
In Re the Arbitration between:

BMS No. 09-PA-0495

Independent School District No. 700,
Hermantown, Minnesota,

Employer,

**GRIEVANCE ARBITRATION
OPINION AND AWARD**

and

Education Minnesota – Hermantown,
Paraprofessional and School Related
Personnel Unit,

Union.

Pursuant to **Article XII** of the Collective Bargaining Agreement effective July 1, 2007 through June 30, 2009, the parties have submitted the above captioned matter to arbitration.

The parties selected James A. Lundberg as their neutral Arbitrator from a list of Arbitrators provided by the Minnesota Bureau of Mediation Services.

The parties stipulated that grievance is properly before the Arbitrator for a final and binding determination.

No procedural issues were before the Arbitrator.

The grievance was submitted July 23, 2008.

The hearing was conducted on April 14, 2009.

Briefs were posted on May 8, 2009 and the hearing was closed upon receipt of briefs.

APPEARANCES:

FOR THE EMPLOYER

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FOR THE UNION

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ISSUE:

The Education Association submitted the following issues:

- 1. Whether the District violated the collective bargaining agreement by refusing to pay janitorial staff additional compensation when it modified the job classification of janitorial staff effectively changing the negotiated salary schedule?*
- 2. Whether the District violated the collective bargaining agreement when it refused to pay janitorial staff additional compensation when janitorial staff substituted for maintenance workers.*

The Employer submitted the following issue:

Did the District violate the collective bargaining agreement by refusing to pay janitors additional compensation when performing maintenance duties in situations that did not satisfy the terms of the working out of class pay provision contained on Schedule A?

RELEVANT CONTRACT LANGUAGE:

ARTICLE 1 – PURPOSE

Section 1, Parties: THIS AGREEMENT is entered into between Independent School District No. 700, Hermantown, Minnesota, (hereinafter referred to as the School District) and the Education Minnesota-Hermantown, Paraprofessional and School Related Personnel Unit, Local 1096 (hereinafter referred to as the union), pursuant to and in compliance with the Public Employment Labor Relations Act of 1971 as amended,

hereinafter referred to as the P.E.R.A, to provide the terms and conditions of employment for all office, clerical, secretarial, paraprofessional, maintenance and janitorial employees.

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Appendix A

Wage Scale	Time	2007-08	2008-09
Maintenance Group			
Head Mechanic	12 Mo. Full-time	21.08	21.44
Maintenance	12 Mo. Full-time	18.92	19.30
Night Lead Janitor	9 Mo. Full-time	14.47	14.85
Janitor	12 Mo. Full-time	13.97	14.35
Janitor – Part time	Open	12.15	12.53

(Appendix A, top of page 27)

(Schedule A Continued)

Shift premium and substitute pay

A night premium pay will be paid to all staff at the rate of \$.20 per hour for all work performed in eight hour shifts starting at 2:00 or later.

The following unit positions shall receive an additional \$1.10 per hour for temporarily “filling in” as a substitute, provided that such “filling in” is for a period of time not less than a 4-hour day:

1. Janitors substituting for a maintenance person.
2. Maintenance person substitution for the Maintenance Leader.
3. Maintenance department personnel substituting for the Maintenance Supervisor.

FACTUAL BACKGROUND:

The collective bargaining agreement that is the subject of this grievance was settled on February 11, 2008 and made effective July 1, 2007 through June 30, 2009. At the time that the collective bargaining agreement was negotiated, the job description for the job classification “Janitor” said a janitor, “Assists maintenance personnel with minor and routine building repairs such as: painting, plumbing, replacing light bulbs, and other

related maintenance activities.” On a daily basis the janitor was engaged in such duties 5% of the time. The job description for janitor that was in effect during contract negotiations was adopted December 12, 2006 and had been used by the parties, since 1999.

After the collective bargaining agreement was negotiated, the school administration modified the description for the job classification for “Janitor”. The new job description said, that a janitor, “Performs minor and routine building repairs such as, but not limited to: painting, plumbing, replacing light bulbs, changing filters and other related maintenance activities.” On a daily basis the Janitor was engaged in such duties 15% of the time. The modified job description was submitted to the School Board and approved in July of 2008.

On July 23, 2008 the Education Association grieved the routine assignment of maintenance duties to janitorial staff. The grievance was directed toward the assignment of work to janitors that was defined as maintenance work during contract negotiations. The Association objected to the assignment of tasks that had previously been supervised by maintenance employees and were now being performed independently by janitors. Under the job descriptions used by the parties since 1999, employees in the janitor classification “assisted” maintenance employees, when doing work such as changing the filters¹ on heaters in classrooms. In the Summer of 2008, janitors were directed to change filters on heaters in classrooms without supervision. The janitorial staff believed that they were routinely being asked to perform maintenance work outside of their job classification.

