully discriminatory. Much of their discussion whether college and university-level committees are engaged in a meet and confer process appears in their treatment of the discrimination issue. I have organized this Decision to conform with the parties' organization of their briefs. Accordingly, I discuss and resolve their additional arguments about the engagement of college and university-level committees in the meet and confer process in the part of this Decision entitled, "Discrimination."

The parties disagree whether the drafters of the First Paragraph intended to include search committees in the "college and university-level committees" to which the third sentence refers. The Employer argues that, because nothing in the First Paragraph expressly states that the parties intended to include search committees in the committees referred to anywhere in the Paragraph, the reference in the third sentence to "college and

university-level committees" should not be construed to include search committees. The Employer also notes that nothing in the MSUM Committee Agreement expressly states that search committees are included in the category, "university committees," and that the lack of such an express statement indicates an intention not to include search committees in that category.

As I interpret the labor agreement, its lack of any reference to the concept of a search committee implies merely that the parties expressed no agreement about that concept, but, instead, that they dealt with issues relating to committees using other, more general descriptions, as in the third sentence of the First Paragraph, in which they used only the broad description, "college and university-level committees." The lack of more particular descriptions that subcategorize "college and university-level committees" implies neither that the parties intended to include or that they intended not to include search committees or any other subcategory of committee in the description, "college and university-level committees."

I reach a similar conclusion about the lack of any reference to search committees in the MSUM Committee Agreement, (which I note is local to that university) -- even though this agreement does describe subcategories of each of the five committee categories it speaks of. The lack of a reference to search committees carries only neutral implications -- perhaps that the parties did not think about search committees when creating the agreement, or, possibly, that, because the subject of search committees was a sensitive issue, they decided not to

address it in the meet and confer process that led to the MSUM Committee Agreement.

The issue whether search committees are "college and university-level committees" within the meaning of the third sentence should be resolved according to the function of each search committee. If the position for which the search is being conducted is a position at the college or university-level, that search committee falls within the scope of the third sentence of the Paragraph. Here, the vacancy notice for the position of Assistant Vice President for Assessment shows that it was a university-level position -- one with functions affecting much of the University. As the vacancy notice states, the position's purpose "is to lead the development of a student learning assessment plan for the University's general education program, the Dragon Core," including data collection and assessment of "student learning in the University's academic programs, including the Dragon Core" and working with "faculty members and deans to implement program efficiencies and enhancements."

My interpretation of the First Paragraph derives from the contract language alone, but I note that the evidence about practice is consistent with that interpretation -- though, as the Employer argues, the evidence about practice relates primarily to MSUM and, without evidence showing similar practice across more of the seven-university system, such evidence should not be used to show a general acceptance by the Employer. The evidence about practice shows that in the past the Association

has appointed full faculty participants on search committees for managerial positions. The evidence relating to the Union's withdrawal of the grievances of March 14, 2005, at MSUM, and of March 2, 2006, at SCSU, shows plausible reasons for their withdrawal that do not indicate acceptance of the Employer's interpretation of the labor agreement.

The evidence about bargaining history is also consistent with my interpretation of the labor agreement -- though, again, that interpretation is based on a reading of the contract language and not on bargaining history.

I make the following ruling with respect to the Employer's argument that the Union's interpretation of the First Paragraph -- which is consistent with my reading of its language -- is contrary to Minn. Stat. Section 179A.07, Subdivision 1. That provision prohibits a public employer from signing an agreement "which limits its right to select persons to serve as supervisory employees or state managers." Because the Employer always retains the right 1) to decide whether it will use a search committee in the selection process, 2) to decide whether to use faculty on such a search committee, and 3) most importantly, to decide whom to select even when it does use a search committee with faculty participants, the requirement of the third sentence of the Paragraph that the Association have the right to appoint any such faculty participants, is not a requirement that "limits" the Employer's "right to select."

