BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

AFSCME, LOCAL 727

and

MENOMONIE SCHOOL DISTRICT

Case 53
No. 60324
MA-11580

(Glen Bowe Grievance)

Appearances:

Mr. Steve Day, Staff Representative, Wisconsin Council 40, AFSCME, appearing on behalf of the Union.

Mr. Steve Weld, Attorney, appearing on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and the District respectively, were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance. A hearing, which was not transcribed, was held on November 7, 2001, in Menomonie, Wisconsin. Afterwards, the parties filed briefs, whereupon the record was closed on December 11, 2001. Based on the entire record, the undersigned issues the following Award.

ISSUE

The parties stipulated to the following issue:

Did the Employer violate the contract when the grievant's supervisor performed work normally done by the grievant? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 1998-2001 collective bargaining agreement contained the following pertinent provisions:

. . .

ARTICLE II – MANAGEMENT RIGHTS

SECTION 1:

It is recognized that the Board will continue to retain the rights and responsibilities to operate and manage the school system of the District and its programs, facilities and properties; and the activities of its employees during working hours.

SECTION 2:

Without limiting the generality of the foregoing Section 1, it is expressly recognized that the Board's operational and managerial responsibilities include:

1. The rights to determine location of schools and other facilities of the school system, including the right to establish new facilities and to relocate or close old facilities.

2. The determination of financial policies of the District, including the general accounting procedures, inventory and supplies and equipment procedures and public relations.

3. The determination of the management, supervisory or administrative organization of each school or facility in the system and the selection of employees for promotion to supervisory, management or administrative positions.

4. The maintenance of discipline control and use of school system property and facilities.

5. The determination of safety, health and property protection measures where legal responsibility of the Board or other governmental unit is involved.

6. The right to enforce the reasonable rules and regulations now in effect and to establish new reasonable rules and regulations from time-to-time not in conflict with this Agreement.

7. The direction and arrangement of all working forces in the system, including the right to hire, suspend, discharge or discipline employees.

8. The creation, combination or elimination of any employee position deemed advisable by the Board. Combination shall mean the Board's right to combine part-time positions within the District into full-time positions and the right to combine full-time positions due to diminished workload.

9. The determination of the size of the working force, the allocation of assignment of work to employees, the determination of policies affecting the selection of the employees and the establishment of quality standards and judgment of employee performance.

10. The determination of the layout and the equipment to be used and the right to plan, direct, and control school activities. The determination of the processes, techniques, methods, and means of employee work performance.

11. The right to establish and revise the school calendar and assign workloads. With the exception of the bargaining unit work as defined in Article IX, Section 3, nothing in this Agreement shall limit, in any way, the District's contracting or subcontracting of work or shall require the District to continue in existence any of its present programs in their present form and/or location or on any other basis.

SECTION 3:

The foregoing enumeration of the functions of the Board shall not be considered to exclude other functions of the Board not specifically set forth; the Board retaining all functions and rights to act not specifically nullified by this Agreement.

. . .

ARTICLE IX – GENERAL PROVISIONS

. . .

SECTION 3 – Bargaining Unit Work:

No one outside of the bargaining unit shall be employed by the Board to perform work normally done by members of the bargaining unit, except in cases of emergency, special projects or for vacation replacements for regular employees. Nothing contained, herein, shall preclude the Board from the creation of new positions in the District, subject to the provisions of Article VII concerning the posting and application for such positions. It is agreed that the Board may make interim assignments to fill vacated positions as may be necessary to comply with the job posting procedures as provided, herein.

BACKGROUND

The District operates a public school system in Menomonie, Wisconsin. The Union is the exclusive collective bargaining representative for the District's clerical, custodial, maintenance and food service employees. The grievant in this case, Glen Bowe, is a District employee who is a member of that bargaining unit. He is currently working as a custodian. For three years prior to the 2001-02 school year, he was the District's Audio-Visual (hereinafter AV) Technician. The instant case arose when Bowe was working as the District's AV Technician.

One of Bowe's job responsibilities as the AV Technician was to maintain an AV equipment accountability system. As part of that process, he conducted an annual survey of the District's staff members to determine their AV equipment needs. Specifically, each March, he sent out a memo to the District's staff which asked them to list, on an attached form, the AV items they wanted for the ensuing school year. After the staff returned their completed forms to Bowe, he would compile a list of the items staff wanted. Bowe would then

submit this list to his supervisor, Sue Molitor, who would decide whether to approve the requested items. Next, Bowe would obtain price bids on the approved items from various vendors. He generally got price bids from about five vendors. After the lowest bids were identified, he would give Molitor the list of requested items along with the corresponding price bids. She would then issue a purchase order which would be forwarded to the District's finance department for processing. Bowe testified that it normally took him two to three weeks to complete this work.

When Molitor reviewed Bowe's purchase order recommendations for the 2000-2001 school year, she made the following changes. First, Bowe had selected a mono VCR for $228. Molitor found a stereo VCR (which was technically superior) for $98. Second, Molitor learned that Bowe was ordering large quantities of unformatted floppy disks for classroom use and then spending considerable amounts of time to format them. Molitor found disks that were already formatted for the same price.

