BEFORE THE ARBITRATOR

In the Matter of the Arbitration Between	
	BMS Case No. 08-PA-0314
INDEPENDENT SCHOOL DISTRICT NO. 621 **RAMSEY COUNTY, MINNESOTA**	**Grievants:**
and	
SCHOOL SERVICES EMPLOYEES **SERVICE EMPLOYEES INTERNATIONAL UNION** **LOCAL 284**	

APPEARANCES:

Ratwik, Roszak & Maloney, P.A., by **John M. Roszak**, appearing on behalf of Independent School District No. 621, Ramsey County, Minnesota.

Peterson, Engberg & Peterson, by **Bruce P. Grostephan**, appearing on behalf of School Services Employees, Service Employees International Union Local 284 and the Grievants.

JURISDICTION:

Independent School District No. 621, referred to herein as the District or the Employer, and School Services Employees Local 284, referred to herein as the Union, are parties to a collective bargaining agreement effective July 1, 2005 thru June 30, 2007, which shall continue thereafter unless modifications are made pursuant to the PELRA of 1971 as amended and notification is given in accordance with Section 15.3 of the collective bargaining agreement. Under this agreement, the undersigned was selected to decide a dispute that has occurred between them. Hearing was held on October 28, 2008 in Shoreview, Minnesota. The parties, both present, were afforded full opportunity to be heard. Replies briefs were filed in this matter, the last of which was received on December 19, 2008.

STATEMENT OF THE ISSUE:

Does the arbitrator have jurisdiction to decide this dispute?

If so, did the Employer violate the collective bargaining agreement and/or past practice when it transferred employees at its discretion?

If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

ARTICLE IX SENIORITY

Section 9.1 Layoffs
The purpose of seniority is to provide a declared policy as to the order of layoff and recall of employees. If an employee's position is eliminated or the hours are reduced, the employee, if qualified, shall have the right to (in this order): **. . .**

Section 9.2 Vacancies
New positions or vacancies of more than forty-five (45) working days duration will be posted on the district web site and in each building for a period of five (5) working days. Applicants for posted positions must submit their application to the hiring supervisor in writing. The local steward of the Union will be furnished a list of all full-time unit applicants for the position by the hiring supervisor upon request. Provided one (1) or more of the applicants is qualified, and all applicants are current maintenance employees, an applicant will be assigned to the job within five (5)* working days after the close of the posting period whenever possible. If the pool of qualified applicants includes both internal and external applicants, an applicant will be assigned to the job within ten (10)* working days, whenever possible.

No employee will be permitted to hold rights to more than one (1) posted job. Employees may apply for any regular vacancy, including a different school location or a different shift from their existing assignment.

The Union may offer suggestions relative to qualifications of applicants. However, the final decision for advancements, transfers, or promotions will be made by the Employer, subject to the grievance procedure.

*If it is not possible to award a job within these stated time frames, the Local 284 steward will be advised as to the reason.

ARTICLE XIII GRIEVANCE AND ARBITRATION

Section 13.1 Grievance
A "Grievance" is any dispute or disagreement as to the interpretation or application of any term or terms of this Contract.

Section 13.6 Jurisdiction and Authority of Arbitration
The arbitrator shall have jurisdiction only over those grievances, (sic) that have been properly submitted to arbitration in accordance with the terms of this Contract. The arbitrator shall have no power to add or subtract from, or change, modify or amend in any way, the terms and conditions of employment set forth in this contract; nor shall the arbitrator have any power to hear or determine any dispute involving matters of inherent managerial policy. The decision of the arbitrator shall be subject to all the limitations of arbitration decisions set forth in the Public Employment Labor Relations Act of 1971 as amended.

ARTICLE XIV MANAGEMENT RIGHTS

Section 14.1 Authority and power of the Employer
These laws of the State of Minnesota have vested in the Employer full authority and power to manage, control and direct the operation of the School District, and to adopt, modify, or repeal policies, rules and regulations for the District. All such authority and power of the Employer shall continue unimpaired, except as limited by specific provisions of the Contract.

ARTICLE XV DURATION AND RENEGOTIATION OF CONTRACT

. . .

