IN THE MATTER OF ARBITRATION	**OPINION & AWARD**
-between-	**Grievance Arbitration**
EDUCATION MINN.-HERMANTOWN	**B.M.S. Case No. 10PA1299**
-and-	**Re: Job Description/Wages**
INDEPTENDENT SCHOOL DIST.700 HERMANTOWN, MINNESOTA	**Before: Jay C. Fogelberg Neutral Arbitrator**

Representation-

For the Union: Jess Anna Glover, Staff Attorney

For the District: Kevin J. Rupp, Attorney

Statement of Jurisdiction-

The Collective Bargaining Agreement duly executed by the parties, provides in Article XII for an appeal to binding arbitration of those disputes that remain unresolved after being processed through the initial steps of the grievance procedure. A formal complaint was submitted by the Local on behalf of the Grievants on or about December 16, 2009, and thereafter appealed to binding arbitration when the parties were unable to resolve this matter to their mutual satisfaction. The under-

signed was then mutually selected as the neutral arbitrator by the parties, and a hearing convened on February 1, 2011 in Hermantown. Following receipt of position statements, testimony and supportive documentation, each side indicated a preference for submitting written summary briefs which were received on March 7, 2011. Thereafter, the hearing was deemed officially closed.[1]

While the parties were unable to agree upon a precise statement of the issue(s), the following is believed to fairly represent an accurate description of the questions to be examined.

The Issues-

1) Is the Union's grievance arbitrable?

2) If so, did the School District violate the parties' Collective Bargaining Agreement and/or prior arbitration award, when they unilaterally implemented a revised job description for those members of the bargaining unit classified as "Janitors" and "Maintenance Employees"?

3) If so, what shall the appropriate remedy be?

[1] At the hearing, the parties waived the thirty day time limitation for rendering an award set forth in Article 1 of the Master Agreement.

Preliminary Statement of the Facts-

The record developed during the course of the proceedings indicates that Education Minnesota-Hermantown Local 1096 (hereafter "Union" or "Local") represents the para-professional, clerical, janitorial and maintenance personnel employed by Independent School District 700 in Hermantown ("District," "Employer," or "Administration"). Together, the parties have negotiated and executed a collective bargaining agreement covering terms and conditions of employment (Joint Ex. 2).

In July of 2008, the Union filed a grievance with the Administration based upon the Employer's unilateral alteration and implementation of a job description for the Janitors. While the Local did not challenge the District's right to change those descriptions or to assign duties, they objected to the Administration's decision to the extent that they believed it amounted to a significant modification of the janitorial position thereby unilaterally altering the classification itself without first bargaining with the Union.

Ultimately the dispute was appealed and the arbitrator ultimately sustained the grievance in his May 2009 decision (Joint Ex. 18), ruling that

inasmuch as the parties had utilized a 1999 job description when negotiating the terms and conditions of employment for the Janitors, they were to continue its use it "…until such time as they are able to negotiate a change in terms and conditions of employment for the job classification of Janitor" (*id*., at p. 10). Further the arbitrator noted that in the event the District wishes to expand the classification of Janitor to include certain maintenance work, it must negotiate such changes with the Union. He further ruled that in the event the classification changes as a result, "….the parties must also negotiate over wages to be paid for the new classification"

In the fall of 2009, the Union expressed concern to the District's Superintendent of Schools, Brad Johnson, that the Janitorial staff was still being asked to perform maintenance duties that were not part of their job description. Additional correspondence between the parties did not resolve the matter and on November 23, 2009, the School Board at a regularly scheduled meeting, adopted a new job description for the janitorial staff (Employer's Ex. 4). Shortly thereafter, according to the Employer's Maintenance Supervisor, Dan Swanson, each of the members of the bargaining unit classified as Janitors or Maintenance employees

(estimated to be approximately thirteen in number) were given a copy of the new description which was implemented on December 1, 2009.

