

**IN THE MATTER OF ARBITRATION  
BETWEEN**

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**ISD 361, International Falls**

**Employer,**

**OPINION AND AWARD  
(Failure to Post Vacancy)**

**and**

**BMS Case No. 10PA0042**

**February 9, 2010**

**AMERICAN FEDERATION OF STATE  
COUNTY AND MUNICIPAL  
EMPLOYEES, COUNCIL 65**

**Union.**

**A. Ray McCoy  
Arbitrator**

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**Appearances**

For the Employer

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For the Union

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## **Jurisdiction**

The arbitrator has jurisdiction to resolve this matter pursuant to the AGREEMENT FOR CONDITIONS OF EMPLOYMENT Between INDEPENDENT SCHOOL DISTRICT NO. 361 INTERNATIONAL FALLS, MINNESOTA AND AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES LOCAL # 510 AGREEMENT FOR CONDITIONS OF EMPLOYMENT 2007-2009. (Hereinafter “Agreement” or “CBA”) Article 15, Section G of the Agreement defines the scope of the arbitrator’s authority. Article 15, Section G-Arbitrator Authority states:

“The arbitrator shall have jurisdiction over disputes or disagreements relating to grievances properly before the arbitrator pursuant to the terms of this procedure. The jurisdiction of the arbitrator shall not extend to proposed changes in terms and conditions of employment as defined herein and contained in this written agreement; nor shall an arbitrator have jurisdiction over any grievance which has not been submitted to arbitration in compliance with the terms of the grievance and arbitration procedure outlined herein.

The arbitrator shall have no right to amend, modify, nullify, ignore, add to or subtract from the terms and conditions of this Agreement. The arbitrator shall consider and decide only the specific issues (s) submitted to him in writing by the employee and by the School Board at the arbitration hearing and shall have no authority to make a decision on any other issue not so submitted to him.” (Agreement at p.18)

The Union filed the grievance on June 3, 2009. The Parties processed the grievance through all relevant steps outlined in the Agreement and notified the arbitrator of his selection by letter dated October 1, 2009. The matter is properly before the arbitrator for resolution. The Parties selected December 9, 2009 for the hearing. The hearing was held on that date at the Koochiching County Courthouse, 715 Fourth Street, International Falls, MN 56649. The Parties had a full and fair opportunity to present their cases including the introduction of documents and the examination of witnesses.<sup>1</sup> After presentation of their respective cases, the

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<sup>1</sup> The Employer called two witnesses, the Superintendent and Assistant Superintendent of ISD 361. The Union called two witnesses, Local 510’s President and a bargaining unit member on unrequested leave or layoff. The Parties submitted two joint exhibits. The Employer submitted two additional exhibits in support of its case. The Employer also submitted several

Parties decided to present oral closing summaries rather than post-hearing briefs. The Parties agreed to hold the record open for an additional day to give the Employer an opportunity to submit an additional case reference for the arbitrator's consideration. A copy of the case reference was received on December 10, 2009 and the arbitrator closed the record on that date.

### **Issue**

The Union said the issue to be decided is whether the Employer violated Article 12, Section G of the Agreement when it failed to post a notice of vacancy during the summer of 2009 while a bargaining unit member was laid off and instead hired students to do work normally performed by bargaining unit members. The Employer said two issues required the arbitrator's attention. The Employer said the first issue to be decided was whether the dispute is arbitrable. If arbitrable, the Employer characterized the issue as whether a bargaining unit employee creates a vacancy when he/she takes a qualified leave of absence for more than 30 days. Does that event trigger the Employer's obligation to post a notice of vacancy pursuant to Article 12, Section G to bargaining unit members on unrequested leave of absence?

### **Relevant Contractual Provisions**

#### **ARTICLE 4 – RIGHTS AND RESPONSIBILITIES OF PARTIES**

Section A – Inherent Managerial Rights: The exclusive representative 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 or 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 B – Management Responsibilities: The exclusive representative 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 provide educational opportunity for the students of the School District. The exclusive representative also recognizes the School Board's responsibility to provide facilities for the education of the students of the School District.

Section C – Effect of Laws, Rules and Regulations: The exclusive representative

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citations in support of its positions.

recognizes that all employees covered by this Agreement shall perform the services prescribed by the School Board and shall be governed by the laws of the State of Minnesota and by the School Board rules, regulations, directives and orders from time to time as deemed necessary by the School Board insofar as such rules, regulations and directives and orders are not inconsistent with the terms of this Agreement.