Section 15.2 Effect of Contract
Any and all prior agreements, resolutions, practices, policies, rules and regulations regarding terms and conditions of employment, to the extent inconsistent with the provisions of this contract, are hereby superseded.

. . . .

BACKGROUND AND FACTS:

In February 2005, the Employer advised the Union that the District planned to reassign custodians but no immediate action was taken. In April or May 2007, the District advised the Union that it would be transferring certain custodians effective July 1, 2007 and in mid-June 2007, twelve employees received notice that they would be relocated. Upon receiving this notice, these twelve custodians filed a grievance on June 21, 2007, asserting that the transfers violated provisions in the collective bargaining agreement; past practices and that they were disciplinary in nature.

On June 28, 2007, the District, through its legal representative, challenged whether the grievance was arbitrable stating the grievance was not arbitrable since there is no contract language which addresses the issues raised by the Union. The matter proceeded to arbitration, however, and on October 14, 2009, the arbitrability challenge as well as the merits of the dispute were argued before this Arbitrator and are the subjects of this dispute.

ARGUMENTS OF THE PARTIES:

Initially, the District argues that this dispute is not arbitrable. As support for its position, it asserts, first, that since there is no provision in the collective bargaining agreement that prohibits management's right to transfer employees, the Union's grievance does not meet the definition of a grievance as defined in Section 13.1 of the collective bargaining agreement. Secondly, the District declares that the Union cannot rely upon any claim of past practice in

order to establish arbitrability since the parties have agreed to abrogate all past practices under Section 15.2 of the contract. And, finally, the District cites the various contract provisions the Union argued were pertinent to this dispute; interprets each, and asserts that none of the provisions can be construed to give the Union the right to grieve non-existent language.

On the merits, the District rejects the Union's assertion that Section 9.2 of the collective bargaining agreement, through the bidding process set up there, grants custodians a vested right to remain at a building site. Further, it denies that Sections 3.4, 4.1, 9.1 and 9.2 cited by the Union in support of its argument create what the Union calls "job rights". Addressing each of the sections cited by the Union, the District declares that Sections 3.4 is not relevant to this dispute; that Section 4.1 applies only to alternate work schedules; that Section 9.1 applies only to layoffs and that the seniority agreed to in it does not carry forward to Section 9.2. As support for its position, the District states that it successfully rejected a Union attempt to negotiate seniority into that provision.

Continuing, the District asserts that the merits of this grievance depend upon the interpretation of the phrase in Section 9.2 which states an employee is not permitted to "hold rights to more than one (1) posted job". Urging that the phrase needs to be given its plain meaning and not one that is "absurd or unreasonable" and relying upon the sentence that follows it, the District urges a finding that the phrase means that an employee cannot bid for every posted positions that is posted at one time and that the employee must commit to applying for a single posting. In addition, it argues that the Union's interpretation of the phrase would result in a custodian holding a job for an entire career unless the job is voluntarily rejected and would bar seniority-driven layoffs.

In addition to rejecting the seniority and "job rights" arguments advanced by the Union, the District states that the merits of this dispute also turn on whether it acted reasonably when it decided to transfer the Grievants. As support for its position, it cites a previous District arbitration decision in which the arbitrator concluded that since Section 9.2 grants the District the final decision with respect to advancements, transfers or promotions, the phrase "subject to the grievance procedure" limits a review of the District's actions to whether they were arbitrary, capricious or made in bad faith.

As proof it acted reasonably, the District charges that the change in the District's

financial circumstances necessitated changes in the way services are delivered; that it acted consistently with the authority it was granted in Article XIV, the management rights provision of the agreement; that the changes implemented followed a thoughtful process spanning two years of internal discussions about improving the quality and efficiency of services within the whole District, and that its specific decision to transfer the custodians was made following its decision to centralize administration and to cross-train to develop a "a big picture" perspective among the custodians who work for the District and to assure a readiness to seamlessly provide custodial services in temporary and emergency situations. As further proof that it acted reasonably when it implemented the change, the District states that it gave the Union advanced notice that changes would be made and that it developed a set of criteria to use in selecting the custodians to be transferred which would cause the least disruption to those transferred. In addition, it stated that the custodians were not the only ones affected by change in the District's financial circumstances as is evidenced by the fact that buildings were closed and overall staff numbers were reduced in the District.