Believing that the Administration's unilateral action resulted in a change in the terms and conditions of employment for both janitorial and maintenance personnel, and moreover contrary to the arbitrator's previous ruling, the Union filed a class-action grievance on December 16, 2009, alleging a violation of the Master Agreement (Article 1) and the May 26th award issued that same year (Joint Ex. 3).

The parties entered into negotiations for a new Contract in February of 2010. A number of proposals and counter proposals were exchanged over the course of the next few months, and the subject of the changes in the job description was discussed (Union's Exs. 2, 3, & 4). In August the parties utilized the services of a mediator in an effort to break their impasse. With his help, a new Master Contract covering the term 2009 – 2011 was finally agreed to in the fall of that year (Joint Ex. 2). The negotiations however, did not resolve the outstanding grievance, and eventually the dispute was appealed to binding arbitration.

Relevant Contract Provisions-

Article 1
Purpose

Section 1. Parties: This Agreement is entered into between Independent School District No. 700, Hermantown, Minnesota (hereafter referred to as the School District) and the Education Minnesota-Hermantown, Paraprofessional and School Related Personnel Unit, Local 1096 (hereafter referred to as the Union), pursuant to and in compliance with the Public Employment Labor Relations Act of 1971 as amended, hereafter referred to as the P.E.L.R.A., to provide the terms and conditions of employment of all office, clerical, secretarial, paraprofessional, maintenance and janitorial employees.

Article 12
Grievance Procedure

Section 1. Grievance Definitions. A "grievance" shall mean an allegation by the Union resulting in a dispute or disagreement between the Union and the School District as to the interpretation or application of terms and conditions contained in this Agreement.

Positions of the Parties-

The **UNION** takes the position in this matter that the Employer has violated the parties' Collective Bargaining Agreement as well as the express provisions of the previous arbitration award when they unilaterally

imposed changes to the terms and conditions of the work assignments given to Janitors and Maintenance personnel without first negotiating with the Local. In support of their claim, the Union contends that the Employer is simply attempting to save money on the backs of some of its lowest paid employees by switching maintenance work to the Janitors who are paid a considerably lower wage rate. The arbitration award issued in the spring of 2009 required the District to use the previous (1999) job description until such time as the parties were able to bargain over a change in the terms and conditions of employment for the janitorial classification. However, almost immediately after the decision was issued, the Administration was at it again, according to the Local, changing the job description for both Janitors and Maintenance Workers without first negotiating with the Union. Moreover, although the parties entered into contract talks for a new Master Agreement, and the issue of the altered job description was addressed more than once, no resolution resulted. The Union urges that just as before, the Administration's unilateral action has dramatically changed the job description for the janitorial staff by adding to the type and frequency of maintenance duties the staff is required to perform. The Employer's maneuvering are

transparent, in the Grievants' view, as the maintenance personnel are paid $5 more per hour than Janitors, and the District has consistently sought to reduce their numbers while hiring more Janitors and assigning them maintenance work, paying them far less to do it. Finally, the Local argues that their complaint is arbitrable as the Administration's actions have had a severe adverse effect on the terms and conditions of employment for the janitorial staff. Accordingly, they ask that the grievance be sustained and that the new (2009) job descriptions be suspended until the parties are able to negotiate over the changes to the terms and conditions of employment for the job classifications in question.

Conversely, the **DISTRICT** takes the position that the Union's grievance is not arbitrable and moreover that the Employer did not violate the terms of the parties' Labor Agreement, or the 2009 arbitration award by implementing a revised job description on December 1, 2009, subject to the parties' negotiations relating to the 2009-2011 collective bargaining agreement. In support of their position, the Employer maintains that it is clear the Local's written grievance as submitted to the Superintendent, focuses on the prior arbitration award. In fact, the only

reference to any portion of the Master Agreement is Article 1 which simply identifies the parties to the contract. Article XII defines a "grievance" as being a dispute between the Union and the District regarding the application or interpretation of terms and conditions specifically referenced in the agreement itself. Nowhere in the document, however, is there language prohibiting the District from altering a job description.

