

OPINION AND AWARD

OF

DAVID S. PAULL

In the Matter of the Arbitration Between

**International Union of Operating Engineers, Local Union
No. 70**

AND

Independent School District No. 656 of Faribault, Minnesota

(Consolidation of Job Classification)

Issued August 14, 2009
BMS Case No. 09-PA-0214

OPINION

Preliminary Matters

The Arbitrator was selected by mutual agreement from a list provided by the Minnesota Bureau of Mediation Services. The International Union of Operating Engineers, Local Union No. 70 (Union) was represented by Nicole M. Blissenbach, a lawyer with offices in Minneapolis, Minnesota. Independent School District No. 656 of Faribault, Minnesota (District) was represented by Joseph E. Flynn, a lawyer with offices in St. Paul, Minnesota.

A hearing was conducted in Faribault, Minnesota, on Wednesday, May 6, 2009. At the hearing, the testimony of witnesses was taken under oath and the parties presented documentary evidence. A court reporter was present and a stenographic transcript of the proceedings was produced. After the witnesses were heard and the exhibits were presented, the parties agreed to submit initial written briefs and discretionary reply briefs. All briefs were filed in a timely manner and the last brief was received July 10, 2009. Thereafter, the grievance was deemed submitted and the record closed.

Issues

The parties do not agree on the substantive issue presented by this dispute. The Union contends that the issue is as follows:

Did the District violate the collective bargaining agreement by unilaterally transferring bargaining unit work to non-bargaining unit personnel, and if so, what is the appropriate remedy?

The District proposes that the issue is:

Did the District violate the terms of the 2008-2010 collective bargaining agreement when it consolidated the duties of the administrative assistant to the Curriculum Director with the duties of the administrative assistant to the Superintendent, a confidential position.

The District also raises several additional issues, which appear to be jurisdictional in nature. The District first contends that the Bureau of Mediation Services (BMS) has ruled that the new position is confidential and excluded from the unit. Second, the District takes the position that the dispute does not constitute a grievance as defined by the CBA. Third, the District asserts that the Union has no standing to raise this issue because no union employee has been injured by the District's actions. Finally, the District contends that, in taking the disputed action, it exercised an "inherent managerial right."

At the hearing, the parties stipulated that the Arbitrator was empowered to formulate the issues, after reviewing the record and the positions of the parties. Having considered the matter, this award will resolve the following issues:

1. Does the CBA grant the Arbitrator the authority to decide this matter?
2. Is the grievance precluded or barred?
3. Did the District violate the terms of the collective bargaining agreement by consolidating the duties of the Curriculum and Instruction Secretary with the duties of the assistant to the Superintendent, a confidential position, and if so, what is the appropriate remedy?

Relevant Contract Provisions

ARTICLE II RECOGNITION OF EXCLUSIVE REPRESENTATIVE

Section 1. Recognition: In accordance with the P.E.L.R.A., the school district recognizes International Union of Operating Engineers Local No. 70 as the exclusive representative for Secretaries and Clerks employed by the school district, which exclusive representative shall have those rights and duties as described by the P.E.L.R.A. and as described in the provisions of the Agreement.

Section 2. Appropriate Unit: The exclusive representative shall represent all such employees of the district contained in the appropriate unit as defined in Article III, Section 2 of this Agreement and the P.E.L.R.A. and in certification by the Director of Mediation Services, if any.

ARTICLE III DEFINITIONS

Section 2. Description of Appropriate Unit: For purposes of this Agreement, the term Secretaries and Clerks shall mean all persons in the appropriate unit employed by the school district in such classifications excluding the following: confidential employees, supervisory employees, essential employees, part-time employees whose services do not exceed 14 hours per week or 35% of the normal work week, employees who hold positions of a temporary or seasonal character for a period not in excess of 67 working days in any calendar year and emergency employees, and personnel represented by other unions.

ARTICLE IV SCHOOL DISTRICT RIGHTS

Section 1. Inherent Managerial Rights: The union recognizes that the school district is not required to meet and negotiate on matters of inherent managerial policy, which include, but are not limited to, such areas of discretion of policy as the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure and selection and direction and number of personnel.

Section 2. Management Responsibilities: The union recognizes the right and obligation of the school board to efficiently manage and conduct the operation of the school district within its legal limitations and with its primary obligation to provide educational opportunity for the students of the school district.