The Union, on the other hand, argues not only that the grievance is arbitrable but that the involuntary transfer of the Grievants violated Section 9.2 of the collective bargaining agreement which provides that bargaining unit members hold rights to a posted position. It also argues that the involuntary transfers violate the seniority rights granted the members under Section 9.1 of the contract and that the District's decision to involuntarily transfer the Grievants was arbitrary, capricious and made in bad faith.

In support of its argument that the grievance is arbitrable, the Union cites language contained in Section 9.2 of the agreement which states that the Employer's decision regarding transfers is subject to the grievance procedure and declares that this provision clearly provides that challenges over transfer decisions fall within the definition of grievance contained in Section 13.1 of the collective bargaining agreement. It also cites a prior District arbitration decision in which the arbitrator, addressing the meaning of the term "subject to the grievance

procedure" contained in Section 9.2 concluded that it granted him jurisdiction to consider whether the District's decision was arbitrary or capricious.

Further, the Union asserts that two other clauses contained in Section 9.2 also made this grievance arbitrable. According to the Union the Arbitrator has the jurisdiction to interpret what the clause "no employee will be permitted to hold rights to more than one (1) posted job" and to determine what rights it gives the employees covered this agreement and also has the jurisdiction to determine whether the clause "in no event will an employee displace another employee with greater seniority" applies once employees have attained a position.

On the merits, the Union argues, first, that employees covered by the collective bargaining agreement hold rights to a posted job. As support for its position, it states that the Section 9.2 clause "no employee will be permitted to hold rights to more than one (1) posted job" grants employees the right to the job they receive by responding to a posting and that Section 4.1 supports that right by granting employees the right to exercise seniority when alternate work schedules are assigned and the position is posted. Continuing, the Union asserts that since Section 4.1 addresses a site-specific posting, it must be concluded that the posting an employee applies for under Section 9.2 is site-specific; that the employee accepted for the position has a right to remain in the location where the position was posted, and that when the District involuntarily transferred those employees it violated the "job right" created under Section 9.2 of the contract.

The Union also asserts that this involuntary transfer ignores the past practice with respect to implementation of the above language. Noting that it has never grieved transfers that were for performance problems or temporary transfers, the Union states it is now grieving these transfers because they were made in an attempt to resolve a management problem and ignore the emphasis placed on interpersonal skills previously considered essential in determining whether an employee would receive a posted position and consistently applied when employees filled vacancies.

Citing the clause "In no event will an employee displace another employee with greater seniority" contained in Section 9.1 of the contract, the Union also argues that Section 9.1 (e) gives senior employees the right to bump a less senior employee, provided they are qualified, since employees they have been granted "job rights". As support for its argument, it states that

if employees must compete for a particular job through the posting process and be awarded that job by the principal and the interview committee based in great part on interpersonal skills, the position has value to them and their right to that job is protected by the seniority given them in Section 9.1, As proof of its assertion, the Union cites several arbitration awards in other jurisdictions written by this Arbitrator in which it was concluded that seniority was a factor to be considered in the Employer's selection process.

And, lastly, the Union argues that the Employer's decision to transfer the Grievants was arbitrary, capricious and made in bad faith. Again returning to the District's previous arbitration, as well as other arbitration decisions issued in other jurisdictions, the Union declares that the District has failed to show that it acted in good faith when it decided to transfer these Grievants. As support for its position, it states that the District provided no documentation for its concerns; no analysis of overtime use or abuse, no evaluation of the custodians' knowledge; no record of discipline; no record of employment and no consideration for seniority and declares that without this evidence the Employer's decision is clearly arbitrary.

DISCUSSION:

At hearing, the District questioned whether this dispute was arbitrable; challenged the Arbitrator's jurisdiction over the dispute, and submitted this issue to the Arbitrator in addition to arguing the merits of the dispute. Consequently, the question of arbitrability must be answered first. After reviewing the collective bargaining agreement and the issue in dispute it is concluded that the dispute is arbitrable and that the Arbitrator has jurisdiction over the dispute.