I make a similar ruling with respect to the Employer's argument that the holding in Arrowhead applies here. The

Arrowhead holding -- that clear and convincing evidence is required to show that a public employer has agreed to negotiate the relinquishment of inherent management rights -- is not applicable here because the Employer has retained its inherent management right to decide whom to select for managerial positions as well as its right to decide whether it will use a search committee and whether it will use faculty on such a search committee.

The Employer also argues that service by Brisch and McCord on the search committee at issue was service to the University, as confirmed by the parties' agreement that they should receive compensation for such service. The Employer argues that, if search committee service is service to the University, the Employer has the unfettered right to select those who perform that service because it qualifies as "other communications," within the meaning of Minn. Stat. Section 179A.07, Subdivision 4 (hereafter, the "Other Communications Subdivision"), which I repeat below, highlighting its second sentence:

Other Communications. If an exclusive representative has been certified for an appropriate unit, the employer shall not meet and negotiate or meet and confer with any employee or group of employees who are in that unit except through the exclusive representative. This subdivision does not prevent communication to the employer, other than through the exclusive representative, of advice or recommendations by professional employees, if this communication is a part of the employee's work assignment. This subdivision does not prevent communication between public postsecondary employers and postsecondary professional employees, other than through the exclusive representative, regarding policies and matters that are not terms and conditions of employment.

The Employer argues that the highlighted sentence permits the Employer to communicate with faculty who are not meet and confer representatives of the Union, if those faculty are communicating as part of a "work assignment" and that, because Brisch and McCord were paid for their service on the search committee, such service, as a work assignment, was "other communication," and not meet and confer service.

This argument raises a potential conflict between the first and second sentences of the Other Communications Subdivision. Its first sentence prohibits an employer from meeting and conferring -- a process that is engaged in by a union representing professional employees -- with any employee in the bargaining unit "except through the exclusive representative," but its second sentence authorizes "communication to the employer, other than through the exclusive representative, of advice or recommendations by professional employees, if this communication is a part of the employee's work assignment."

I do not interpret the second sentence of the Other Communications Subdivision as one that would obviate the prohibition in the first sentence whenever the public employer decides that it will assign faculty used in the meet and confer process and pay them. Such an interpretation would ascribe to the legislature an intent to allow the easy undoing of the clearly intended protection given to a union representing professional employees by the provision's first sentence. Rather, as I interpret the provision, its first sentence

establishes conditions required of an employer when bargaining unit members are participants in meet and confer processes (as well as in meet and negotiate processes) and its second sentence permits "communication" of "advice or recommendations" to the employer by non-participants in those processes. I read "communication" to mean a more passive provision of information by the employee, something different from full participation on a committee.

This interpretation of the Other Communications Subdivision gives reasonable meaning to both its first and second sentences. I rule that, because the Employer appointed Brisch and McCord as participants on the search committee at issue, that appointment was not protected by the second sentence of the Other Communications Subdivision from the requirements of its first sentence -- that meet and confer processes must occur through the exclusive representative.

Discrimination.

The Employer argues that in the past the Union has consistently followed a policy of appointing only Union members to college and university-level committees, thereby illegally discriminating against fair share faculty to their detriment. It argues that such discrimination is an unfair labor practice as defined by the National Labor Relations Act (the "Act"), citing Boilermakers, Local No. 374 v. NLRB, 435 F.3d 1358 (D.C.Cir. 1988) for the holding that "a union commits an unfair labor practice if it attempts to coerce employees into participating in union activities" by discriminating against

non-union members of a bargaining unit in the union's hiring hall referrals. The Employer also argues that the Union's practice of selecting only its members to serve on college and university-level committees violates Minn. Stat. Section 179A.13, Subd. 3(1) and (7), a provision of PELRA, set out below:

Employee organizations, their agents or representatives, and public employees are prohibited from:
(1) restraining or coercing employees in the exercise of rights provided in 179A.01 to 179A.25 [PELRA];
(7) restraining or coercing any person with the effect to [sic]: (d) preventing an employee from providing services to the employer; . . .