Section 3. Effect of Laws, Rules and Regulations. The union recognizes that all employees covered by this Agreement shall perform the services and duties prescribed by the school district and shall be governed by the laws of the State of Minnesota, and by school district rules,

regulations, directives and orders, issued by properly designated officials of the school district. The union also recognizes the right, obligation and duty of the school board and its duly designated officials to promulgate rules, regulations, directives and orders from time to time as deemed necessary by the school board insofar as such rules, regulations, directives, and orders are not inconsistent with terms of this Agreement and recognize that the school board, all employees covered by this Agreement, and all provisions of this Agreement are subject to the laws of the State. Any provision of this Agreement found to be in violation of any such laws, rules, regulations, directives or orders shall be null and void and without force and effect.

Section 4. Reservation of Managerial Rights: The foregoing enumeration of school district rights and duties shall not be deemed to exclude other inherent management rights and management functions not expressly reserved herein and all management rights and management functions not expressly delegated in this Agreement are reserved to the school district.

ARTICLE VI GRIEVANCE PROVISIONS

Section 2. For the purpose of this article the following definitions shall apply:

Subd. 1. A “grievance” shall mean an allegation by an employee resulting in a dispute or disagreement between the employee and the school district as to the interpretation or application of terms and conditions contained in this Agreement.

Subd. 2. The “aggrieved person” is the person or persons making the grievance. If in the judgment of the union, the grievance affects a group of more than one (1) employee, it may be presented by the union at the superintendent’s level.

Section 3. Procedure:

Subd. 1. Purpose: The primary purpose of this procedure is to secure at the earliest level, equitable solutions to the grievance. Before submitting a grievance, the aggrieved person or persons shall discuss it with the employee’s immediate supervisor individually or together with a representative of the Local 70. The number of days indicated at each level shall be considered as maximum, and time limits may be extended by mutual consent. If the grievance is filed on or after May 15, the time limits may be reduced by mutual consent in order to effect a solution prior to the end of the school year or as soon thereafter as practical.

Subd. 2. Levels of Grievance:

Level 4. If the aggrieved person is not satisfied with the disposition of the grievance at Level 3, the grievance may be submitted to arbitration by written request for arbitration as provided by the P.E.L.R.A. of 1971, as amended, within twenty (20) days of the hearing or following the next regularly scheduled Union General Membership meeting. The Board of Education and the Local 70 shall not

be permitted to assert in an arbitration proceeding any grounds or to rely on any evidence not previously disclosed to the other party prior to one day of the arbitration hearing. The arbitrator shall have no power, to alter, add to, or subtract, from the terms of the working Agreement. Both parties agree to be bound by the award of the arbitrator as provided by the P.E.L.R.A. of 1971, as amended, and agree that judgment thereon may be entered in any court of competent jurisdiction.

Relevant Facts

The District is a political subdivision and an independent school district located in Faribault, Minnesota. Approximately 4000 students are enrolled within the District and approximately 550-600 people are employed.

The Union is the exclusive representative of all secretaries and clerks employed by the District. Currently, the parties are signatory to a collective bargaining agreement (CBA) effective for the period beginning July 1, 2008, and ending June 30, 2010. The parties agree that the CBA is the contract that applies to this dispute.

Prior to May of 2008, the District employed a person in the job classification of Curriculum and Instruction Secretary and a person in the job classification of Administrative Assistant to the Superintendent. The position of Curriculum and Instruction Secretary has been a full time bargaining unit position since the late 1970's or early 1980's.

The job classification of Administrative Assistant to the Superintendent is not a bargaining unit position. The position, prior to May of 2008, consisted of assisting the Superintendent and the Board of Education. The position included the performance of certain work that was confidential in nature. The position was therefore excluded from the bargaining unit pursuant to the CBA at Article III, Section 2, as well as by Minnesota law.

The record shows that, since the late 1970's or early 1980's, and prior to May of 2008, the following duties were performed by the Curriculum and Instruction Secretary:

- Ordering, checking-in, and distributing educational materials including textbooks, testing materials, and instructional supplies;
- Returning unused educational materials to the Minnesota Department of Education;
- Submitting approval for payment of invoices;
- Preparing documents and materials for school district personnel;

- Typing curriculum documents, memos, emails, and district personnel communications;
- Copying curriculum materials for teachers;
- Preparing and distributing state mandated testing materials for teachers and students;
- Preparing requisition orders and maintaining federal grant records for public and non-public schools;
- Reporting federal grant expenditures on the electronic data reporting system;
- Answering and returning curriculum department phone calls;
- Maintaining records for home school families;
- Preparing annual report for the state of Minnesota; and
- Opening, answering, and distributing mail.