In the alternative, the Administration asserts that in the fall of 2009, the members of the janitorial staff were raising questions regarding their duties and those of the maintenance staff. They wanted a clarification of their job description. In response to those concerns, the Superintendent met with representatives of the Union to discuss the matter and ultimately a revised description was created and subsequently adopted by the School Board in late November of that year. When contract negotiations commenced in early 2010, the Local had every opportunity to bring the issue to the table. Indeed, each of the Employer's proposals included explicit language at the top indicating that the Union had a right to negotiate a new wage rate for the Janitors as a result of the modified janitorial and maintenance job descriptions. According to the Employer,

at one point they specifically told the Local that if they wished to make changes they should make a monetary proposal. That however, did not occur and a new Labor Agreement was reached without any new language reflecting a wage change as a result of the modified job descriptions. Finally, the Employer argues that the words of the arbitrator in the previous award were carefully crafted indicating that the Unoin possessed the ability to negotiate changes but that it was not imperative they do so. For all these reasons then, they ask that the grievance be denied.

Analysis of the Evidence-

Initially, the Employer's argument regarding substantive arbitrability must be considered. In this regard, they assert that the Union's complaint does not address a portion of the parties' Agreement, and therefore the Arbitrator is necessarily precluded from examining the case on its merits. This argument however, is not persuasive. Rather, based upon the language in the parties' Agreement, their history regarding the 2008 grievance and the subsequent arbitration addressing it, as well as the oft-cited presumptions of arbitrability supported by the courts, I find that this

matter is properly before me to be decided bases upon the substantive evidence surrounding the dispute.

Distilled to its essence, the Administration maintains that the Local's complaint focuses almost entirely on Arbitrator Lundberg's prior decision and award and therefore does not meet the definition of a grievance as set forth in Article XII of the Master Contract, *supra*. Section 12.1 states that a grievance is a dispute over the interpretation or application of "...terms and conditions contained in this Agreement" (Joint Ex. 2). In the prior award however, the arbitrator noted that there were "no procedural issues" along with the stipulation by the parties that the matter was properly before him for resolution based upon the merits (Joint Ex. 18, p. 1). The relevant contract language referenced in the same document then specifically lists Article 1 of the Master Contract and Appendix "A" (*id.*, p. 2-3). These are the very same portions of the current contract that are either cited or referenced in connection with the instant grievance.[2]

It is further noted that once the second grievance was filed, and subsequently processed, at no time prior to the arbitration itself is there

[2] With the exception of the wage rates for job classifications within the bargaining unit, the language in the 2007-09 and 2009-11 Agreements are essentially the same.

any indication that the District was contesting its arbitrability when they denied the complaint at step two and again at step three (Joint Ex. 3).

Additionally, I am persuaded by the Local's argument that where a new incident generally gives rise to the same issue that is addressed in an earlier award, the new incident may be taken to arbitration.[3] As the Elkouris have noted in their well-respected treatise on arbitration, whether an award has a binding precedential effect on a future dispute is a proper subject for arbitration, absent express language in the parties' labor agreement to the contrary. No such prohibition is found in Joint Exhibit 2, and when coupled with the relevant language included in Arbitrator Lundberg's award and the strong presumption in labor jurisprudence that a grievance is normally arbitrable, I conclude that the success or failure of the Union's December 2009 complaint must rise or fall based upon its merits.

There is essentially no dispute but that the District has been shifting job duties, normally performed exclusively by the maintenance personnel, over to those occupying the classification of janitor. It is equally clear that the change has been driven in no small measure by the Employer's desire to cut costs in light of diminished revenues, while at

[3] Referencing Elkouri & Elkouri's treatise, *"How Arbitation Works," 5th Ed. at p. 609.*

the same time increasing the efficiencies of its work force.[4] Furthermore, the record is void of any evidence that either party is seeking an arbitral ruling that addresses the specific job duties of the maintenance personnel and what duties are reserved to the janitors. Rather, what is of paramount importance is the precedential value of the earlier decision and award of Arbitrator Lundberg, and the events that followed.