Section E – All grievances by employees shall be processed in accordance with the grievance procedure in this agreement.

## ARTICLE 12 – SENIORITY

### Section E – Unrequested Leaves of Absence and Recall

Subd. 1 In the event of a layoff, employees shall be laid off according to seniority in the inverse order of hiring. Employees shall be recalled according to seniority in the inverse order of layoff.

Subd. 2 When placed on unrequested leave of absence the employee will file his/her name and address with the superintendent's office to which any notice of reinstatement or availability of positions shall be mailed. Notification of a change in address will be the responsibility of the employee. Failure of a notice to reach the employee will not be the responsibility of the school district if any notice has been as provided herein.

Subd. 3 If a position covered by this agreement becomes available to a qualified employee on unrequested leave of absence, the school district shall by certified mail notify such employee. The employee will have fifteen (15) calendar days from the date of such notice to accept the notice of reemployment, and twenty-one (21) calendar days to report for work. Failure to reply or report for work as stipulated herein will constitute a waiver on the part of the employee. An employee may reject any offer of employment not equal to or greater than the level of employment of the employee at the time the employee was placed on unrequested leave, with such rejection not affecting the employee's right to recall. An employee refusing a recall offer that would be equal to or greater than the employee's pre-layoff status within the timelines of this subdivision shall forfeit all recall rights under terms of this section.

Subd. 4 Recall rights shall be for two years (24 calendar months) following date of placement on unrequested leave. Employees on ULA who have exhausted their recall rights, will have accrued sick leave and other accrued benefits restored if the employee is hired to fill a vacancy within one year of termination of recall rights.

Subd. 5 Any employee placed on unrequested leave of absence may accept employment outside the school district during the period of unrequested leave and still sustain recall rights under the terms of this agreement. Any temporary employment by the school district (less than 30 consecutive working days) during an employee's layoff period in a position less than the position formerly held by the employee and in the employee's same job classification shall be compensated in accord with wages specified in Appendix A of this agreement.

Section F – In the case of a reduction of forces or the elimination of a position, a senior employee may exert his/her seniority preference over a junior employee first within the same seniority list and job category. If no position exists within the employee's category, then the employee may exert his/her preference over a junior employee in any classification provided he/she has the necessary qualifications to perform the duties of the job involved. The School Board and/or the appropriate supervisor shall make the determination as to whether or not the employee possesses the necessary qualifications.

Section G – Temporary vacancies may be filled by senior qualified employees within a building, if possible. In the event said vacancy has a higher rate of pay, qualified employee filling such vacancy shall receive such higher rate of pay when such an appointment is made by the supervisor. Temporary vacancies known to be in excess of thirty (30) days shall be posted on employee's bulletin boards.

Section H – Notice of all vacancies and newly created positions shall be provided to the Union President for posting on designated Local 510 bulletin boards and the employees shall be given seven (7) days time in which to make application to fill the vacancy or new position. The senior employee making application shall be transferred to fill the vacancy or new position, provided he/she has the necessary qualifications to perform the duties of the job involved. The School Board and/or other appropriate supervisor shall make the determination as to whether or not an applicant possesses the necessary qualifications. In the event the Union does not concur in the determination, the applicant shall have the right to appeal through the normal grievance procedure. Newly created positions or vacancies are to be posted in the following manner: rate of pay and classification.

## ARTICLE 15 – GRIEVANCE PROCEDURE

Section A – Definition of a Grievance – A grievance is defined as a dispute or disagreement as to the interpretation or application of the specific terms and conditions of this Agreement.

Section C (5) Reduced to Writing: “Reduced to writing” means a concise statement outlining the nature of the grievance, the provision(s) if the contract in dispute, and the relief requested.

Section D – Time Limitation – Grievance shall not be valid for consideration unless the grievance is submitted in writing, setting forth the facts and specific provision of the Agreement allegedly violated and the particular relief sought, within twenty days after the first event giving rise to the grievance occurred. Failure to file any grievance within such period shall be deemed a waiver thereof.

Section G – Arbitrator's Authority- The arbitrator shall have no right to amend, modify, nullify, ignore, add to or subtract from the terms and conditions of this Agreement. The arbitrator shall

consider and decide only the specific issue(s) submitted to him in writing by the employee and by the School Board at the arbitration hearing and shall have no authority to make a decision on any other issue not so submitted to him.