¹ A number of out of classification tasks were identified by witnesses but the most often cited task was changing filters independently rather than with supervision.

The grievance asks that janitors who have been directed to perform maintenance work be paid at maintenance rates, which are nearly \$5.00 per hour higher than the pay for janitor work. The grievance also asks for substitute pay to be assessed for janitors who substituted as maintenance employees for four (4) hours or more.

SUMMARY OF UNION POSITION:

The Education Association contends that the contractual pay schedule is being violated by the Employer, because the District has de facto created a new job classification by routinely assigning maintenance work to the janitorial staff. The collective bargaining agreement does not provide for the routine assignment of maintenance work to janitors who are not paid to perform maintenance work. The job description implemented after the contract was negotiated, added maintenance duties to the job classification of Janitor. The new description requires greater knowledge, skill and training in the area of maintenance and assigns maintenance tasks at a higher rate per day than the previously approved job description. Since the job description for the classification of Janitor was unchanged from 1999, until after negotiations were complete, the Employer is in effect, attempting to create a new job classification without negotiating the terms and conditions of employment. The Employer is getting more than it bargained for in negotiations and bargaining unit employees are being paid less than the bargained for rate for work that they are being asked to perform.

While janitors in the School District are being called upon to regularly work out of classification in the maintenance area, the School District is reducing maintenance staff and increasing janitorial staff. The Association argues that the amount of maintenance work has not decreased commensurate with the staff reductions made in the

maintenance area and the amount of janitorial work has not increased commensurate with the increase in janitorial staff. The School District has unilaterally redefined the job classifications and reassigned a significant amount of maintenance work to janitorial staff. In simple terms, the District is attempting to have significant amounts of maintenance work done by janitors at a pay rate that is roughly \$5.00 less per hour than it pays maintenance employees to perform the same work. The pay rates associated with job classifications found in the collective bargaining agreement were established based upon the job descriptions adopted in 1999 and relied upon continuously through contract negotiations that resulted in the current collective bargaining agreement. The School District violated the contract by unilaterally creating a job classification that requires more knowledge and skill in the maintenance area as well as more frequent use of maintenance skills at the same pay rate as janitors, whose pay rate was negotiated under the job requirements that were in place from 1999 through February of 2008, when the parties reached a settlement over the current contract.

The Employer also violated the collective bargaining agreement by refusing to pay the \$1.10 premium for substituting for maintenance employees, as required by the Shift premium provision found in **Schedule A** of the collective bargaining agreement.

The Education Association asks that janitorial workers be paid “back pay” for doing maintenance work on the negotiated maintenance salary schedule. Alternatively, the union asks for an order directing the Employer to cease assigning work based upon the 2008 revised job descriptions and reinstate the prior job description. Additionally, the Association asks that janitors be compensated for time working as substitute maintenance

workers under the substitute pay provision found at **Schedule A** of the collective bargaining agreement.

SUMMARY OF EMPLOYER’S POSITION:

The adjustments made by the Employer to the staffing levels in the School District are authorized by the managerial rights language of the collective bargaining agreement found at **Article IV, Section 1, p. 2**, which says the “selection, direction and number of personnel” is an inherent managerial right. The fact that the Employer has been reducing the number of maintenance employees in an effort to have maintenance employees fully engaged in maintenance work for which they are paid nearly \$5.00 per hour more than janitors is not in conflict with any term of the collective bargaining agreement. The School District is simply attempting to operate in as efficient a manner as possible in a very difficult economy.

At **Article XI, Section 5 p. 17** of the collective bargaining agreement says that the “District retains the right to determine when positions could be modified/consolidated.”

Nothing in the collective bargaining agreement requires that the Employer “lock in” a specific number of employees in either the positions of maintenance worker or janitor. In fact, the Union was well aware of the Employer’s decision to reduce the number of maintenance positions and had ample opportunity to raise the issue at the bargaining table. The Union should not be attempting to obtain in arbitration what it failed to obtain in negotiations.

The collective bargaining agreement does not provide for janitors to receive payment as maintenance workers simply because they perform some maintenance tasks.

The employees who work in both job classifications often perform tasks out of classification. The contract does not require payment of maintenance wages to janitorial staff when performing maintenance work.