Both arbitrators and the courts strongly presume substantive arbitrability. In determining whether an issue is arbitrable, both frequently ask whether the subject matter has been excluded from the arbitration agreement and, if there is no express exclusion, whether there is other significant evidence that the parties intended to exclude it from the arbitration provision.[1] In this dispute, the District argues that since it has retained all management rights not specifically limited by other provisions of the contract; that since there is no specific transfer language in the contract, and that since the parties have agreed to a "zipper" clause

which provides that the specific terms of the contract supersede all practices to the extent that they are inconsistent with the immediate contract, the issue is not arbitrable. This argument ignores the fact that the parties clearly agree in Section 9.2 of the collective bargaining agreement that although the Employer may make the final decision regarding transfers, its decision is subject to the grievance procedure. Given this express contract language, it must be concluded that even though management has retained the right to make transfers and the parties have agreed that the final decision regarding transfers shall be made solely by the Employer, the parties intended that any decision to transfer employees would not be arbitrary or capricious and would be made in good faith.[2] Further, since it is undisputed that the grievance was properly submitted, the Arbitrator has jurisdiction to determine the merits of the grievance.

On the merits, however, it is concluded that Union's arguments are without merit. Essentially, the Union advanced four arguments. First, relying upon an interpretation of language contained in Sections 9.2 and 4.1 of the collective bargaining agreement, it argues that employees covered by the agreement hold rights to a posted job. Secondly, it declares that the District's actions ignore the past practice regarding transfers. Next, it argues that employees have seniority rights which were violated when the District transferred them. And, finally, it charges that even if the Grievants have no seniority rights or job rights to their position, the District's decision to transfer the Grievants was arbitrary, capricious and in bad faith.

Although the Union refers to "job rights" in one argument and "seniority rights" in another, it essentially is arguing that an employee has "seniority rights" based upon a reading of the language contained in Sections 9.2 and 4.1 of the collective bargaining agreement and a clause in Section 9.1. Nothing in any of those provisions, even though it is unclear as to what the parties intended by the term "rights" in Section 9.2 can be interpreted as granting employees "seniority rights" that the Employer must consider when transferring employees.

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[1] See *The Common Law of the Workplace, The View of Arbitrators, Second Edition*, Theodore J. St. Antoine, Editor, BNA Books, Washington, D.C. 2005, p. 95.

[2] See Elkouri and Elkouri, *How Arbitration Works, Sixth Edition*, ABA Section of Labor and Employment Law, The Bureau of National Affiars, Inc., Washington, DC, 2003, pp. 796-797; *School Service Employees Local 284 and Moundview Schools, ISD #621*, J. Jacobs, 1998; *Watkins, Inc.*, 93 LA 660, (Hoh, 1989), and *Rollins Environmental Services, Inc.*, 75 LA 655, (Mann, 1980).

While parties rarely hold exactly the same understanding of a contractual term, it is the arbitrator's responsibility when interpreting a disputed term to discern as nearly as possible the parties' mutual intent. In doing so, an arbitrator may rely upon standards of contract interpretation, the concept of past practice and the principle of reasonableness.[3] Among the standards of contract interpretation one might apply is the ordinary and popular meaning of a word; specific and general terms of an agreement and a reading of the document as a whole. When these standards are applied in this dispute, it is apparent that the parties intended employees only to exercise "seniority rights" when the parties cannot mutually agree to which employee within a building shall be assigned an alternate work schedule created by management; when layoffs are necessary, or when recall occurs.

The Union's argument that the clause "no employee will be permitted to hold rights to more than one (1) posted job," found in Section 9.2 of the contract read in conjunction with Section 4.1 grants an employee the right to a posted position is not persuasive. The Union incorrectly relies upon Section 4.1 as proof that the parties intended an employee who bid for a posted position and was accepted for that position to hold a right to it. Section 4.1 of the agreement solely allows a senior employee to displace one less senior when the Employer establishes an alternate work schedule and the parties cannot agree on which employee shall fill the position with the alternate work schedule. It is not a dispute over remaining in a specified job but a dispute over who may be assigned to which work schedule.

In addition, there is nothing in Section 9.1 that grants employees the right to retain a posted position for which they have bid and been accepted. Instead, Section 9.1 establishes the procedure that will be followed when layoffs are necessary and allows employees who are being laid off to exercise seniority rights in certain circumstances. It also allows laid off employees to exercise seniority rights when being recalled to a position that is at or lower than that employee's previous classification. Nothing in this section refers to an employees right to retain a posted position for which they have bid and been accepted or to remain in a site-specific location.