### **Background**

The Union notified ISD 361 by letter dated June 1, 2009 that it objected to the District's use of student workers to perform janitorial services while a bargaining unit member was on unrequested leave. The District, at least since 2002, has hired student workers to assist with summer maintenance duties which might include moving furniture, cleaning, painting and general maintenance. The Union did not object to the practice of hiring students during the summer except when a bargaining unit employee was on unrequested leave. As the Union stated in its June 1, 2009 letter to ISD 361:

“The Union requests that the District cease using this help until Union members are offered work. This same situation occurred some time in 1996 or 1997 and the District agreed to not use student help and reinstated Union employee to do the summer cleaning. We ask the District to cooperate with this matter.” (School District Exhibit 1, Hereinafter, SD Ex. 1)

During the summer of 2009, the Employer advertised and hired four students to perform janitorial duties. The Union grieved the use of student workers saying that the Employer was obligated to post a notice of vacancy so that the bargaining unit member on layoff could exercise his right to perform the janitorial services during the summer months. The Employer disagreed. The bargaining unit member on unrequested leave last worked for the District as a substitute between May and June of 2009. The District laid the bargaining unit member off prior to hiring the students. Prior to being laid off, the bargaining unit member had worked in the place of another unit member who was on sick leave. The unit member on sick leave had been out more than 30 days and had not returned to work at the time that the bargaining unit member who had replaced him was laid off.

## **Positions of the Parties**

### Employer's Position

1. The arbitrator does not have subject matter jurisdiction over the issue the Union wishes to address. The Parties Agreement gives the arbitrator jurisdiction to resolve only those grievances submitted to him/her in writing and signed by an employee. The Agreement does not permit the Union to file a "class action" grievance.
2. Article 15 Section G, along with other language in the Agreement demonstrates that Council 65 does not have standing to pursue this grievance.
3. Article 3, Section A defines an employee as a person employed by the School Board, Article 4, Section E states that all grievances shall be processed in accordance with the procedures outline in Article 15. Article 15 states that the arbitrator can only decide grievances submitted to him in writing by an employee.
4. Council 65 is bringing this action seeking an opinion but the Agreement does not give it standing to bring the grievance on behalf of unnamed employees.
5. A bargaining unit employee on a qualified leave of absence does not create a vacancy within the meaning of that term as used in the Agreement even if the qualified leave exceeds thirty days.
6. The Agreement does not define the term "vacancy." Reasonableness and practicality require the term "vacancy" to be applied when a position is unfilled. A position is unfilled it is vacant due to death, retirement, termination or when an employee quits of his/her own volition.
7. When an employee is out on sick leave the position cannot be considered vacant because that employee has rights to return following the illness.
8. The Employer has hired student workers to do bargaining unit work during summer months for over 26 years. It is a well-established practice accepted by both Parties.
9. The Union did not file a grievance when other bargaining unit members were laid off and the District hired students to perform janitorial services during the summer months.
10. The burden of proof rest with the Union to demonstrate by a preponderance of the

evidence that the Employer violated the Agreement.

11. An employee on leave of absence does not create a vacancy.
12. It is management's right to determine whether a vacancy exist and whether it will be filled.
13. Management decided to cover some of the work performed by the employee who was on sick leave and the rest of the work was set aside or left undone. This decision fits squarely with the Employer's right to decide the selection and direction of personnel. It is also the Employer's right to decide whether a vacancy exists.
14. There is nothing in the contract limiting the Employer's right to determine when a vacancy exists.
15. The Employer maintains a substitute list. Individuals on the substitute list may be union and non-union. They are called upon to fill the District's need for temporary work assignments. The District decides when to use a substitute from the list and usually does so when a bargaining unit member is on leave, vacation or similarly away from the job for a temporary period of time. These are not vacancies.
16. The District might create a temporary position and if the person hired to fill that temporary position quits or leaves for whatever reason, a temporary vacancy would be created. The thirty (30) day rule in the Agreement applies only to temporary vacancies. It does not imply or describe the right of a laid off employee to bump into one of these temporary positions.
17. The bargaining unit employee who was on leave of absence informed the Employer that he might be away from the job for six (6) or eight (8) weeks. The Employer must have the ability to hire substitutes to cover a situation like that one. As a practical matter the Agreement does not address the issue of whether a vacancy is created when an employee is out on leave for a period lasting longer than thirty (30) days.
18. The recall rights of laid off employees applies only to permanent vacancies caused by death, retirement or the creation of a new position.
19. The Employer decided to hire the bargaining unit member on unrequested leave or layoff to fill in for the unit member on sick leave for part of the six to eight week period but

then exercised its right not to cover the remainder of the time that the employee on leave of absence was scheduled to be away from work. That was Management's right to make that determination.

