

BUREAU OF MEDIATION SERVICES

ARBITRATION AWARD

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IN THE MATTER OF ARBITRATION)	
)	
Between)	
)	BMS# 13 PA 0081
INDEPENDENT SCHOOL DISTRICT #740)	
)	
and)	
)	John Remington,
)	Arbitrator
OPERATING ENGINEERS LOCAL 70)	
)	
_____)	

THE PROCEEDINGS

The above captioned parties, having been unable to resolve a grievance over the assignment of custodial work, selected the undersigned Arbitrator John Remington, pursuant to the provisions of their collective bargaining agreement and under the rules and procedures of the Minnesota Bureau of Mediation Services, to hear and decide the matter in a final and binding determination. Accordingly, a hearing was held on December 6, 2012 in Melrose, Minnesota at which time the parties were represented by counsel and were fully heard. Oral testimony and documentary evidence were presented; no stenographic transcription of the proceedings was taken; and the parties requested the opportunity to submit post hearing briefs which they did subsequently file on January 18, 2013.

The following appearances were entered:

For the Employer:

Kevin J. Rupp, Esq.	Rupp, Anderson, Squires & Waldspurger
Francis Hinnenkamp	Custodial Supervisor
Tom Rich	Superintendent

For the Union:

M. William O'Brien, Esq.	Miller, O'Brien & Jensen
Dave Eiyneck	Business Representative

THE ISSUE

The parties were unable to agree upon a statement of the issue at the hearing. The Union frames the issue as “whether or not the Employer violated the collective agreement by regularly assigning bargaining unit custodial duties to a Supervisor?” The Employer asserts that the issue is whether or not it violated the collective agreement by assigning minimal cleaning duties (2.75 hours per day) to an Assistant Custodial Supervisor, and whether or not such assignment is permitted by past practice. However, the Employer also contends that there are significant preliminary issues to be resolved including: is the grievance barred because it was untimely filed; is the grievance waived or barred because grievance information was not submitted in a timely manner as required by the collective agreement; and is the grievance precluded by the Minnesota Public Employee Labor Relations Act? These preliminary issues must be addressed prior to any consideration of the merits of the grievance.

BACKGROUND

Independent School District No.740, hereinafter referred to as the “EMPLOYER or DISTRICT,” is a state chartered school district which operates the public primary and secondary schools of Melrose, Minnesota. Full and part-time custodial employees of the District are represented, for purposes of collective bargaining, by the International Union of Operating Engineers and its Local Union #70, hereinafter referred to as the “UNION.” Janice Bunyea, the Grievant in this matter, is a custodian and the Union Steward.

The facts are essentially undisputed. On April 30, 2012 the Union submitted a grievance on behalf of Grievant alleging that supervisory personnel were performing bargaining unit work (cleaning) in violation of the collective agreement. It would appear from the record that the Union’s concern in this regard dates from the appointment of John Dziengel as Assistant Custodial Supervisor in April of 2010. Prior to Dziengel’s appointment the District utilized two custodial supervisors, both of whom worked during daytime hours.¹ However, Dzeingel was assigned to work from 2:30 p.m. to 11:00 p.m. when most bargaining unit custodians are also at work. At the hearing the Union indicated that the grievance was also intended to protest custodial work performed by both Dziengel and Custodial Supervisor Fran Hinnenkamp. The grievance formally filed on April 30, 2012 simply states: “It was discovered by the Union that custodial duties (cleaning) is being performed by non-bargaining unit employees.” The grievance alleges violation of “Article II, Section 2 and Article III, Section 2; and any/all other Articles and

¹ The record reveals that most custodial work is performed after 2:30 p.m. and that bargaining unit employees normally work between 2:30 p.m. and 11:00 p.m.

past practices that may apply.” It requests that “Bargaining Unit work to be performed by bargaining unit members only” in remedy.