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[3] See *The Common Law of the Workplace, The View of Arbitrators, Second Edition*, Theodore J. St. Antoine, Editor, BNA Books, Washington, D.C. 2005, p. 71.

Further, although Section 9.2 is included in Article IX, Seniority, it makes it clearer that the parties intended seniority to be a factor only when there is a dispute over who shall fill an alternate work schedule and when employees are being laid off and recalled. Although this section is entitled "Vacancies", it addresses not only vacancies but new positions; states that no employee shall hold more than one posted job within the District and reaffirms Article XIV, the management rights provision, by stating that while the Union may suggest qualifications relevant to applicants who are being considered for advancements, transfers or promotions, the Employer will make the final decision. Nothing in this provision establishes that seniority shall be the prevailing consideration when filling a new position or vacancy or when an employee is being considered for an advancement, transfer or promotion.

The Union's argument that the parties' past practices establishes that an employee has a right to a site-specific job is also not persuasive. While the evidence supports the Union's assertion that, in the past, the District has relied upon interpersonal skills as a primary criterion for selecting an employee who has bid for a certain position, it does not meet the test of a binding past practice.

Although arbitrators have held that some longstanding, past practices which are not inconsistent with the terms of the collective bargaining agreement and which reflect the parties understanding as to how a contract term shall be interpreted are as binding upon the parties as any written contract provision, they have also regularly held that to be binding, a practice must be unequivocal, clearly stated and acted upon, readily identifiable over a reasonable period of time and accepted by both parties.[4] In addition to these binding past practices, however, there are other practices that occur by happenstance or may be choices made by management in the exercise of its managerial discretion. They generally reflect the current way of doing things and not the prescribed way of doing them and, therefore, cannot be considered binding past practices.[5] In this case, it would be difficult to agree with the Union that criteria the Employer has relied upon when selecting an employee to fill a posted position in the past is binding upon the Employer now since doing so would ignore management's right to change its method of

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[4] *Celanese Corporation of America*, 24 LA 168 (Justin, 1954); *City of Naperville*, 100 LA 754 (Cohen, 1993); *Tennessee Valley Authority*, 97 LA 73 (Bankston, 1991); *City of Marion*, 91 LA 175 (Bittle, 1988).
[5] *Belleville Shoe Manufacturing Company*, 84 LA 337 (Pratte, 1985).

operation and to determine the duties of the needed position and/or the qualifications needed to fill those positions.

Further, even if one were to conclude that there has been a past practice of relying upon interpersonal skills as a primary criterion in selecting an employee who has bid for a certain position, a conclusion that such a reliance establishes an employee's right to a site-specific job would negate the parties agreement in Section 9.1 regarding layoffs and would limit an employee's right to exercise his/her seniority rights solely to the building where the position would have been posted. Not only does it appear that this was not the parties' intent when they agreed to Section 9.1, this consequence would be inconsistent with the fact that seniority, generally, is meant to grant employees with the longest continuous service the right to hold "a" job for which they are qualified if there is such a job available rather than "the" job.[6]

In addition to its inconsistency with the intent expressed in Section 9.1, the Union's argument is contrary to the intent expressed in Section 9 by the clause which states that the Employer shall have the final decision over which employee will be advanced, transferred or promoted. Given these facts, a finding that a past practice exists and a conclusion that it reserves to the employee a site-specific position would cause this Arbitrator to violate the power granted her under Section 13.6 of the contract since the findings would result in the terms of the contract being modified.

While there were no contract provisions to support the Union's previous arguments, there is contract language to support its fourth argument. Section 9.2, as discussed above with respect to whether the dispute is arbitrable, expressly states the Employer's final decision is subject to the grievance procedure. Although the clause preceding this language specifically states that the final decision shall be made by the Employer and there are no other contract provisions which limit the criteria to be considered by the Employer when making such a decision, "subject to the grievance procedure" must impose some restriction upon the criteria used by the Employer in making its decision or it would not have been included in the contract. In general, arbitrators, including this Arbitrator, agree with the premise that management has the right to operate its business and direct its work force and are hesitant to impose any

