IN THE MATTER OF THE ARBITRATION BETWEEN

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 65, Union, and INDEPENDENT SCHOOL DISTRICT NO. 2580 (EAST CENTRAL), Employer.	)	MINNESOTA BUREAU OF MEDIATION SERVICES CASE NO. 11-PA-1211 DECISION AND AWARD OF ARBITRATOR

APPEARANCES

For the Union:

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For the Employer:

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On November 16, 2011, in Finlayson, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The grievance alleges that the Employer violated the labor agreement between the parties by

reducing the hours of work assigned to the grievant, Jean A. Bonk, and by refusing to allow the grievant to exercise her seniority by displacing a junior employee for the hours of work thus reduced. The last of post-hearing written materials were received by the arbitrator on March 12 and April 4, 2012.

FACTS

The Employer (sometimes, the "District") operates the public schools in and near Finlayson, Minnesota, a city in east central Minnesota. The Union and the Employer were parties to a labor agreement, Article 20, Section 1, of which states its duration, thus:

> . . . for the period commencing on July 1, 2005, through June 30, 2010, and from year to year thereafter, unless either party serves written notice of its intent to modify this Agreement in accordance with the terms hereof. . . .

Hereafter, I refer to this agreement as the "2005-2010 labor agreement" or merely as the "labor agreement"). As I note below, however, the present grievance arose in February of 2011, after its nominal term and during a time the parties continued to operate according to its provisions.

Article 2 of the labor agreement establishes the Union as the collective bargaining representative of employees described as follows:

> Article 2, Section 1. Recognition. In accordance with PELRA [the Public Employees Labor Relations Act] and pursuant to the certification issued by the BMS [the Minnesota Bureau of Mediation Services], the District recognizes the East Central Workers Chapter of AFSCME [the American Federation of State, County and Municipal Employees], as the Union for all personnel of [the

> District] who are not required to be licensed teachers by the State Board of Education and, pursuant to the certification of the Bureau of Mediation Services, which exclusive representative shall have those rights and duties as prescribed in PELRA and as described in the provisions of this Agreement.
>
> Section 2. Appropriate Unit. The Union shall represent all such employees of the District contained in the appropriate unit as defined in the certificate issued by the Director of Mediation Services.

The parties did not present in evidence the certificate of the Bureau of Mediation Services that thus defines the "appropriate unit" referred to in Article 2, Section 2, of the labor agreement.

The grievant has been employed by the Employer for twenty-four years, during all of which time she has worked in the classification the parties usually refer to by the title, "Paraprofessional." The labor agreement also refers to that classification by the titles, "Teacher Aide" and simply "Aide." (Hereafter, I will usually refer to this classification as "Paraprofessional.")

Cindy L. Mortensen testified that she has worked for the Employer as a Paraprofessional for twenty-six years and that she is the most senior employee in that classification. She testified that the primary work of a Paraprofessional is to assist Special Education Teachers in the classroom and to monitor students in the lunch room and on the playground. In addition, Mortensen testified that for the last twelve years she has driven a specially equipped van, transporting to and from school students who have a disability that inhibits their riding a regular school bus. She testified that when she began van driving, she was the first person in the District to perform

that work and that it was not posted for bidding. Instead, the the Employer's then Superintendent, Jeffrey Peura, approached her and asked her to do the work. She testified that she thought Peura asked her to do the van driving because she was even then the most senior Paraprofessional.

The grievant testified as follows. She has worked for the Employer as a Paraprofessional for twenty-four years and is the second most senior employee in that classification. She performs the usual work of a Paraprofessional, assisting Special Education Teachers. About three to four years ago, she began driving a van taking disabled students to and from school who were unable to ride the regular school bus. At the time she began to do van driving, Superintendent Peura asked her to do the work, as the most senior Paraprofessional. She continued to do van driving in addition to her classroom work with special education students until February of 2011, when the following circumstances occurred, which gave rise to the present grievance.

On February 14, 2011, Tamara L. Schultz, the Employer's new Superintendent, wrote the following letter to the grievant:

> Effective Tuesday, February 22, 2011, the McVee family will no longer be requiring a special van, and will be riding Bus Route 8 in the morning and afternoon.
>
> Per [Article 6, Section 4, of the labor agreement], two weeks notice is required for a change of regular work assignment. As this is an extra assignment, you are being advised that this change is to take place in one week. . . .