It is undisputed that not long after Mr. Lundberg's decision was issued in May of 2009, the Employer (in October of that same year) revised the job descriptions for those working in the janitorial and maintenance classifications. While the Employer urges that the revisions were intended to clarify any confusion that may have existed at the time concerning each classification's job responsibilities, the fact remains that the alterations were unilaterally imposed and approved by the School Board on November 23, 2009 (District's Ex. 11). The Administration has attempted to down play their action as being merely a means of clarifying any confusion between the two groupings' responsibilities. However, I would agree with the Union that it constituted a more significant modification as the changes appear to reflect expanded

[4] It is undisputed that since at least 2007, the hourly wage differential between the two classifications has approached $5.00.

responsibilities for the janitorial staff. Where previously a Grievant might have assisted someone in the maintenance classification with a particular chore, under the newly revised description, janitors are expected to work independently on some assignments, performing tasks that had previously been identified as maintenance work alone (Employer's Ex. 19; Union's Ex. 1). Indeed, the Employer does not deny that the altered description contains reference to additional repair-type work that had not been identified as falling within the purview of the janitors' routine job assignments heretofore (District's Ex. 4). That the proposed "clarification" needed the School Board's approval in order to take effect, is further evidence of the significance of the event.

The District's unilateral change to the existing (1999) job description for janitors by assigning unsupervised maintenance work to them, was also the catalyst that led the Union to file their earlier grievance in July 2008. As previously noted, that matter was ultimately appealed to arbitration and the complaint of the Local sustained by the arbitrator (Joint Ex. 18). The Grievants now assert that Mr. Lundberg's decision is binding on the facts that gave rise to the instant dispute. The Administration, on the other hand, argues that the circumstances

surrounding the Union's current grievance have changed materially from the prior complaint, and therefore the earlier decision does not control the outcome of this one. I must however, respectfully disagree with the Employer's assertion.

Both the District and the Union have referenced the Elkouris' treatise, *How Arbitration Works*, BNA 6th ed., as support for their respective positions. In relevant part, the authors observe:

> "...where a new incident gives rise to the same issue that is covered by a prior award, the new incident may be taken to arbitration, but in the absence of materially changed circumstances, it may be controlled by the prior award" (*id.*; at pp. 577-78).

The parties differ however, with regard to the Elkouris' remarks, when applied to the December 16, 2009 submission. According to the District, the fact that they implemented the changes in job duties prior to the negotiations over the current contract, as opposed to immediately after reaching an agreement with the Union in 2008, constitutes a material change that significantly diminishes the impact of Arbitrator Lundberg's decision in connection with the instant matter. Again, however, I must disagree with this rational.

The Supreme Court, in its often-cited decision, *W.R. Grace & Co. vs. the Rubber Workers Local 759*, 461 U.S. 757, has ruled that arbitral awards are not entitled to the same precedential effect given to judicial decisions, nor are they necessarily binding when arbitration cases follow that involve similar contract language but a different complaint or incident. At the same time, however, case law and arbitral authority do not preclude the use of a prior award as guidance. Whether the modification of the janitors' job description occurred before or after the collective bargaining process had been undertaken by the parties is not, in my judgment, nearly as significant as the unrefuted fact that it was done unilaterally and without first negotiating with the Local regarding the proposed changes.

The Employer relies on the fact that, unlike the previous incident, the alterations implemented in 2009 were in advance of the 2009-2011 contract between the parties, thereby giving he Local the opportunity to negotiate with the Administration once bargaining commenced. However, in spite of numerous opportunities to address the issue at the table, the Union declined to do so. This argument, however begins to lose altitude when the unrefuted fact of a unilateral, and significant,

change in the job duties and responsibilities for janitors is factored into the equation, along with relevant contract language.