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[6] See Elkouri and Elkouri, *How Arbitration Works, Sixth Edition*, ABA Section of Labor and Employment Law, The Bureau of National Affairs, Inc., Washington, DC, 2003, p. 837.

restrictions upon that right unless the parties have mutually agreed to those restrictions.[7] They are also reluctant, however, to uphold any management action under a provision that makes the employer the sole judge of a matter that is arbitrary, capricious or made in bad faith and which adversely affects the relationship between management and its employees.[8] Based upon these maxims and the fact that there are no other contract provisions which restrict the Employer's right to decide who shall be advanced, transferred or promoted, it is concluded that the parties in this dispute intended to subject the Employer's decision in those instances to a finding as to whether its decision was arbitrary, capricious or made in bad faith when they agreed to submit the Employer's decision to the grievance procedure in Section 9.2.

In arguing that the Employer's decision was arbitrary, capricious and made in bad faith, the Union rejected the reasons cited by the District as cause for the change and charges that the District provided no evidence of a change in financial circumstances; failed to show that there was excessive use of overtime in some buildings or that the transfer positively affected the District's circumstances. While the Union correctly states that the District cited the use of excessive overtime and a change in its financial circumstances as partial cause for its decision to change its method of operation and failed to provide evidence to that effect, one cannot ignore the fact that the District also stated that it changed it method of operation and transferred the Grievants because it wanted its custodians to develop a better understanding of all of the District's needs with respect to maintenance of its facilities and to be cross-trained in order to provide better and more efficient services to all facilities within the District. Since the Union is charging party, it has the burden to prove that all of the factors cited by the District as cause for the change result in a decision that was arbitrary, capricious or in bad faith. In this respect, while the District may have failed to show there were claims of overtime that were excessive or to submit a financial analysis showing a change in its financial circumstances, it's testimony that

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[7] See Elkouri and Elkouri, *How Arbitration Works, Sixth Edition*, ABA Section of Labor and Employment Law, The Bureau of National Affairs, Inc., Washington, DC, 2003, pp. 637-641; *Management Rights*, Marvin Hill, Jr. and Anthony V. Sinicropi, BNA Books Arbitration Series, The Bureau of National Affairs, Inc., Washington, DC, 1986, pp. 6-8.

[8] See Elkouri and Elkouri, *How Arbitration Works, Sixth Edition*, ABA Section of Labor and Employment Law, The Bureau of National Affairs, Inc., Washington, DC, 2003, p 640; *School Service Employees Local #284 and Moundsview Schools, ISD #621*, Jacobs, 1998; *Fairway Foods*, 44 LA 161 (Solomon, 1965) *Rollins Environmental Services, Inc.*, 75 LA 655, (Mann, 1980); *National Tea Company*, 90 LA 773, (Baroni, 1988); *Watkins, Inc.*, 93 LA 660 (Hoh, 1989); *Chemineer, Inc.*, 121 LA 938 (Heller, 2005).

employees other than custodians have also been similarly affected by the change in its method of operation and that buildings have been closed, certainly evidence of an effort to address its financial circumstances, went undisputed. Further, the Union provided no evidence that the District's decision to centralize its operations; its decision to cross-train its custodians or its decision to broaden custodial perspective with respect to the maintenance needs of all of the District's facilities were arbitrary or capricious decisions.

In addition, there was no evidence that the procedure adopted by the District in deciding who would be transferred was arbitrary or capricious or that any of the transfers were made for disciplinary reasons. Without such evidence, it cannot be concluded that the District arbitrarily or capriciously selected those employees to be transferred. Further, although Union witnesses testified as to the inconveniences caused by the transfers, the District is not obligated to determine who shall be transferred based upon stress or inconveniences to individual employees although one can certainly understand that a transfer may cause an individual employees some stress and/or that a new location may not be as convenient as an old one. The Employer's responsibility is to establish a system for selecting employees to be transferred that treats all employees similarly and to do otherwise would be arbitrary.

Accordingly, based upon the record, the arguments advanced by the parties and the discussion above, it is concluded that the Employer did not violate the collective bargaining agreement when it decided to transfer the twelve Grievants and the following award is issued.

AWARD

The grievance is denied.

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By: _____
Sharon K. Imes, Arbitrator

February 2, 2009
SKI