For many years, Marie Hoffman served in the position of Administrative Assistant to the Superintendent. When she announced her intention to retire in May of 2008, the District determined to combine the duties of the Administrative Assistant with those of the Curriculum and Instruction Secretary into a modified Administrative Assistant to the Superintendent job classification.

Kathy Matejcek, who once functioned as the Curriculum and Instruction Secretary, was selected by the District to fill the newly modified position. Sharon Gillen is a clerical bargaining unit employee and the current shop steward. She testified that, in her new position as Administrative Assistant, Ms. Matejcek still performs all of the bargaining unit duties she once performed as the Curriculum Secretary. Ms. Gillen further testified that 90% of the duties of the new position were previously performed in the Curriculum Secretary job classification. Ms. Gillen testified that she worked closely with Ms. Matejcek and observed her on a daily basis. “[I]f it wasn’t for her curriculum duties that she took with her to her new position she really wouldn’t have anything to do,” Ms. Gillen stated at the hearing.

Ms. Matejcek did not attend the hearing and was not called to testify.

The District’s decision to combine these two positions was motivated by financial considerations. The Superintendent, Dr. Robert Stepaniak, testified that the District’s operating

levy was “low” when compared with other independent school districts. As an example, Superintendent Stepaniak noted that the operating levy provided by the school district voters was approximately \$385 per pupil. Superintendent Stepaniak further testified that the “average” operating levy in the State of Minnesota was in the range of between \$700 to \$750 per pupil.

In response, the District made a number of cuts in order to reduce its operating budget to about \$1.5 million over a two year period. In this context, the District decided to reduce the clerical staff by about \$54,000.

The District’s decision to combine the two positions was due, according to Superintendent Stepaniak, to the changing nature of clerical work. Superintendent Stepaniak testified that much of the work that was formerly performed by clerical assistants, such as typing and the transmittal of communications, was now being performed by the department administrators themselves due to advances in technology. Superintendent Stepaniak testified that, due to the implementation of email, his use of his clerical assistant to transcribe and produce his previously dictated correspondence was greatly reduced. The Curriculum Director, according to the testimony of Superintendent Stepaniak, experienced a similar reduction in the need for support staff due to these technological advances.

After the District announced its intention to combine the two positions, the Union filed a grievance. The grievance, dated June 2, 2008, provided in part that the District was “allowing an employee outside of the bargaining unit to do Clerical work.” The grievance did not name a specific grievant, but was filed on behalf of the “Entire Bargaining Unit.”

The District denied the grievance by letter dated June 3, 2008. In his letter, Dr. Stepaniak stated that the CBA contained no language “that would limit management from making this change.” Dr. Stepaniak also reiterated the District’s motivation for the change, stated as “budget

problems.” The grievance was denied “on the grounds that the master agreement does not prohibit management from reassigning duties from the unit to a confidential employee.”

Thereafter, the grievance was appealed through the steps of the grievance procedure. On July 17, 2008, the District, through their lawyer, notified the Union of its intent to “immediately petition the BMS for a hearing and a ruling” on the new position and whether or not it was a proper job classification for the bargaining unit.

The petition was filed by the District on October 8, 2008, with the Minnesota Bureau of Mediation Services (BMS), styled as request for a unit clarification. Specifically, the District requested a unit clarification order excluding the newly modified position of Administrative Assistant to the Superintendent from the bargaining unit on the basis of the confidential duties assigned. On October 15, 2008, the BMS issued the requested unit clarification order excluding the position of Administrative Assistant to the Superintendent from the bargaining unit as confidential within the meaning of *M.S. Section 179A.03, Subd. 4*. In pertinent part, the order determined that the newly modified position was confidential in nature and excluded from the bargaining unit.

The Union did not object to the exclusion of the modified position from the bargaining unit. In a letter dated July 21, 2008, the Union conceded the existence of confidential duties and explained to the District that the grievance challenged only the removal of bargain unit work from the bargaining unit. The BMS order further noted that the Union did not contest the issues raised by the petition.