On February 16, 2011, the grievant responded to Schultz' letter, thus:

> It is my intention to exercise my right to bump the next Van Driver with the most hours. This would be Sharen Johnsen. I would appreciate your approval in this matter so that I can be trained in a timely manner.

On February 18, 2011, Schultz responded to the grievant's request to bump:

> I am in receipt of your notification to bump a van driver's extra assignment effective on the completion of your training for that position -- sometime the week of February 22. . . .

On March 2, 2011, however, Schultz sent the grievant the following letter:

> This letter is to advise you of a change of decision regarding "bumping" rights on your extra assignment of van driving. Per [Article 6, Section 4, of the labor agreement], which explicitly specifies the change of your regular work schedule, which is your paraprofessional position, the district calculates your pay and fringe benefits on your <u>regular</u> position, and per the contract, your bumping rights are only within your <u>regular</u> position -- not any extra assignments. There are no van driver positions in the AFSCME contract. . . . [Emphasis is in the original.]

On March 2, 2011, the Union initiated the present grievance, which alleges that the Employer violated Article 6, Section 9, and Article 14, Section 3, of the labor agreement and "all other applicable contract articles."

There is no express reference in the labor agreement either to the task of "van driving" or to a classification, "Van Driver." The parties cite as relevant several provisions of the labor agreement, described as follows.

Article 6 of the labor agreement is entitled, "Hours of Work." Section 1 of Article 6 lists twelve classifications by title -- Secretary, Bus Driver, Teacher Aide, Custodian, Cook, Food Service Clerk, Cleaner, Assistant Cook, Food Service

Worker, Mechanic, Lead Bus Driver, and Special Education Secretary -- giving for each information that relates not only to daily hours of work, but varying miscellaneous statements. Neither party argues that the work of van driving is included in the duties of the Bus Driver's classification.

The text after the listing for "Teacher Aides" in Article 6, Section 1(C), is the following:

> Work schedules will depend on program design. Teacher Aides with the most seniority will be the first to be offered the longest shifts.

Article 6, Section 4, of the labor agreement provides:

> Posting of Work Schedules: The District shall post the current work schedules showing the work days and hours of all full-time and part-time employees. The District shall give all employees at least two (2) weeks advance notice of any change in the regular work schedule, except for situations beyond the reasonable control of the District or with the consent of the employee.

Article 6, Section 9, of the labor agreement provides:

> Reduction of Hours: There shall be no reduction of force or hours for any employee without meeting the employee and the Union 30 calendar days in advance to explain the District's position.

Article 14 of the labor agreement is entitled, "Job Posting -- Temporary Transfer -- Reduction in Force." The following sections from Article 14 are relevant:

> Section 1: Notice of any vacancy or a newly-created position shall be posted on the employee bulletin board and present employees shall be given five (5) work days' time in which to make application to the District to fill such vacancy. The senior employee who has demonstrated necessary qualifications to perform the duties of the vacant position shall be given consideration by the District in filling the vacancy. Provide a copy of job postings to Union President.

Section 3: Layoff: Layoffs shall occur within job classifications, subject to Article 13 -- Seniority -- Section 5. The length of seniority used will be total District seniority. The job classifications are:

1. Cleaner
2. Food Service
3. Secretary: All clerical, secretary positions
4. Aides: All aides, clerk aides, tech. tutor
5. Cooks: cooks, baker, asst. head cook
6. Custodians
7. Mechanic
8. Bus Drivers
9. Food Service Clerk

Section 4: Recall: Recall shall be in inverse order of classification layoff, subject to Article 13 -- Seniority -- Section 5.

Employees on layoff status shall be notified by the administration, in writing, of all vacancies regardless of classification.

Employees on layoff who held a position within the five (5) years preceding their being laid off in a classification different from the one from which they were laid off shall automatically be recalled to their previously held classification when a vacancy occurs.

Employees may not "bump" into a previously held job class. (Example: Sally is laid off from her job as an aide. She previously held the job class of cook. Sally shall be recalled as a cook only when a cook job becomes vacant.

Section 5: The District shall not be required to place or retain any employee who is not qualified to perform the duties in an efficient manner.