20. As a practical matter, had the Employer been required to follow the recall procedures in order to cover the six to eight week period, the language of the Agreement could have required the Employer to go without having the job filled for too long. That is because under the recall provisions, the laid off employee has 15 days to declare interest in the position and another 21 days to actually show up for work. During that period of time, the Employer would have been without any workers to perform the duties of the employee out on sick leave. If the Employer was required to apply the recall procedures when an employee is out on a qualified leave of absence the result would be absurd. It would hamstring the District.
21. The District needs the ability to hire substitutes. The Agreement does not prohibit the Employer from doing so.

#### Union's Position

1. The Employer's argument that the dispute is not arbitrable is a red herring. The Union has the right to pursue a grievance such as this regarding the procedural violation of the Agreement. The Union is permitted to file a "class action" grievance to resolve a dispute on behalf of all members of the bargaining unit.
2. The violation is a procedural one. It might not be possible to identify which bargaining unit member is affected until the procedure has been completed. It could have been anyone in the unit who could have applied for the vacancy had the Employer properly posted it.
3. An individual grievant could not have filed this particular grievance.
4. The Employer's position would render the language precluding a position from being vacant for more than 30 days meaningless.
5. The bargaining unit member who was out on sick leave for more than thirty (30) days created a vacancy and the Employer was required to post a notice so any laid off

employee could exercise his/her recall rights and bid on the position.

6. Article 12, Section G requires the Employer to post a notice of vacancy.
7. The laid off bargaining unit member must be given back wages and benefits and his unrequested leave date must be reestablished.

## **OPINION AND AWARD**

### Arbitrability of the Dispute

Before addressing the merits of the dispute, it is necessary to address the argument put forth by the Employer that the grievance is not arbitrable. The Employer argues that the Union lacks standing to bring a “class action” grievance. The Employer points to Article 15, Section G in support of its position. Specifically, the Employer argues that Article 15, Section G limits the arbitrator’s authority to consider and decide issues to those “submitted to him in writing by the employee and by the School Board at the arbitration hearing and shall have no authority to make a decision on any other issue not so submitted to him.” (Agreement at p. 18) The arbitrator declines to accept the Employer’s interpretation of the Agreement on this point. While, Article 15, Section G does limit the arbitrator’s authority to decide only the specific issues submitted to him in writing by the employee and by the School Board, it does not require that every grievance be initiated by an employee. The Employer’s interpretation is not supported by the express language of the Agreement or the conduct of the Parties at the hearing of this matter.

First, it must be acknowledged that the Parties define a grievance as “a dispute or disagreement as to the interpretation or application of the specific terms of this Agreement.” (Agreement at p.16) It does not define a grievance as only those disputes or disagreements by an employee that are reduced to writing and submitted to the arbitrator at a hearing. The language limiting the arbitrator’s authority does not place a limitation on who may bring a grievance in the first instance. In other words, that language has no bearing on who has standing to bring a grievance at Step 1 of the grievance process. The Employer’s reliance on Article 4, Section E is also unpersuasive. Article 4, Section E simply states: “All grievances by employees shall be

processed in accordance with the grievance procedures in this agreement.” (Agreement at p. 3) The words “grievances by employees” implies that others such as the Union or the Employer may bring grievances as well.

Contrary to the interpretation urged by the Employer, the language of Article 4, Section E acts as a limitation on the employee’s choice of forum and process for addressing disputes as opposed to operating as a bar to the Union’s right to bring a “class action” grievance. Had the Parties intended to restrict the Union’s right to bring a “class action” grievance, they should have clearly and unambiguously stated as much in the Agreement.

There is no language supporting such an interpretation. Article 15, Section G provides a way for the arbitrator to clearly and concretely understand the positions of the Parties and therefore to focus the opinion and award on the specific concerns brought forth by the Parties. Hopefully, by the time the dispute reaches the hearing stage of the process, the Parties will have had numerous opportunities to share their respective positions and evaluate the strength or validity of them. The prehearing stages of the grievance process provide more than ample opportunity for the Parties to either find grounds for resolving the dispute or to refine their positions so that the issues brought to arbitration are clear and advance the cause of both sides, namely that the language of the Agreement at issue be properly analyzed.