The District’s action to consolidate the two positions was taken unilaterally, without first discussing the matter with the Union. In determining the scope of the consolidated position, the District considered several matters. The first was whether the new position should be full-time or

part-time. The District determined that the position should be full-time in order to fully respond to the needs of the Superintendent and the School Board. In support of this determination, Superintendent Stepaniak referred to the qualifications for the job. From the record, it appears that the position requires some post-secondary education, experience in accounting and knowledge of computer software programs. Superintendent Stepaniak also expressed a preference for a candidate with a Bachelor's degree, as well as secretarial and leadership experience. The District believed that it would be difficult to find a person to fill the job classification on a part-time basis.

Given the state of its finances, the District further endeavored to obtain the best employee performing the most services for the pay provided. The record shows that the position of Administrative Assistant was one of the highest paid clerical positions. The District concluded that a combined position was the most efficient response to the reduced duties caused by technological advances. In its view, many of the duties performed by the Curriculum and Instruction Secretary were not as urgent and could be performed when time permitted. The District also noted that the two positions had historically performed similar functions. Examples of common duties were answering phones, ordering and distributing materials, duplicating, compiling and distributing information for meetings, preparing reports, maintaining records and processing mail.

The combining of the two positions did not appear to cause the discharge of any bargaining unit employee. Rather, the new position essentially took the place of the position vacated by the retirement of Ms. Hoffman.

The record establishes that, had it been consulted, the Union would have proposed several alternative ideas to reduce costs while maintaining the duties within the existing

bargaining unit. For example, the Union would have suggested reducing the Curriculum and Instruction Secretary position to part-time or reassigning the bargaining unit duties within the existing bargaining unit position. Superintendent Stepaniak confirmed that the District had previously utilized one or more of these alternatives when it eliminated a clerical position in the middle school.

Positions of the Parties

The Union

The Union begins its statement of position by addressing the District's jurisdictional issues. Reference is first made to the District's contention that the grievance is improper because there was no injury to a specific bargaining unit member.

In response, the Union asserts that Article VI, Section 2, Subd. 2 specifically permits the Union to file a grievance on behalf of more than one employee. The "wholesale removal of bargaining unit work," the Union contends, "adversely affects the entire bargaining unit." The Union notes that Superintendent Stepaniak confirmed that if duties are regularly removed from the bargaining unit, the unit will eventually be reduced in number.

The Union takes the position that the District's contentions regarding jurisdiction were not raised prior to the hearing and that the contract precludes any argument based on grounds not previously disclosed to the other party, pursuant to Article VI, Section 3, Subd. 2, Level 4.

The Union further argues that the BMS bargaining unit decision does to preclude a finding of a contract violation. Minnesota labor law, asserts the Union, does not authorize the BMS to pass on or ratify the "stripping of bargaining unit duties from a duty certified unit." The Union cites to a number of cases in support of the proposition that the BMS has expressly denied all authority to determine issues concerning the assignment of bargaining unit work.

The Union takes the general position that the District is not "free to unilaterally transfer bargaining unit work to non-bargaining unit employees." Job security is an "inherent" element of a collective bargaining agreement, the Union suggests, and all attempts to transfer such work is

an “attack on job security.” Citing additional precedent, the Union asserts that assigning bargaining unit work to non-unit employees cannot be achieved except under “extraordinary circumstances.” Cases are cited in support of the proposition that a key factor is the impact of the transfer on the bargaining unit.

In this case, contends the Union, Ms. Matejcek was promoted from the position of Curriculum Secretary, a bargaining unit position, to Administrative Assistant to the Superintendent, a confidential position. The job duties performed in the new position are the same as previous discharged in the prior position. There is no evidence, argues the Union, of a past practice providing a basis to give non-bargaining unit personnel the right to perform unit work.

The Union takes the position that the CBA prohibits this transfer of these duties. Citing to Article II, Section 1 and 2, the Union asserts that secretarial and clerical work belong to the bargaining unit employees and there has been no “change or diminishment in the need for the duties formerly performed by the Curriculum Secretary.”