On November 20, 2006, the Employer adopted the current version of its Policy 707, entitled, "Transportation of Public School Students." Section VII(B) of Policy 707 provides for the transportation of "resident disabled students whose handicapped conditions are such that the student cannot be safely transported on the regular school bus." Policy 707 requires that the District provide transportation for such students to and from school and that the District "determine the type of vehicle used to transport disabled students on the basis of the

handicapping condition and applicable laws." Nothing in Policy 707 establishes or otherwise refers to the personnel the District is to select as the driver of the vehicle used in such transportation.

On March 15, 2004, the Employer adopted a policy entitled, "Educational Preparation -- Paraprofessional." (Hereafter, because this policy is unnumbered, I refer to it as the "Paraprofessional Policy.") At the hearing, the Employer provided this document as the job description for the Paraprofessional classification -- though it does not state the duties of the classification as would a typical job description. Rather, the Paraprofessional Policy lists the skills and education required to serve in the classification. Generally, the skills and education listed relate to teaching or assistance in teaching. Nothing in the policy provides that a Paraprofessional should have skills suited to driving. It lists "Instructional Assistance Competencies," which can be used as alternatives to attainment of educational requirements. At least one of these relates to skills appropriate to special education -- "Philosophical, Historical and Legal Foundations of Special Education and ESEA."

Mortensen testified that since she became the first van driver twelve years ago, the Employer has increased to four the number of vans and van drivers used to transport disabled students and that, with only a few short-term exceptions, the person selected to drive the van has always been the most senior available Paraprofessional. According to Mortensen, the

selection of the most senior available Paraprofessional to do the work of van driving is supported by Article 6, Section 1(c), which states that "Teacher aides with the most seniority will be the first to be offered the longest shifts." This argument, of course, assumes that van driving is included in the work of a Paraprofessional. Mortensen testified that van driving is appropriate work for Paraprofessionals because they know the needs of disabled special education students.

Garry W. Johnson testified for the Union that he is a Custodial Engineer, that he has been an officer of the Union and that he has represented the Union in bargaining with the Employer. Johnson testified as follows. In the spring of 2010, when he was President of the Union, Superintendent Peura told him that the District wanted to have students who were the subjects of a child welfare investigation driven by van from school to Pine City and back over a period of about a month. Peura told Johnson that the students were to leave school during the teaching day, at about 2:00 p.m., when no Paraprofessionals were available to drive the van because they were working in class rooms. Peura asked Johnson, as Union President, to approve the use of a non-Paraprofessional, Custodian William Morgan, to drive the van. Johnson testified that he consented to the use of a non-Paraprofessional for this van driving because the children needed the service and no Paraprofessional was available. Johnson also testified that sometimes during the month, these students were driven to Pine City by a Paraprofessional. If one became available to drive the

van, Peura assigned the work to her, but usually Morgan drove the van.

In addition, Johnson testified that during bargaining for a new labor agreement, which was to succeed the current labor agreement (the stated term of which ended on June 30, 2010, except for year-to-year extension), the parties met in mediation on July 1, 2011, and that during mediation, both parties made proposals concerning van driving. The proposal made by the Employer was that the new labor agreement contain a provision expressly stating that van driving was an extra assignment, to be assigned by the Employer. Neither the proposal of the Union nor that of the Employer was adopted.

Christina M. Abrahamson testified that she has been employed by the District for two years, the first year in a payroll function. For the past year, she has been the Employer's Human Resources Director. I summarize her testimony as follows. Van driving does not require a commercial driver's license or any other special qualification. The only training required is instruction to the van driver about the route he or she is to drive. Abrahamson regards van driving as an "extra assignment," i.e., as I understand her testimony, work that is not included in the regular duties of any bargaining unit classification. She testified that, because van driving is an extra assignment, it is not work that is covered by the labor agreement and that, accordingly, the Employer is not required to allow any "bumping" rights for van driving.

Abrahamson now posts van driving for bidding as an extra assignment. At the time of the hearing, three vans were driven

by Paraprofessionals and one by a Bus Driver. For the hours of work they spend in van driving, Paraprofessionals are paid the appropriate hourly rate for a Paraprofessional, and the Bus Driver is paid the appropriate rate for the Bus Driver's classification. Other evidence shows that the Employer has paid Paraprofessionals who do van driving wages for an additional forty-five minutes per day at their Paraprofessional wage rate.