The grievance in this case was timely filed and processed through the relevant steps of the grievance procedure. The Employer failed to argue at any of the steps leading up to arbitration that the grievance was disallowed because it was brought by the Union and not an employee. It was at the hearing of this matter that the Employer first revealed its position that the Agreement prohibited the Union from bring a “class action” grievance. However, the Employer did not submit this issue to the arbitrator in writing but offered it verbally.

The Union did not object to the Employer’s verbal submission of issues. The Parties jointly introduced the completed grievance form describing the issue from the Union’s perspective. (See Joint Exhibit 2, Hereinafter Jt. Ex. 2) In point of fact, the Union submitted its issue in writing and the School Board failed to do so. The Parties’ willingness to submit issues verbally acts as a waiver of the requirement that the issues be submitted in writing at the hearing. Were the arbitrator to follow, the literal language of the Agreement, none of the issues brought

forth by the Employer could be considered because they were not submitted in writing at the hearing of this matter.

Given the waiver, the arbitrator has the authority to consider and decide both the verbal and written issues submitted at the hearing. The arbitrator finds that the dispute is arbitrable and that the language of the Agreement does not prohibit the Union from bringing a “class action” grievance.

### Merits of the Grievance

The written issue as taken from the official grievance requires the arbitrator to determine whether the Employer violated “Article 12, Seniority, Section G, H; and all other applicable provisions.” The issue can be stated as whether the Employer had a vacancy that it should have posted at the time it decided to hire student workers to perform janitorial services. If it had a vacancy to post then any bargaining unit employee on unrequested leave and qualified to perform the duties could have bid on the position. The facts essential to resolving this grievance are not in dispute.

The President of Local 510 requested and received sick leave. He informed the Employer that he might be away from the job for approximately eight (8) to ten (10) weeks.<sup>2</sup> The Employer covered some but not all of the time that the Local 510 President was away from his position. It did so by employing Mr. Kittleson, a bargaining unit employee on unrequested leave. Mr. Kittleson filled in for the Local 510 President for approximately two months. The Employer then placed Mr. Kittleson on unrequested leave or layoff. After doing so, the Employer advertised in the local paper that it was hiring individuals to perform janitorial work during the summer months. The Employer hired four students to perform janitorial duties such as cleaning, painting, moving furniture, the same duties performed by Mr. Kittleson before he was laid off. The

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<sup>2</sup> The arbitrator is mindful of the testimony regarding whether an employee on a qualified leave of absence creates a vacancy. The arbitrator agrees that a vacancy is not created simply because an employee is granted sick leave. Answering that question does not resolve the instant grievance. The key question has to do with the advertising and hiring of students to do janitorial work during the summer months while a bargaining unit member is on unrequested leave.

Employer has a long history of hiring students to perform janitorial duties during summer months. The Union did not object to the practice except during those summers when one or more members of the bargaining unit was on unrequested leave and eligible to perform the duties.

The Employer argues that hiring students to perform janitorial services during summer months is an established past practice which should be given the weight of contractual language. The arbitrator disagrees. The facts do not support the conclusion that the use of students to perform janitorial services during the summer when bargaining unit members capable of performing those services are on unrequested leave is a practice accepted by both Parties. The Employer produced evidence showing it has hired students to perform janitorial services for more than a decade. (School District Exhibit 2, Hereinafter SD, Ex. 2) The Employer also produced evidence demonstrating that the Union objected to the practice of hiring students to perform janitorial services when bargaining unit members were on unrequested leave. (SD, Ex. 1) That exhibit revealed that the Union filed a grievance similar to the instant one in 2008 demanding that the Employer cease using “casual employees to perform bargaining unit work while laid off bargaining unit employees were available.” In the letter accompanying the grievance, the Union clearly stated that it expected the Employer to cease using students to do summer janitorial work while unit members were on unrequested leave. In that letter, the Union said it had also challenged similar conduct in the late 1990’s and that the Employer cooperated in correcting the matter.

The arbitrator finds this evidence sufficient to support the conclusion that an established practice did not exist. An established past practice requires mutuality if it is to aid in the interpretation of ambiguous contract language. There can be no doubt that mutuality is lacking in this case. The Union understood this practice to be permissible only when all of its members capable of performing janitorial work were employed as opposed to being on unrequested leave. The Employer, on the other hand, maintains that the practice can be implemented each summer regardless of whether a bargaining unit member is on unrequested leave. Given the lack of mutuality, the arbitrator cannot accord any significant value to the practice.

It is, however, unnecessary to resort to a consideration of past practice in this case because the contract language relevant to this dispute is unambiguous. Article 12 of the

Agreement deals with, among other things, the process by which bargaining unit members on unrequested leave are to be recalled or offered opportunities for re-employment even if those opportunities are temporary in nature.