The District’s position, that its action is an “inherent management right,” is also addressed. Cases are cited in support of the proposition that the management rights clause cannot be utilized to justify the removal of bargaining unit work, however “broad and encompassing” it may be. The Union declares that the District “relies solely upon language permitting it to determine organizational structure and the number of personnel,” pursuant to Article IV, Section 1. The Union maintains that Section 2 of Article IV, expressly requiring that the District must act “within its legal limitations,” a requirement that extends to “arbitral law and the Employer’s collective bargaining obligations.”

Precedent is cited in support of the proposition that the use of “broad and unspecific language,” such as that used in Article IV, cannot imply a waiver of the Union’s right to “bargain over the existence of bargaining unit classification . . . the Employer does not have the right to assign 30 years old bargaining unit work to confidential employees, especially where, as here, it diminishes the bargain unit.”

The Union addresses the District’s position that the elimination of the position was necessary for efficient management. Superintendent Stepaniak, the Union contends, admitted that “there were other cost-saving options available to the school district, such as reducing the curriculum secretary position to part-time or reassigning the bargaining unit duties within the existing bargaining unit positions. The Union notes that when clerical position was eliminated by the District in the middle school, the duties were simply reassigned within the bargaining unit. The Union suggests that the District “could have made the same decision” in this case, minimizing the impact on the bargaining unit. The new job, asserts the Union, is “simply the former Curriculum Secretary position with a handful of confidential duties added.”

The Union declares that the District must be ordered to restore the Curriculum Secretary work to the bargaining unit, prohibiting non-bargaining unit employees from performed such work. “We understand that a decision to restore bargaining unit work . . . could cause some inconvenience,” the Union maintain. However, the Union argues that convenience “should not trump principles of collective bargaining, and the Employer should not be rewarded for ignoring its collective bargaining partner and violate the collective bargaining agreement.”

The District

The District begins its statement of position by addressing the issue of jurisdiction. The BMS unit clarification order excludes the disputed position from the bargaining unit, the District argues, requiring the grievance be dismissed. The position has been deemed a confidential one by the BMS, the District asserts. Thus, the position is outside the bargaining unit and the scope of grievance jurisdiction.

In support of this position, the District cites to *M.S. Section 179A.09*, which supplies the criteria used by the BMS in evaluating job classifications. “Based on the foregoing,” the District asserts, “whether a position and the duties of the position are properly included in bargaining units are exclusively governed by the PELRA.” The District cites to Minnesota court cases in support of the proposition that “If there is a dispute as to the identity of the exclusive representative, these matters are not to be resolved under the contract but are to be determined by the district court.” Article VI, Section 3, Subd. 2 of the CBA is referred to, containing a limitation on an arbitrator’s power to alter the CBA.

The District takes the position that the grievance is barred by the equitable doctrines of *res judicata* and *collateral estoppel*. In this regard, the District argues that the same parties were involved in the BMS unit clarification decision and that the BMS decision was judicial or quasi-judicial in nature. “The parties had the opportunity for a hearing and to present their cases before the BMS,” the District maintains, noting that the final decision was never appealed by the Union.

The District also argues that the facts necessary to reach a decision in both the unit clarification case and the present matter are exactly the same. The District contends that the BMS has to “review the principles and the coverage of the uniform comprehensive position

classification and compensation plans of the employees [including the] “supervisory level of authority, geographical locations, history, extent of organization, the recommendation of the parties and other relevant factors.”

The District takes the position that the grievance must be denied because there is not an “aggrieved party,” as required by the CBA. “It is uncontested in this matter,” argues the District, “that no Union members lost their jobs, hours, pay or benefits or suffered any other direct harm as a result of the School District’s elimination and reassignment of duties of the Administrative Assistant to the Curriculum Department.”

The District also points out that the grievance was not brought by a union member but by the Union Business Representative. The District contends that the Union’s business representative is not an “employee of the School District or a member of the bargaining unit.” The District argues that as a result, there is no “justiciable controversy” presented and no union member was harmed.

The District contends that the business representative of the employees has no standing under the agreement to file a grievance. The requirement that the grievance be brought by an aggrieved employee and not by the Union is not a “mere formality,” according to the District, but is included “for the specific purpose of aiding the employer in evaluating and responding to the grievance.”

The District notes that “While the Union alleges that all of its employees have been harmed, the specific remedy sought by the Union is elusive. The Union seeks to be made whole, yet the District argues that it has not taken away any work. “Very simply,” the District contends, “the Union is not seeking a remedy which this Arbitrator has authority to provide.”