DECISION

The parties' arguments raise issues that I resolve as follows. In Article 2, Section 2, of the labor agreement (hereafter, the "Recognition Provision"), the Employer recognizes the Union as the collective bargaining representative for "all personnel" not required to be licensed as Teachers (except employees excluded by PELRA). This section also provides that the Union, and by clear extension, the personnel represented by the Union, have the rights and duties "described in the provisions of this Agreement."

The Recognition Provision does not expressly refer to the kind of work to be performed by the personnel represented by the Union. Rather, the language defines the Union's representation by reference to personnel -- that licensed Teachers are excluded from that representation and that "all personnel" other than licensed Teachers are included. The exclusion of licensed Teachers and the inclusion of all other personnel necessarily implies 1) that the work Teachers perform is not covered by the labor agreement, and 2) that the work done by "all personnel" other than licensed Teachers is covered by the labor agreement.

This interpretation is, of course, subject to the proviso that the personnel doing the work must be qualified to perform it, a matter not at issue here.

Accordingly, I rule that the work of van driving is covered by the labor agreement because it is not excluded as licensed-teaching work, and because, if it is to be done, it can be performed by personnel represented by the Union.

The evidence shows that neither the Paraprofessional Policy (which the Employer refers to as the job description for Paraprofessionals) nor any other job description, including Policy 707, which relates to transportation of students, establishes the work of van driving as included in the duties of any particular classification. Because the work of van driving is not included in the job description of a particular classification, it is, in that sense, an "extra assignment," but, as I have ruled above, it is, nevertheless, work that, by force of the Recognition Provision, is covered by the labor agreement.

As I understand the Employer's position, it argues that even if van driving is considered to be work covered by the labor agreement, it is still an "extra assignment," not included in the duties of a particular classification, and, therefore, assignable by the Employer to any Union member. The Union argues that, even though no job description assigns van driving to a particular classification, the parties have shown by consistent practice that they consider it to be included in the work of a Paraprofessional.

For the following reasons, I rule that, at the time the grievance arose, in February of 2011, the parties had by

practice shown an agreement that van driving was work to be assigned to the senior Paraprofessional available. Mortensen, Johnson and the grievant all testified that since the District first had a need for van driving, about twelve years ago, it has with few exceptions been performed by the most senior available Paraprofessional. They testified that the selection process used was not the process of posting and bidding as established by the labor agreement, but rather, an informal one -- agreement between the Union and Superintendent Peura to use the most senior Paraprofessional available when an opening occurred. As Johnson testified, in the spring of 2010, Peura recognized this practice by seeking Johnson's assent to a departure from it -- the use of a Custodian for van driving when Paraprofessionals were busy during the school day.

Johnson testified that Superintendent Schultz succeeded Peura in June of 2010. The evidence shows that at first Superintendent Schultz recognized that van driving was covered by the labor agreement, when, in letters to the grievant dated February 14 and 18, 2011, she recognized 1) that the work was covered by the labor agreement and 2) that the grievant had bumping rights derived from the agreement. On March 2, 2011, Schultz changed her decision, rejecting the grievant's right to bump and stating that "there are no van driver positions in the AFSCME contract."

In Elkouri & Elkouri, How Arbitration Works, (6th Ed.) 606, in a chapter entitled, "Custom and Practice as a Term of the Contract," the authors discuss arbitration decisions that

have considered whether consistent and longstanding practice can constitute an implied term of a labor agreement, even in the absence of express language in the agreement. The authors write:

> Under certain circumstances, custom and past practice may be held enforceable through arbitration as being, in essence, a part of the parties' "whole" agreement. Some of the general statements of arbitrators in this regard may be noted:
>
> > It is generally accepted that certain, but not all, clear and long standing practices can establish conditions of employment as binding as any written provision of the agreement. [Citing Alpena Gen. Hosp., 50 LA 48,51 (Jones, 1967)].
> >
> > In cases where the contract is completely silent with respect to a given activity, the presence of a well established practice, accepted or condoned by both parties, may constitute in effect, the unwritten principle on how a certain type of situation should be treated. [Citing Tex. Util. Gen. Div., 92 LA 1308, 1312 (McDermott, 1989)].
>
> . . . .