The evidence demonstrates that negotiations between the Union and the District had not commenced at the time the Employer implemented the job description changes. The master agreement in effect then (and the current one as well) in Article XV, Section 1, contained language protecting the status quo for the life of the contract which ran for a period from July 1, 2007 through June 30, 2009, "....and thereafter as provided by P.E.L.R.A." (Joint Ex. 1; p. 25). The same document, in Article XII, Section 8, states that an arbitrator's decision in cases properly before him/her are final and binding on the parties.

Arbitrator Lundberg's opinion and award notes specifically that, at the outset of that hearing, the parties stipulated the grievance was properly before him for "a final and binding determination" (Joint Ex. 18; p. 1). In connection with his findings and award, he directed the parties to, "....continue to use the 1999 through 2008 job description of janitor.....until such time as they are able to negotiate a change in terms and conditions of employment" for the classification of janitor (*id.,* at pp. 10-11). The District contends that the word "able" utilized in Lundberg's

award meant that the Union had the ability to address the issue when the parties commenced negotiations over the current agreement. While there is no particular reference to negotiations relating to the next contract in the arbitrator's May 26th decision, it takes no leap of faith to conclude that the "proper remedy" identified contemplated that the parties "… follow the terms negotiated in the July 1, 2007 through June 30, 2009 contract" until such time as they could bargain over proposed changes to the job classification. A reasonable interpretation of these words lead to the conclusion that the arbitrator wanted the status quo to continue for the life of the current contract and to then negotiate over the *proposed* changes once bargaining commenced over the successor agreement. The subsequent actions of the Employer were not consistent with the remedy ordered, however. Rather they took upon themselves to unilaterally alter the job description for the Grievants in advance of any negotiations with the Local on the subject.

The District maintains that Mr. Lundberg's wording of his decision only required them to bargain with the Union over the impact of the new job description they formulated and adopted, as opposed to the revisions in the duties themselves. They argue that the Local had

repeated opportunities to negotiate the wage changes and related benefits throughout the bargaining process – and indeed, were reminded of this more than once in writing – but chose not to do so. This position however, ignores the mandate set forth in the prior decision. Arbitrator Lundberg wrote:

> "On the other hand, *the Employer may not unilaterally impose new terms and conditions of employment upon the job classification of janitor to include some independent maintenance work,* it must negotiate over the change in terms and conditions of employment…..If the classification is changed, the parties must *also* negotiate over wages to be paid for the new classifications" (Joint Ex. 18; pp. 9-10; emphasis added).

Clearly, the terms of the prior decision prohibited the District from imposing the changes in the job description in advance of bargaining with the Union. Yet that is precisely what occurred. Nor do I find the Employer's actions to constitute a *de minimis* violation of Arbitrator Lundberg's award. The changes adopted, as previously noted, included increased maintenance work being performed independently by members of the janitorial classification. Moreover, it violated Article XII of the only Master Agreement then in existence relative to the final and binding effect on an arbitrator's decision on the parties.

Award-

Based upon the foregoing analysis, I conclude that the District's actions were in violation of both the Master Contract and the prior ruling of the arbitrator. The grievance is therefore sustained. Accordingly, the Employer is directed to continue to apply the 1999 through 2008 job description of janitor to define their classification, and to forthwith cease the reassignment of duties to janitorial workers pursuant to the 2009 job description unilaterally adopted by the Administration. To be clear, consistent with Arbitrator Lundberg's decision, going forward the Employer's obligation is to meet and bargain in good faith with the Local regarding any significant expansion of janitorial job responsibilities that is being contemplated similar to what occurred in December of 2009, as well as the impact of such a revision *vis-à-vis* wages and benefits. In light of the timing of this award and negotiations over a new master agreement that is pending, the obligation mandated here may be rolled into the general bargaining process once it commences. The Union is also obligated to exhibit the same standard of good faith at the table.

Respectfully submitted this 14th day of April, 2011.

Jay C. Fogelberg, Neutral Arbitrator