Following informal attempts to resolve the matter prior to the filing of the written grievance, the Union’s claim was effectively rejected by Superintendent Rich in a letter to Union Business Representative Dave Eynck on April 23, 2012. This letter states, in relevant part:

In addition, I note that Article 2, Section 1 of the contract states that the union represents “custodial employees,” not “assistant custodial supervisors.” Furthermore, since our discussion we have reevaluated our custodial staff schedules and were able to change the schedules of three (3) of our staff. Because of this the Assistant Custodial Supervisor will be cleaning 2.75 hours/day beginning today. This amount of work does not meet the “fourteen (14) hours per week or thirty-five (35) percent of the normal work week” requirement contained in Article 2, Section 2 and PELRA.

Finally, and most importantly, the arrangement with the Assistant Custodial Supervisor is simply effective and efficient. We do not see a reason or requirement that we change his assignment.

The grievance was denied by the Employer following a Step 2 meeting on June 5, 2012, and was rejected by the Board of Education on June 25, 2012. It was ultimately processed to arbitration in compliance with the provisions of the collective agreement. As noted above the Employer raises procedural objections to the consideration of the merits of the grievance. The parties agree that these objections, along with the merits of the dispute, are properly before the Arbitrator for final and binding resolution.

PERTINENT CONTRACT PROVISIONS

Article 2- Recognition of Exclusive Representative

Section 1. Recognition: In accordance with PELRA, the School District recognizes the International Union of Operating Engineers, Local No. 70 as the exclusive representative of full-time and part-time custodial employees employed by the School Board of Melrose Area Public Schools #740, which exclusive representative shall have those rights and duties as prescribed by PELRA and as described in the provisions of this Agreement.

Section 2. Appropriate Unit: The exclusive representative shall represent all such employees of the School District contained in the appropriate unit as defined in Article 3, Section 2 of this Agreement and the PELRA and in certification by the Director of the State of Minnesota, Bureau of Mediation Services.

Article 3- Definitions

Section 1. Terms and Conditions of Employment: Terms and conditions of employment shall mean the hours of employment, the compensation therefore, including fringe benefits, except retirement contributions or benefits, and the employer's personnel policies affecting the working conditions of the employees. "Terms and Conditions of Employment" is subject to the provisions of PELRA.

Section 2. Description of Appropriate Unit: For purposes of this Agreement, the term "custodian" shall mean all persons in the appropriate unit employed by the School District in such classifications excluding the following: confidential employees, essential employees, part-time employees whose services do not exceed the lesser of fourteen (14) hours per week or thirty-five (35) percent of the normal work week in the employees' bargaining unit, employees who hold positions of a temporary or seasonal character for a period not in excess of sixty-seven (67) working days in a calendar year unless those positions have already been filled in the same calendar year and the cumulative number of days in the same position by all employees exceeds sixty-seven (67) days in that year, and emergency employees.

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Article 4- School Board Rights

Section 1. Inherent Management 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 and all management rights and management functions not expressly delegated in this Agreement are reserved to the School Board.

Section 2. 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 to provide educational opportunity for the students of the School District.

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Article 15- Grievance Procedure

Section 1. Grievance Definition: A “grievance” shall mean an allegation by an employee resulting in a dispute or disagreement as to the interpretation or application of any terms or terms of this Agreement.

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Section 4. Time Limitation & Waiver: Grievances shall not be valid for consideration unless the grievance is submitted in writing to the School Board’s designee setting forth the facts and the specific provision of the Agreement allegedly violated and the particular relief sought within fifteen (15) days after the date the event giving rise to the grievance occurred. Failure to file any grievance within such period shall be deemed a waiver thereof. Failure to appeal a grievance from one level to another within the time periods hereafter provided shall constitute a waiver of the grievance. An effort shall first be made to adjust an alleged grievance informally between the employee and the School Board’s designee.

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Section 8. Arbitration Procedures: I the event that the employee and the School District are unable to resolve any grievance, the grievance may be submitted to arbitration as defined herein.
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Subd. 4. Submission of Grievance Information

- a. Upon appointment of the arbitrator, the appealing party shall, within five (5) days after notice of appointment, forward to the arbitrator, with a copy to the School Board, the submission of the grievance, which shall include the following:
 - (1) The issues involved.
 - (2) State of the facts.
 - (3) Position of the grievant.
 - (4) The written documents relating to the grievance
- b. The School Board may make a similar submission of information relating to the grievance, either before (or) at the time of the hearing.