The evidence shows the kind of consistent and long-standing practice referred to in this passage from <u>How Arbitration Works</u> -- that the assignment of van driving to the senior available Paraprofessional began twelve years ago and continued until the time of the present grievance with a few exceptions and that Superintendent Peura recognized the practice as an implied term of the labor agreement when, in the spring of 2010, he sought the Union's assent to use a non-Paraprofessional for van driving.

The only reference in the labor agreement to bumping appears in the fourth paragraph of Article 14, Section 4, set out above and repeated here:

> Employees may not "bump" into a previously held job class. Example: Sally is laid off from her job as an aide. She previously held the job class of cook. Sally shall be recalled as a cook only when a cook job becomes vacant.

This reference to bumping does not expressly establish such a right, but, by excluding one kind of bumping, it recognizes by implication that employees have such a right. Indeed, Schultz recognized that the labor agreement establishes the right to bump in her letter of February 18. 2011, to the grievant -- though she later decided not to accord that right to the grievant. I rule, therefore, that when the grievant requested to displace Sharen Johnsen, a less senior Para-professional, in February of 2011, the Employer should have permitted her to do so.

The following further discussion, at page 619 of <u>How Arbitration Works</u>, is also relevant in this case:

> . . . an impressive line of arbitral thought holds that a practice that is not subject to unilateral termination during the term of the collective bargaining agreement is subject to termination at the end of said term by giving due notice of intent not to carry the practice over to the next agreement; after being so notified, the other party must have the practice written into the agreement to prevent its discontinuance. [Numerous citations omitted.] One arbitrator explained:
>
>> Consider first a practice which is, apart from any basis in the agreement, an enforceable condition of employment on the theory that the agreement subsumes the continuance of existing conditions. Such a practice cannot be unilaterally changed during the life of the agreement. For . . . if a practice is not discussed during negotiations, most of us are likely to infer that the agreement was executed on the assumption that the practice would remain in effect.
>>
>> The inference is based largely on the parties' acquiescence in the practice. If either side should, during the negotiation of a later agreement, object to the continuance of this practice, it could not be inferred from the signing of a new agreement that the

> parties intended the practice to remain in force. Without their acquiescence, the practice would no longer be a binding condition of employment. In face of a timely repudiation of a practice by one party, the other must have the practice written into the agreement if it is to continue to be binding. [Citing Mittenthal, NAA 14th Proceedings at 56.]

The award in this case requires the Employer to pay the grievant the wages she would have earned if she had been permitted to displace Sharen Johnsen as a van driver on February 22, 2011, when, the evidence shows, she would have completed instruction as to Johnsen's van driving route -- subject, however, to the limitation described just below.

On January 25, 2012, the parties executed a new labor agreement. Before that date, the terms and conditions of employment of bargaining unit members were established by the parties' extension of the provisions of the 2005-2010 labor agreement, including, as I have ruled above, the agreement implied in their mutually accepted practice of using the most senior Paraprofessional available to do the work of van driving.

When, on January 25, 2012, the parties executed their new labor agreement (the nominal duration of which is from July 1, 2010, through June 30, 2013, with possible extension), the 2005-2010 agreement ceased to be effective. During bargaining for the new agreement, the Employer proposed contract language that would make van driving an extra assignment, no longer assignable only to the most senior available Paraprofessional. Though the language was not included in the new contract, the proposal gave effective notice to the Union that the Employer wanted to discontinue its assent to that practice, which bound it while the 2005-2010 labor agreement was in force.

I rule, therefore, that, after execution of the new labor agreement on January 25, 2012, the Employer was no longer bound by the practice it had previously accepted. Accordingly, the award limits the grievant's recovery to wages she would have earned in van driving before January 25, 2012.

AWARD

The grievance is sustained. The Employer shall pay the grievant the wages she would have earned in van driving from February 22, 2011, till January 25, 2012, if she had been permitted, on February 22, 2011, to displace the next most senior Paraprofessional in her van driving assignment. I retain jurisdiction to resolve any dispute the parties may have in determining the amount payable to the grievant.

April 6, 2012

Thomas P. Gallagher, Arbitrator