The District argues that there is no authority to determine the propriety of the discontinuance of the position and reassignment of duties, as this is an action based on its “inherent managerial rights.” The District has the right to eliminate positions, the District asserts, and once eliminated, to determine the proper organizational structure. The District cites to Article IV, Section 1 and 2 of the CBA. “Nowhere in the CBA is there any mention of any limitation on the right of the School District to discontinue any position with the School District,” the District contends. Cases are cited in support of this proposition, as well as the contention that these actions are appropriate in a financial crisis, such as that facing the District at this time. “The School District determined that the most efficient and economical manner of organization these duties was to assimilate the duties of the Administrative Assistant to the Curriculum Department into the position of the Administrative Assistant to the Superintendent,” the District argues, declaring that this action is “well within its discretionary authority.”

It is necessary, argues the District, for the Union to show that the duties being assigned outside the bargain unit are solely Union member duties. The District argues that the assignment of non-unit work “does not affect the terms and conditions of a unit members’ employment. The Union’s claims that “it has ownership” of these duties is contravened by Article III of the agreement, the District contends. Pursuant to this article, the district contends, there is no limit on confidential employees to perform unit work [citing cases].

“In addition to the fact there is no language that clearly spells out the exclusivity of clerical work as belonging to Union members,” the District asserts, “the facts of this case similarly do not support the Union’s claim.” In this regard, the District points out that the Superintendent’s assistant has “always had duties of a clerical nature, similar, if not identical to that of other clerks.” No distinction can reasonably be made, the District argues.

Contrary to the Union's assertions, the District contends that it has a unilateral right to assign this work outside the bargaining unit. The District contends that the law is to the contrary. "Absent any express limitations of contracting out in the CBA," the District contends, a school district's decision to assign duties outside of a bargain unit is still an inherent managerial right."

Similarly, the District argues, there was no obligation to meet with the Union on the matter. In this regard, the District appears to analogize its actions with subcontracting. The only contractual restriction on its ability to contract out bargaining unit work is to negotiate the effects of such subcontracting, the District argues. In support of this position, the District cites to several cases in support of the proposition that subcontracting is within the employer's sole authority where union members are not subject to an actual reduction of work. The District notes that, in its view, there is no evidence as to what harm was caused by the transfer of duties and there is no issues of loss of pay or benefits. "If the Arbitrator provided the Union with the authority to require the School District to negotiate on these issues," the District asserts, "the result would be contrary to the plain meaning of the contract."

In conclusion, the District takes the position that the grievance is "disingenuous and completely without merit." The District requests that the grievance be denied in its entirety.

Discussion

Jurisdictional Issues

The District challenges the jurisdiction or authority of an arbitrator to decide this matter through the grievance procedure. The District maintains that the question of whether the duties of a position are properly included in a bargaining is exclusively within the authority of the PELRA. Second, the District takes the position that consideration of the issue is barred by the legal doctrines of *res judicata* and *collateral estoppel*. Third, the District argues that the grievance is not permitted under the CBA, because it was filed by the Union on behalf of the bargaining unit and not a specific employee. Fourth, the District argues that Article IV, Section 1 of the CBA cannot be decided through the grievance procedure. The applicable principles, however, do not permit any of these contentions to be sustained.

Minnesota Statutes (M.S.) Chapter 179A, Section 179A.04, Subd. 1(1) and (2) provides that the Bureau of Mediation Services (BMS) has the authority to resolve all petitions for “certification or decertification as the exclusive representative of an appropriate unit pursuant to the criteria set forth in *M.S. Section 179A.09*.” These criteria permit the BMS to “consider the principles and the coverage of uniform comprehensive position classification[s].” It must be noted, however, that the law permits consideration of job duties only insofar as they apply to the classification of positions in the context of appropriate bargaining units for union representation.

This grievance does not challenge the classification of the reconfigured position of Administrative Assistant to the Superintendent. This position, as combined by the District, now contains confidential duties as defined in *M.S. Section 179A.04, Subd. 4*. As such the law requires that the position be classified outside the bargaining unit. The Union does not challenge

that fact and how the confidential duties affect the classification of the new position under the law.

The Union further does not contest that the PELRA authorizes the BMS to make unit determinations. The Union does challenge the District's contention that the PELRA governs what duties of a position are properly in the bargaining unit. The District's contention here is that the BMS order decided what duties can be assigned to the classification.