The Employer also cites another provision of PELRA, Minn. Stat. Section 179A.06, Subdivision 2, which provides that public employees have the right not to join unions.

The evidence supports a finding that at MSUM the Association appoints only Union members to college and university-level committees, and, indeed, the Union asserts not only that it has a contract right to do so, but, as I describe below, that its right to do so is consistent with law. (Hereafter, for ease of reference, I refer to the policy of selecting only Union members to serve on college and university-level committees as the "members-only policy.")

The Employer argues that fair share faculty are adversely affected by the members-only policy in several ways -- 1) that they lose the opportunity that committee participation provides for service to the University, one of the five factors relevant to tenure and promotion, 2) that they miss the opportunity for additional compensation in summer months, 3) that they miss the

opportunity for "reassigned time" during the academic year, which would permit them to use time spent in committee work as part of the duty day, 4) that they lose the opportunity to show such committee work on their service records when seeking an administrative position, and 5) that they do not have the opportunity to participate in the wider life of the University, causing them to feel diminished in their value to the University in comparison to Union members.

The Employer also argues that the University itself suffers adverse consequences from the Association's members-only policy -- not having the service of fair share faculty available for service on college and university-level committees.

The Union argues that non-service by fair share faculty on college and university-level committees is not a significant detriment to their ability to perform service to the university because, by the agreement of the Association reached in the MSUM Committee Agreement, they have many opportunities to serve on the other committees described in the MSUM Committee Agreement, notably the many programmatic and departmental committees. Three fair share faculty appeared as witnesses for the Employer, testifying in support of the Employer's arguments that fair share faculty suffer the adverse consequences described above. They conceded on cross-examination that they had had opportunities to serve on programmatic and departmental committees and that they had attained tenure and promotion, notwithstanding their lack of service on college and university-level committees.

The Union's primary response to the Employer's allegation that the members-only policy is unlawful discrimination is the following. Its right to select only Union members as the faculty who serve on college and university-level committees is one authorized by the provisions of PELRA that describe the obligation of public employers to meet and confer with professional employees and their representatives. It argues that because these provisions of PELRA clearly authorize a union representing professional employees to select only union members for participation in meet and confer processes, its members-only policy should not be considered unlawful discrimination. The Employer argues that college and university-level committees are not engaged in a meet and confer process and that, therefore, the Union's policy of appointing only its members to those committees is not protected by PELRA's meet and confer provisions.

The Union makes the following argument. PELRA classifies meetings between public employers and unions representing professional employees into two categories. They may meet and negotiate about terms and conditions of employment, as described in Minn. Stat. Section 179A.07, Subdivision 2, and they may meet and confer "to discuss policies and other matters relating to their employment which are not terms and conditions of employment," as described in Minn. Stat. Section 179A.07, Subdivision 3. If the Employer elects to have faculty serve on college and university-level committees, meetings of those committees fit this description of meet and confer meetings

because they concern "policies and other matters which are not terms and conditions of employment."

The Union argues that its interpretation of what is meant by "meet and confer" is consistent with PELRA's definitions of "meet and confer" meetings and "meet and negotiate" meetings given in Minn. Stat. Section 179A.03, Subdivisions 10 and 11, and in Minn. Stat. Section 179A.08, Subdivisions 1 and 2, which I repeat below:

179A.03, Subdivision 10. Meet and confer. "Meet and confer" means the exchange of views and concerns between employers and their employees.

179A.03, Subdivision 11. Meet and negotiate. "Meet and negotiate" means the performance of the mutual obligations of public employers and exclusive representatives of public employees to meet at reasonable times, including where possible meeting in advance of the budget making process, with the good faith intent of entering into an agreement on terms and conditions of employment. This obligation does not compel either party to agree to a proposal or to make a concession.