The parties did address working out of classification by a janitor in a maintenance position in the Substitute pay provision of **Appendix A** of the collective bargaining agreement. The parties agreed that Janitors who work at least four (4) hours performing maintenance work should be paid an additional \$1.10 per hour. The Education Association did not establish that any janitors were improperly compensated for out of classification work performed for periods of four hours or more² No proof was submitted that the Employer violated the Substitute pay provision of the **Appendix A** of the collective bargaining agreement.

The Employer exercised its inherent managerial rights in setting staffing levels for janitorial and maintenance positions. The changes in staffing levels do not represent a violation of the collective bargaining agreement. Furthermore, the Employer has not violated the Substitute pay provision of **Appendix A** of the collective bargaining agreement. Hence, the grievance should be denied.

OPINION:

The Education Association and the School District negotiated over the terms and conditions of employment for a number of job classifications, including that of janitor for the period July 1, 2007 through June 30, 2009. A preponderance of the evidence supports the proposition that the job description for janitor first used in 1999 defines the scope of

² Ms. Larson, a Janitor, appeared before the arbitrator and testified to working extended periods of time performing Maintenance work. The information was new to management at the hearing and the Employer entered into a stipulated agreement with the Association to pay Ms. Larson at the contracted rate for substitute work she perform in periods of four hours or more.

work for the job classification of janitor. The 1999 job description was used continuously by the parties from 1999, until after a settlement was reached over the July 1, 2007 through June 30, 2009 contract. The Employer did not notify the Education Association of a change in the job description during negotiations or that it intended to expand the job classification of janitor. Since the parties negotiated over the terms and conditions of employment for the job classification of janitor and they used the same definition for the job classification for a period of nine years leading up to and throughout negotiations, the negotiated job classification of janitor does not include working independently on maintenance projects, as included in the 2008 job description. Janitors in ISD No. 700 “assist” on maintenance projects but do not “perform” maintenance projects independently. When a janitor is asked to “perform” maintenance work, the janitor is being asked to work out of his or her job classification. The School District should cease the assignment of unsupervised maintenance work to janitorial staff.

Based upon the definition of janitor used by the parties for a period of nine years leading up to and including the current contract, the Employer has routinely asked janitors to work “out of classification.” The collective bargaining agreement does not include a “working out of classification” provision that requires payment of maintenance wages for janitors who perform maintenance duties. In the absence of contractual authority, the arbitrator can not require the Employer to pay to janitor’s higher wages for performing work out of classification. On the other hand, the Employer may not unilaterally impose new terms and conditions of employment upon the job classification of janitor. If the Employer wishes to expand the classification of janitor to include some independent maintenance work, it must negotiate over the change in terms and conditions

of employment. The proper remedy is to require the parties to follow the terms negotiated in the July 1, 2007 through June 30, 2009 contract and negotiate over proposed changes to the classification of janitor. If the classification is changed, the parties must also negotiate over wages to be paid for the new classification.

The Education Association established by a preponderance of the evidence that janitor, Jane Wargin, substituted as a maintenance person for six (6) hours on July 14, 2008. Ms. Wargin should be paid pursuant to the terms of **Appendix A**, Substitute pay provision of the collective bargaining agreement. The Employer argued that Ms. Wargin's notes indicated that on July 14, 2008 she cleaned filters. However, a fair reading of the entry together with her testimony clearly indicates that cleaning is incidental to the process of changing heating filters, which is the activity noted in Ms. Wargin's notes. The unsupervised work she performed that day was out of her job classification for a period in excess of four (4) hours. The balance of documentation submitted by the Education Association witnesses demonstrated that janitors were routinely called upon to work out of classification but were not asked to substitute for maintenance workers for periods of four (4) hours or more.

AWARD:

- 1. The Arbitrator finds that the parties negotiated the terms and conditions of the collective bargaining agreement effective July 1, 2007 through June 30, 2009 and based the job classification of janitor on the job description first used by the parties in 1999.*
- 2. The parties are directed to continue to use the 1999 through 2008 job description of janitor to define the job classification of janitor, until such time*

as they are able to negotiate a change in terms and conditions of employment for the job classification of janitor.

- 3. The Employer shall cease assigning independent maintenance projects to janitorial staff, until such time as they are able to negotiate a change in terms and conditions of employment for the job classification of janitor.*
- 4. The arbitrator finds that janitor Jane Wargin substituted as a maintenance employee for six (6) hours on July 14, 2008.*
- 5. The Employer shall pay Jane Wargin six hours premium pay for substitute work performed on July 14, 2008.*

Dated: May 26, 2009

James A. Lundberg, Arbitrator