However, a review of the BMS order indicates that it does not assign duties to a particular job classification, but rather merely determines appropriate bargaining units. The BMS does not appear to have the authority to determine the validity of an employer's assignment of work to a particular job classification. *County of Hennepin and AFSCME Council 14 and Teamster Local 320, BMS Case No. 96-PCL-218 (1996)*. The only question that is raised by this grievance is whether the District's unilateral transfer or assignment of bargaining unit work to a non-bargaining unit employee is in compliance with the CBA. This is an issue that arises under the CBA. It is not governed by the PELRA. Therefore, the authority of the BMS under the PELRA does not extend to this dispute.

In support of its contention that the grievance is barred by the doctrines of *res judicata* and *equitable estoppel*, the District contends that the Union has already had an opportunity to litigate this matter in the unit clarification proceeding. For these doctrines to apply, an identity of issues must be present. While the unit clarification proceeding involved the same parties and some of the same facts, the issues were not the same. The issue in the unit clarification was whether or not the reconfigured job classification was appropriate for the bargaining unit. The contractual issue presented here recognizes that the modified position contains confidential

responsibilities. The question presented by the grievance relates to the validity of the assignment of duties under the CBA.

Without an identity of issues, the doctrines are not applicable. Since the issues are distinguishable, there is no risk that the grievance award might conflict with the unit clarification order. If the grievance is sustained, the only possible remedy is a return of the job duties to the bargaining unit. Such a remedy could not include any confidential responsibilities, since these duties are excluded from the bargaining unit by contract and by Minnesota labor law. It is noted that Article II, Section 2 specifically ties the concept of “appropriate bargaining unit” to any certification issued by the BMS.

The District’s contention that the grievance must be denied for the lack of an “aggrieved party” must be answered with reference to a specific provision of the CBA. Article VI, Section 2, Subd. 2 of the CBA defines the term “aggrieved party” as including the Union whenever the “grievance affects a group of more than one (1) employee.” Under this contract, whether a loss of bargaining unit work affects the entire bargaining unit is determined solely by the Union.

Finally, the District contends that this matter may not be resolved pursuant to the contractual grievance procedure because the question is “within the inherent managerial rights of the employer and over which the Arbitrator has no jurisdiction to rule . . . the grievance . . . must be denied for lack of subject matter jurisdiction.”

The CBA, at Article VI, Section 2, Subd. 1, defines a “grievance” as “an allegation by an employee resulting in a dispute or disagreement between the employee and the school district as to the interpretation of application of terms and conditions contained in this Agreement.”

What is or what is not an inherent management right has been at the center of many grievances over the years. Article IV, Section 1 refers generally to several matters on which the

District “is not required to meet and negotiate.” These include the “functions and programs” of the District, the budget, utilization of technology, organizational structure and “selection and direction and number of personnel.” The Union’s contention is that the right to assign work previously performed by a bargaining unit member to an employee who is not a member of the bargaining unit is not one of these rights. This particular action is not specifically addressed in Article IV, Section 1. The Union contends, among other things, that the District’s action is prohibited by several clauses in the contract, including Article II, Section 1 and Article III, Section 2. These contrasting positions indicate that a genuine contractual issue exists. No contractual provision excludes the issue raised. In the absence of such a contractual provision indicating that the issue is barred from the grievance machinery, it appears that the issue can be decided pursuant to Article VI.

Assignment of Duties to Non-Bargaining Unit Employee

In this case, the Union challenges the District’s action to transfer work that has been performed within the bargaining unit since the late 1970’s or early 1980’s to a new position containing confidential duties which by law, which cannot exist within the bargaining unit.

Noting that the work has been performed by bargaining unit employees for many years, the Union contends that the transfer of these duties outside the bargaining unit breaches the CBA at Article II, Section 1, identifying the Union as the exclusive representative for secretaries and clerks employed by the school district.” The Union recognizes that this provision, which specifically refers to secretaries and clerks, does not specifically prohibit the District’s action and cannot form the basis for an award in their favor. The rule to be applied, according to the Union,

is that “bargaining unit work may not be assigned to non-unit employees except under extraordinary circumstances, even in the absence of an express provision covering bargaining unit work.”