Section 179A.08, Subdivision 1. Professional Employees. The legislature recognizes that professional employees possess knowledge, expertise, and dedication which is helpful and necessary to the operation and quality of public services and which may assist public employers in developing their policies. It is, therefore, the policy of this state to encourage close cooperation between public employers and professional employees by providing for discussions and the mutual exchange of ideas regarding all matters that are not terms and conditions of employment.

Minn. Stat. Section 179A.08, Subdivision 2. Meet and Confer. The professional employees shall select a representative to meet and confer with a representative or committee of the public employer on matters not specified under section 179A.03, subdivision 19 [which defines "terms and conditions of employment"], relating to the service being provided to the public. The public employer shall provide the facilities and set the time for these conferences to take place. The parties shall meet and confer at least once every four months.

The Union argues that these definitions show the intention of the legislature that meetings between public employers and unions representing their professional employees fall into two categories -- meetings in which they meet and negotiate about terms and conditions of employment or meetings in which they meet and confer about ideas "regarding all matters that are not terms and conditions of employment," as described in Section 179A.08, Subdivision 1.

The Employer responds to this argument as follows. The Union's classification of meetings between representatives of management and faculty as fitting only two categories -- meet and negotiate or meet and confer -- is incorrect. Notwithstanding the breadth of the statutory definition of "meet and confer" as a meeting about matters that are not terms and conditions of employment, thus falling within the second part of the Union's broad dichotomy, no meeting can be a meet and confer meeting unless it has been established through the procedural prerequisites set out in Article 5, Section K, of the labor agreement:

Section K. Meet and Confer. Meet and Confer shall mean the exchange of views and concerns between employers and their respective employees at meetings scheduled for this purpose in accordance with Article 6 of this Agreement and the applicable provisions of PELRA.

With respect to this argument, I rule as follows. For non-System meetings, i.e., at each university in the System, the highlighted phrase of Article 5, Section K -- "scheduled for this purpose in accordance with Article 6" -- is a reference to the five sentences of the First Paragraph, which I have

interpreted above, and to the other three paragraphs of Article 6, Section B, Subdivision 2. As I have written above, the first sentence of the First Paragraph provides for discussions that must occur at least monthly and in that sense are regularly "scheduled" meetings. The second sentence of the First Paragraph refers to other kinds of meet and confer meetings -- meetings of "additional committees which deal with meet and confer issues or which are appointed via the meet and confer process." I agree with the Union that the relevant statutes establish a broad definition of meet and confer discussions -- those "regarding all matters that are not terms and conditions of employment," as described in Section 179A.08, Subdivision 1 (emphasis added). Those additional meet and confer committees "may be established as mutually agreed to by the Association and the President." I construe this provision broadly, to permit agents of the President to act for him in following the procedures described in the remainder of Article 6, Section B, Subdivision 2, of the labor agreement -- setting the time, place and agenda of meet and confer meetings.

The third sentence of the First Paragraph also describes what may be, if faculty are participating members, meet and confer committee meetings at the college and university-level, as I have decided above. I rule 1) that agents of the President may be used to perform the procedures for those committee meetings, and 2) that the University's omission of one or more of those procedures does not recharacterize the meetings as something other than meet and confer meetings.

The Employer argues that in Minn. Stat. Section 179A.07, Subdivision 4, the Other Communications Subdivision, PELRA recognizes some "other communications" between professional employees and their employer as outside the meet and confer process, thus negating the Union's argument that PELRA establishes a dichotomy of communications -- either meet and negotiate or meet and confer. I interpret the second sentence of the Other Communications Subdivision as an express statutory exception to the broad description of meet and confer discussions given in Section 179.08, Subdivision 1, of PELRA -- those "regarding all matters that are not terms and conditions_ of employment."