Article 12, Section E, Subd. 3 states: “If a position covered by this agreement becomes available to a qualified employee on unrequested leave of absence, the school district shall by certified mail notify such employee.” (Agreement at p. 14) There is no question that a bargaining unit employee qualified to perform janitorial work was on unrequested leave. That person was Mr. Kittleson. The Parties disagree as to whether a “position covered by this agreement” became available. The arbitrator relies on the testimony offered by the Assistant Superintendent to resolve this issue. Assistant Superintendent Grover testified that the School District advertised in the newspaper that it had temporary janitorial positions available during the summer months. Assistant Superintendent Grover testified that four students were hired as a result of the advertisement to perform duties such as maintenance of the grounds, painting, rearranging or moving furniture to allow for painting or repairs etc. He also testified that the positions were expected to last for approximately eight (8) to ten (10) weeks. Given this testimony, the arbitrator can only conclude that a position or positions covered by the Agreement became available while a bargaining unit employee qualified to fill one of the positions was on unrequested leave. Therefore, the Employer was obligated to notify Mr. Kittleson by certified mail of the opportunity to bid on the position.

The Agreement also states that “Temporary vacancies known to be in excess of thirty (30) days shall be posted on employees’ bulletin boards.” (Agreement at p.15) Here again, the testimony of the Assistant Superintendent illustrates plainly enough that the Employer intended to and did create temporary vacancies that would last more than thirty days. Therefore, the opportunities should have been posted on the employees’ bulletin boards as required by Article 12, Section G. (Agreement at p.15)

Testimony revealed that the Employer met with the Union to discuss whether Mr. Kittleson would be called prior to hiring non-bargaining unit members to fill the temporary vacancies. Assistant Superintendent Grover testified that he felt the Union and Employer had a “gentleman’s agreement” that the District would try to use bargaining unit members on

unrequested leave before resorting to nonbargaining unit workers. Testimony revealed that the Employer maintains what it refers to as a “substitute list.” The Assistant Superintendent testified that not all of the people on the list were bargaining unit employees but that it was his practice to attempt to use bargaining unit employees before resorting to nonbargaining unit substitutes.<sup>3</sup>

The arbitrator can find no basis for the Employer’s decision to deviate from either the express contractual language considered above or what it referred to as a “gentleman’s agreement” with regard to Mr. Kittleson. When the Employer advertised for students to fill temporary positions lasting eight to ten weeks, it basically told the community that it had “vacancies.” As such, the Employer was required to comply with contractual language requiring it to post the notice of vacancy so that any bargaining unit member on unrequested leave could decide whether he or she was interested in and qualified to do the work. The Employer failed to do so. The School District should have notified Mr. Kittleson by certified mail that he was eligible to bid on the positions.

Finally, Article 12, Section H requires the Employer to provide the Union with notice of “all vacancies.” The Parties Agreement does not make a distinction between temporary and permanent vacancies. The Employer argued that a temporary vacancy can only arise when the person filling the temporary position dies, resigns or is terminated. However, a temporary student janitorial position that is expected to run for more than thirty (30) days and that is advertised in the newspaper is also a vacancy. It is not unlike a newly created position and as such subjects the Employer to the notice requirements of Article 12, Section H.

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<sup>3</sup> The Employer argued that it needed flexibility and that if it is required to resort to the recall provisions whenever it has temporary work lasting more than thirty days, it might find itself in the unfortunate position of being without an employee for a long period of time. However, the inconvenience of the contractual language must be resolved during bargaining. As the Agreement states, the arbitrator has no right to alter the language of the Agreement. The inconvenience of posting a notice of a temporary position expected to last more than thirty days is the language the Parties agreed to and that must be honored.

### **Award**

Based on the foregoing, the grievance is SUSTAINED. The Employer is hereby required to make whole the only bargaining unit employee identified during the hearing as eligible to bid on the summer janitorial work, Mr. Kittleson. In doing so, the Employer must adjust his seniority and unrequested leave accordingly. The back pay award will cover the period of time that the students were employed to perform janitorial services. In addition, the Employer must pay any lost benefits that Mr. Kittleson would have received in establishing the appropriate make whole remedy. The arbitrator retains jurisdiction to clarify the award and to resolve any disputes associated with the Parties' efforts to comply with the award.

Respectfully submitted

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A. Ray McCoy  
Arbitrator

Dated: February 9, 2010