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Subd. 8. Jurisdiction: 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 as outlined herein; nor shall the jurisdiction of the arbitrator extend to matters of inherent managerial 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. In considering any issue in dispute, in its order the arbitrator shall give due consideration to the statutory rights and obligations of the public School Board to efficiently manage and conduct its operation within the legal limitations surrounding the financing of such operations.

Article 19- Duration

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Section 2. Effect: This Agreement constitutes the full and complete Agreement between the School District and the exclusive representative representing the custodial employees of the School District. The provisions herein relating to terms and conditions of employment supersede any and all prior agreements, resolutions, practices, school of employment inconsistent with these provisions.

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CONTENTIONS OF THE PARTIES

The Union takes the position that the Employer has violated the collective bargaining agreement by assigning bargaining unit custodial duties to supervisors and requests in remedy that the Employer cease and desist from making such assignments. The Union argues that Section 2 of Article 19, supra, precludes enforcement of any verbal side agreements that permit supervisors to perform bargaining unit work and further argues that there is no credible evidence to show that any such side agreement ever existed. The Union further takes the position that there is no binding past practice between the parties which permits supervisors to perform bargaining unit work. Finally, the Union contends that the Employer's various procedural arbitrability arguments lack merit. Accordingly, it requests that the grievance be sustained.

The Employer takes the position that the grievance has been waived because it was not timely filed within the meaning of the collective agreement; that it has also been waived on the basis that certain grievance information was not properly submitted within five days of the appointment of the Arbitrator as required by Article 15, Section 8,

Subdivision 4; and that the grievance is precluded by the provisions of Minnesota Statutes 179A (Public Employees Labor Relations Act [PELRA], as amended). The Employer further takes the position that the past practice of the parties establishes that the cleaning duties being performed by the Assistant Custodial Supervisor are an accepted way of doing business. In this connection the Employer argues that the cleaning duties admittedly performed by Custodial Supervisor Hinnenkamp are *de minimis*; were never discussed by the parties during the grievance process; and were first raised at the arbitration hearing. Finally, the Employer contends that the 2.75 hours per week of cleaning work admittedly performed by the Assistant Custodial Supervisor are permitted by the terms of the current labor agreement, are *de minimis*: and are permitted within the meaning of PELRA. The Employer therefore asks that the grievance be denied.

DISCUSSION, OPINION AND AWARD

Prior to any consideration of the merits of this dispute, the Arbitrator must address the arbitrability challenges raised by the Employer.

Timeliness of the Grievance

The Employer maintains that the grievance was not filed within the fifteen day time limit specified in Article 15, Section 4. The Union counters that the grievance was filed within fifteen days of when the Union first became aware of the violation and that, in any event, the violation was continuing in nature and indeed continued up until the date of the arbitration hearing. There can be no doubt from the record that the Union's assertion in this regard is correct. Employer witnesses Tom Rich and Hinnenkamp both testified that the Assistant Custodial Supervisor has been continuously assigned cleaning

work since his appointment to that position and Hinnenkamp testified that approximately 10 to 15 percent of his own work involves cleaning the cafeteria on a daily basis, work he has performed for at least fourteen years as a supervisor. As many arbitrators have found in similar cases, continuing violations of the contract are deemed continuing grievances. Each time that a violation is repeated it gives rise to a new grievance. Because supervisors continued to perform custodial work throughout the grievance process, the instant grievance must be deemed timely. Accordingly, the Employer's argument in this regard must be, and is hereby, rejected.