In contrast, the District argues that its action is consistent with its “inherent managerial rights” pursuant to Article IV, Section 1. However, the District also appears to recognize that even an action taken under this provision is not without limit. The District suggests that the applicable rule is that “management has the right to contract out work as long as the action is performed in good faith, is reasonable and does not subvert the labor agreement.”

There does exist a number of cases holding that the modification of job classifications by an employer is restricted by recognition clauses that specifically refer to certain positions. These cases would appear to support the Union’s position. In support of this proposition, the Union cites to *New Britain Machine Co.* 8 LA 720 (Wallen, 1947). However, these cases do not appear to constitute the majority rule.

Similarly, there appears to be substantial support for the rule that, absent a contravening contractual provision, “management has the right to contract out work as long as the actions is performed in good faith, is reasonable and does not subvert the labor agreement. In support of this proposition, the District cites *ISD No. 88 v. School Services Employees Union Local 284*, 503 N.W., 2d 104 (Minn. 1993). This rule appears to have been applied principally in subcontracting cases. Although there are many similarities between subcontracting cases and those cases that concern the transfer of work outside the bargaining unit, they are not the same. Subcontracting cases arise when bargaining unit work is contracted to a separate employer, not signatory to the pertinent collective bargaining agreement.

The rule that appears to be most applicable to this case has been stated in several cases, including *American Cement Corp.* 48 LA 72, 76 (Block, 1967):

Where arbitrators have upheld management's right to eliminate jobs or classifications and relocate residual job duties, they have stressed that such changes must be made in good faith, based upon factors such as a change in operations, technological improvements, substantially diminished production requirements, established past practice, etc. See, Elkouri & Elkouri, *How Arbitration Works* (4th Edition, p. 496)

It is further noted that minimal or minor changes in the employer's operation are not sufficient to justify a transfer of work out of the bargaining unit. The transfer must be a response to a change that is "material and substantial." It has been noted that, unless there is a significant change in operations, "it is usually held that a long-standing, contractually recognized job should not be transferred from union to non-union personnel." *United Telephone Co. of Ohio*, 91 LA 318 (Strasshofer, 1988).

In *Arkla Chemical Corp.*, 54 LA 62 (Prewett, 1969), it was recognized that the bargaining unit is more seriously adversely affected by transfers of work entirely outside the bargaining unit, as opposed to distributing job duties to residual bargaining unit employees.

In this case, the good faith of the District is beyond question. Dr. Stepaniak testified that the transfer of work was due to the necessity of reducing the District's operating budget in response to shrinking revenues. Based on this record, the District's need to make adjustments to its operations was supported by persuasive evidence.

However, in this case, the transfer of work was not justified by the existence of one of the recognized factors. The record in this regard indicates that the transfer of work was due to reduced typing and the implementation of email.

It cannot be denied that the introduction of email is a positive and useful technological advance that has necessarily affected the work of every person who discharges duties using a

computer. However, the use of email is not new, but has been available in office settings for many years. There was no evidence to suggest that the ability to send and receive email diminished the amount of work assigned to the position to any substantial degree. The timing of the transfer does not suggest that it was “based” on the installation and use of personal computers and the use of email in the District offices. Further, typing and email processing was only one of thirteen categories of duties performed by the Curriculum and Instructional Secretary. The evidence is that the vast majority of the work performed in the reconfigured position was the same as that previously performed by the Curriculum and Instruction Secretary. Based on these factors, it cannot be concluded that the basis for the transfer of work was either substantial or material.

Prior to their transfer, the vast majority of the current duties of the Administrative Assistant to the Superintendent were performed by a bargaining unit member. Pursuant to the CBA and the parties’ well established custom and practice, these duties were assigned within the bargaining unit to the Curriculum and Instruction Secretary. Unless justified by a substantial reason, the modification of these duties cannot be achieved by unilateral action during the effective period of the current collective bargaining agreement.

There is no evidence to suggest that any employee suffered any financial loss due to the District’s transfer of duties. On the basis of the foregoing, the consolidated duties, not including the confidential responsibilities, should be returned to the bargaining unit without delay and in any event, within 30 days of the date of this award.

Conclusion

Having carefully considered the testimony and exhibits received into evidence, as well as the written closing arguments of the parties, it is the opinion of the Arbitrator that the District violated the collective bargaining agreement when it consolidated the duties of the Curriculum and Instruction Secretary with the duties of the Administrative Assistant to the Superintendent.

The grievance is therefore **SUSTAINED**.