The parties disagree about the relevance of the United States Supreme Court's decision in Minnesota State Board of Community Colleges v. Knight, 465 U.S. 271 (1984), in which fair share faculty in the Minnesota Community College system challenged PELRA's requirement that public employers conduct meet and confer meetings exclusively through a certified union, alleging that that requirement violated their First Amendment and Equal Protection rights. Knight rejected the contention made by the plaintiffs that the statute violated those constitutional rights. The Union cites the following passage from Knight:

The state has a legitimate interest in ensuring that its public employers hear one, and only one, voice presenting the majority view of its professional employees on employment-related policy questions, whatever other advice they may receive on those questions. Permitting selection of the "meet and confer" representatives to be made by the exclusive representative, which has its

unique status by virtue of majority support within the bargaining unit, is a rational means of serving that interest. 465 U.S. 271, 291.

The Employer argues that, because the issues presented here do not raise similar issues about constitutional protections, Knight is not directly germane to this case. I agree with the Employer that the constitutional issues presented in Knight are not relevant to the question whether college and university-level committees are meet and confer committees. In addition, I agree with the Employer that the holding in Knight, despite its general endorsement of exclusive union representation of faculty in meet and confer meetings, does not directly bear on the question whether the Union's members-only policy unlawfully discriminates against fair share faculty in violation of the Act; that issue was not before the court.

The Employer argues that the Union is collaterally estopped from asserting that college and university-level committees are engaged in a meet and confer process. The Employer cites a decision issued on March 29, 1990, by the Minnesota Bureau of Mediation Services ("BMS"), BMS Case Nos. 88-FSC-380, 89-FSC-2093 and 90-FSC-2178, which was upheld on appeal by a January 31, 1991, decision of the Minnesota Public Employment Relations Board. In that case, fair share faculty at MSUM petitioned the BMS for a reduction in the fair share fees assessed by the Union against fair share faculty, arguing that "IFO university committees" were not meet and confer committees and that, therefore, the costs attributable to the Union's participation on those committees were not chargeable to fair share faculty.

The Employer cites Graham v. Special School District No. 1, 472 N.W.2d 114, 115-116 (Minn. 1991) in which the court established the following five criteria needed to preclude relitigation of issues previously determined by an administrative agency:

- 1) the issue to be precluded must be identical to the issue raised in the prior agency decision;
- 2) the issue must have been necessary to the agency adjudication and properly before the agency;
- 3) the agency determination must be a final adjudication subject to judicial review;
- 4) the estopped party was a party or in privity with a party to the prior agency determination; and
- 5) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

The Employer argues that because the BMS findings and conclusions in the March 29, 1990, decision included the following paragraph, the Union is precluded from relitigating the issue whether college and university-level committees are meet and confer committees:

1. The IFO University Committees on the campus of Moorhead State University are not meet and confer committees. Accordingly, the costs for operation of these committees are non-chargeable and must be included in members-only costs of the IFO in its calculation of the fair share fee assessment.

I rule that the last four criteria necessary to collateral estoppel, as established by Graham, are present, but that the first criterion is not present -- that the issue to be precluded from relitigation in this case must be identical to the issue decided previously in the BMS decision of March 29, 1990. An examination of that decision shows that it was based upon an interpretation of PELRA and relevant provisions of the parties' 1989-91 labor agreement. Article 6, Section B, Subdivision 2,

of the parties' labor agreement in its 1989-91 version included all of its present text except the second, third, fourth and fifth sentences of the First Paragraph -- those that establish the parties' present agreement about "additional" meet and confer committees and about college and university-level committees. As I have described above in my discussion of bargaining history, the parties amended Article 6, Section B, Subdivision 2, in their 1991-93 labor agreement by adding the second, third and fourth sentences of the First Paragraph.