The Employer raises a similar arbitrability argument when it maintains that the Union failed to submit certain information to the Arbitrator within five days of the notice of appointment as required by Article 15, Section 8, Subdivision 4, *supra*. The Union concedes that it made no separate submission of this information to the Arbitrator but argues that the Employer was in timely possession of all of the relevant information from the grievance submission and ensuing grievance meetings. Indeed, Superintendent Rich testified that he was in possession of this information and admitted that the Employer was in no way prejudiced by the Unions "technical" non-compliance. It is also significant that the parties jointly communicated with the Arbitrator following his appointment by electronic mail on August 8, 2012; again on August 22, 2012; again on August 31, 2012; again on September 4, 2012; and again on December 4, 2012, but the Employer never raised its arbitrability objection regarding the submission of grievance information provided for in Article 15. The Employer clearly had multiple opportunities to assert its rights under Article 15, Section 8, Subdivision 4, but failed to do so. The Arbitrator must therefore find that the Employer's failure to assert its objection in this regard must be

deemed a waiver of the claimed Article 15 rights by the Employer in this instance. Moreover, he finds that the Employer was not prejudiced by the Unions apparent non-compliance. The Employer's argument in this regard must therefore also be rejected.

Contention that the Grievance is Precluded by PELRA

The Arbitrator does not deem it productive to fully discuss the Employer's claim that the grievance is somehow precluded by PELRA because it seeks a bargaining unit determination from the Arbitrator or that the Union is effectively engaging in an unfair labor practice by attempting to coerce the Employer to assign certain work to the bargaining unit. The Arbitrator clearly has no authority to award either of these outcomes in remedy to the grievance. There is no jurisdictional dispute here as contemplated by Minnesota Statute 179A.13, a provision identical to Section 8(b)(4)(D) of the National Labor Relations Act. Suffice it to say that the Arbitrator is fully in accord with the arguments asserted by counsel for the Union in his post hearing brief and must, accordingly, reject the argument advanced by the Employer and find that the grievance is not precluded by PELRA.

Past Practice

The Employer contends that it has been a clear, consistent and longstanding practice for custodial supervisors to perform some cleaning work similar to that performed by bargaining unit members. In fact, when John Dziengel was hired as an Assistant Custodial Supervisor in April of 2010, he was scheduled by the Employer to spend approximately 50% of his time cleaning. Superintendent Rich testified that he discussed this scheduling arrangement at some point with then Union Business Agent Cynthia Evans in "the April to June 2010 timeframe." Evans allegedly approved this

scheduling so long as Dziengel's cleaning duties did not exceed 50% of his work time.²

While it is apparent to the Arbitrator that custodial supervisors have regularly engaged in cleaning activities for many years in the District, and that such cleaning can fairly be characterized as an accepted means of doing business, the collective bargaining agreement contains a clear and unambiguous "zipper" clause (Article 19, Section 2) which provides:

The Agreement constitutes the full and complete Agreement between the School District and the exclusive representative representing the custodial employees of the School District. The provisions herein relating to terms and conditions of employment **supersede any an all prior agreements, resolutions, practices, school of employment inconsistent with these provisions.** (Emphasis added.)

This agreement was signed by the Employer on September 8, 2010, well after Dziengel was hired and well after Evans allegedly approved his performance of cleaning duties.

The Arbitrator is therefore compelled to find that any past practice that may have existed regarding the performance of cleaning duties by supervisors was terminated by the express terms of Article 19, Section 2.

We are left, therefore, with the question of whether or not the performance of cleaning duties by supervisors is in violation of the 2010-2012 collective bargaining agreement. This question is wholly a matter of contract interpretation. The agreement contains no language directly prohibiting the performance of bargaining unit work by supervisors, nor is there language specifically authorizing such work, even on a limited

² Evans did not testify. Current Union Business Agent Dave Eiyneck testified that he was unable to find any written agreement or record of this so called agreement. Rich's recollection is hearsay and cannot be given great weight.

basis. The Arbitrator must therefore find that the agreement is ambiguous with respect to the subject grievance.

The Union argues that the recognition clause (Article 2) together with description of the appropriate unit in Article 3, Section 2 prohibits supervisors from performing custodial work and cites numerous arbitrators who have denied the unilateral re-assignment or transfer of essential work to non-bargaining unit employees. The difficulty is that here there is no apparent re-assignment or transfer of work as it cannot be denied that supervisors have performed some cleaning and other custodial work for many years. Although the contract is silent with respect to the performance of bargaining unit work by supervisors, it does in Article 4 retain the Employer's right to determine the "organizational structure and selection and direction and number of personnel and all management rights and management functions not expressly delegated" This language tends to support the position taken by the District. Further, it is apparent that the parties intended to permit some flexibility in the Employer's assignment of custodial work in Article 3, Section 2 by excluding confidential employees, essential employees and part-time employees who perform a limited amount of custodial work from the bargaining unit.

Article 3, Section 2 clearly permits the Employer to assign custodial work to a non-bargaining unit member so long as that employee works less than 2.75 hours per day or less than 14 hours per week. While the intent of this provision appears to be to permit the Employer to hire part-time or temporary employees outside the bargaining unit, it is not unreasonable to apply this standard to a supervisor who is a full time employee but also serves as a part-time custodian. Such an interpretation of the contract language

balances the legitimate interests of both the Employer and the bargaining unit members. As Arbitrator Smith opined in 36 LA 1018, “the managerial interest in efficient allocation of work should not have to stop at the boundaries of a defined bargaining unit. On the other hand, the decision to allocate work to employees outside the bargaining unit should be one made in the honest exercise of business judgment, and not arbitrarily, capriciously, or in bad faith.” The Arbitrator finds that there is no evidence of bad faith or arbitrary and capricious determination in the record and that the Employer has here assigned limited bargaining unit work to custodial supervisors in the honest exercise of business judgment.

Brief comment is warranted with respect to the Union’s contention that the District does not employ a sufficient number of custodians to effectively clean the approximately 300,000 square feet of building space managed by the District. While this contention may have some merit, the collective agreement clearly reserves to the Employer the right to determine its own organizational structure and select the number of employees necessary to perform needed work. Accordingly, the Union’s preferred level of custodial staffing as suggested by the Service Management Assist, Inc. (Union Exhibit # 2) cannot be deemed material to the instant dispute.

The Arbitrator has made a particularly detailed review and analysis of the record in this matter; has carefully examined the relevant portions of the collective agreement; and has thoroughly considered the various arguments set forth in the post hearing briefs. Further, he has determined that certain issues raised in these proceedings must be deemed immaterial, irrelevant or side issues, at the very most, and therefore has not afforded them any significant attention, if at all, for example: Assistant Custodial Supervisor Dziengel’s

pay and duties, whether or not Dziengel is married to a member of the School Board; whether or not Hinnenkamp performs most of the District's boiler related functions; whether or not the Employer or the Union called Evans to testify; and so forth.

Having considered the above review and analysis together with the findings and observations hereinabove made, the Arbitrator has determined, and so he finds and concludes, that with the specific facts of the subject grievance, and within the meaning of the parties' collective agreement, that the Employer violated the provisions of that agreement when it assigned Assistant Custodial Supervisor John Dziengel four hours per day of custodial duties. However, it rectified this violation when it reduced Dziengel's cleaning duties to 2.75 hours per day. The Arbitrator further finds that the custodial work currently performed by Supervisor Fran Hinnenkamp is *de minimis* and not in violation of the collective agreement. Accordingly, the grievance is sustained, in part, and denied, in part. An award will issue, as follows:

AWARD

THE EMPLOYER VIOLATED THE PARTIES'
COLLECTIVE AGREEMENT WHEN IT ASSIGNED
50% CUSTODIAL DUTIES TO THE ASSISTANT
CUSTODIAL SUPERVISOR.

REMEDY

THE EMPLOYER SHALL DESIST FROM ASSIGNING
MORE THAN 2.75 HOURS PER DAY OF CUSTODIAL
WORK TO CUSTODIAL SUPERVISORS.

JOHN REMINGTON, ARBITRATOR

February 20, 2013

Gilbert, AZ