Because the BMS decision of March 29, 1990, was based on a factual premise that is now significantly different, I rule that Graham's first criterion for collateral estoppel is lacking. The issue to be precluded here is not identical to the issue raised in the prior agency decision. The issue decided in the BMS decision was whether, under PELRA and the 1989-91 version of the parties' labor agreement, "IFO University Committees" at MSUM "are meet and confer committees." The issue the Employer would have precluded in the present case, however, is whether, under PELRA and the current version of the labor agreement, which is significantly different from the 1989-91 version, college and university-level committees are meet and confer committees. Accordingly, I conclude that the Union is not estopped from asserting under the provisions of the amended labor agreement that college and university-level committees with faculty participants are engaged in a meet and confer process.

With respect to the Employer's argument that the Union's members-only policy is an unfair labor practice under state and

federal law, I rule as follows. PELRA's prohibitions in Minn. Stat. Section 179A.13, Subd. 3(1) and (7) -- that unions must not restrain or coerce employees in the exercise of rights established by PELRA or prevent employees from providing services to their employer -- were not intended to include the prohibition of a members-only policy with respect to faculty participation in the meet and confer process. PELRA's express authorization of such a policy negates such an interpretation.

In its argument that the members-only policy violates the Act, the Employer cites Boilermakers, supra, Utility and Industrial Construction Company, 214 NLRB. 1053 (1974), and United States Postal Service, 345 NLRB. 1203 (2005). The first two of these cases are union hiring hall cases in which it was determined that discrimination against non-union bargaining unit members in hiring hall referrals was unlawfully coercive under the Act. In Postal Service, it was held that an agreement between the Postal Service and the Letter Carriers union to use only union members for short-term assignment to a training academy was unlawfully coercive.

The Union argues that no court or labor relations agency has ever held that a union commits an unfair labor practice by refusing to appoint non-members to perform representational functions on behalf of the organization or that an employer commits an unfair labor practice in recognizing union representatives appointed pursuant to such a policy, citing WPIX v. NLRB, 870 F.2d 858 (C.A.2, 1989) (upholding a contract provision giving union representatives longer leaves of absence

than those available to employees not on union business), Carbide Corp., 228 NLRB 1152 (1977) (upholding superseniority rights of union stewards in shift transfers) and NLRB v. Teamsters Local 338, 531 F2d 1162 (C.A.2 1976) (recognizing superseniority rights of union stewards in layoff and recall).

I rule that, because PELRA authorizes the Union to appoint its members exclusively as its representatives in the meet and confer process, the members-only policy is not an unfair labor practice under the Act. None of the fact settings in the cases cited by the parties are comparable to the facts in this case. The primary distinction here is that the members-only policy is authorized by state law as a representational function performed in behalf of the Union. In the absence of authorities holding that non-union employees are unlawfully coerced by preference given to union members in representational functions, I am unwilling to find a violation of the Act.

I conclude that the Employer violated Article 6, Section B, Subdivision 2, of the labor agreement. If the Employer intended that Brisch and McCord serve as full participants on the search committee for the position of Assistant Vice President for Assessment, the Employer violated the agreement by failing to confer with the Association and obtain its agreement to use faculty as full participants on the search committee and by failing to allow the Association to select such faculty participants. If the Employer intended Brisch and McCord to be ex officio members of the search committee, the Employer violated the agreement by failing to obtain the

Association's agreement to use ex officio faculty on the search committee.

The service of Brisch and McCord on the search committee was completed by the fall of 2006, and, therefore, an award that requires correction of their appointment is not possible. The Union has requested an award that, as appears above, states my interpretation of the labor agreement. In addition, the Union seeks an award that directs the Employer's future compliance with the labor agreement in accord with that interpretation. I do not make such an award because grievance arbitrators do not have injunctive powers. Decisions in grievance arbitration achieve authority in future cases either by an employer's conclusion that the issue presented has been finally settled or by deference given to past decisions by the tribunal in future cases.

AWARD

The grievance is sustained. As I have determined above, the Employer violated the labor agreement in the manner stated.

June 23, 2008


Thomas P. Gallagher, Arbitrator