The spreadsheet software which Bowe used to track and record the annual AV equipment purchase requests was Excel. Molitor believed that particular spreadsheet software did not have either the capabilities or the flexibilities of database software, so she began exploring converting the AV equipment accountability system to a Filemaker database program. At the time, the District was using a Filemaker database program for other applications. Bowe could not operate a Filemaker database program.

About this same time, the District was reviewing its staffing needs. As part of that process, the District's Human Resources Director, Steve Ashmore, requested Molitor's input on staff changes that might achieve cost savings. In response to that request, Molitor examined the District's technology demands. Her review established the following trend: the demand for computer technology services had increased, while the demand for AV services had decreased. As an example, where teachers might previously have requested a standard overhead machine, now they were requesting overhead projectors like Proxima, which connects directly into a computer and thereby provides significantly improved technological capabilities. Additionally, the number of computers in the District had doubled from 500 to over 1000 in the preceding three years. This trend, combined with Ashmore's request for input on staffing levels, prompted Molitor to begin formulating a staffing proposal that called for an increase in computer technology/information specialist staff and a decrease in AV technology staff.

In formulating her proposal, Molitor approached two technology department employees – Jeremy Eggers and Eric Eggers – and inquired whether they would be willing to add AV equipment accountability duties to their existing job responsibilities. At the time, the Eggers brothers were both employed by the District as Information Systems Specialists. That position is in the same bargaining unit as the AV Technician. Molitor believed that it would be an

efficient use of the District's resources to distribute the AV duties between the two of them (the Eggers brothers) since both were housed in the same building as the AV office and both could assume the AV duties with little disruption to their existing work schedule. Molitor also knew that Jeremy Eggers was well-versed in the Filemaker database program. Other District employees could use that program (the Filemaker database program) for data entry, but Eggers had previously created databases to suit the District's needs. Specifically, he had used Filemaker to create a database for the District's inventory system which, in turn, prompted the District to begin switching all of its data retention over to the Filemaker system.

In response to Molitor's inquiry (whether they would be willing to add AV duties to their existing job responsibilities), both Jeremy and Eric Eggers indicated that they would assume the additional AV duties.

In early January, 2001, Molitor submitted a staffing proposal to restructure the District's technology department. Her proposal included the following components: 1) the elimination of the AV Technician position (Bowe's position); 2) the creation of two new Technology Information Specialist positions; and 3) the reclassification of Molitor's position from Building and Grounds Executive Secretary (her actual job title at the time) to Technology Coordinator. The part of her proposal which is most relevant to this case is the first component wherein she proposed the elimination of the AV position. Molitor envisioned that if that happened, and Bowe was subsequently laid off, then the AV equipment accountability work Bowe had previously performed would be split between the Eggers brothers. Specifically, Molitor envisioned that Jeremy Eggers would be responsible for creating an interactive Filemaker database because he had previously done so for the District's inventory system, and that Eric Eggers would be responsible for price bidding because he was already doing so for computer-related items such as hardware and replacement parts. Molitor's staffing proposal was subsequently submitted to Human Resources Director Ashmore. It was forwarded to all staff via e-mail on January 19, 2001.

Not surprisingly, Molitor's staffing proposal upset Bowe because it proposed that his AV position be eliminated. By his own admission, his response (to it) was to stop speaking/communicating with everyone in the technology department, and to withdraw from daily contact with them. Prior to Molitor's staffing proposal coming out, Bowe's normal work routine was to arrive at the technology office around 7:00 a.m. and perform computer entry work or other office duties until around 8:30 a.m., at which time he would typically depart for the District's other buildings for on-site work. Molitor normally arrived at the office at 8:00 a.m., so she would generally have an opportunity to interact with Bowe for at least 30 minutes each day. After Molitor's staffing proposal came out, however, Bowe made a concerted effort each day to leave the office before Molitor arrived.

On March 5, 2001, the Board of Education decided to reduce the size of the District's non-certified staff. One position which the Board eliminated was Bowe's AV position. Bowe was subsequently notified that his AV position was being eliminated as of June 30, 2001 and that he would be laid off as of that date. Prior to being laid off though, Bowe exercised his seniority and bumped from his AV position into a full-time custodial position. This occurred in April, 2001. While Bowe was laid off from his AV position, he was never without full-time employment with the District because he bumped into a custodial position.

The instant grievance arose about the time the District decided to eliminate Bowe's AV position.

FACTS

As was noted in the **BACKGROUND** section, each March Bowe sent out an AV equipment request memo to the staff. Knowing that, and anticipating that Bowe was going to be laid off from his AV position, Molitor decided to send out the 2001 AV equipment request memo herself. On February 28, 2001, Molitor sent a memo and an order form to the District's staff for their use in making requests for AV equipment and supplies. In doing this, what Molitor did was open up the electronic copy of the memo and order form Bowe had sent the previous year, and make some changes to them. According to Molitor, it took her only seconds to do this. Sometime thereafter, Molitor sent an AV catalog to teacher Wendy Schwak. Molitor did this at Eric Eggers' request.

On March 5, 2001, Bowe filed the instant grievance. The grievance contended that when Molitor sent out her February 28, 2001 memo concerning AV equipment, this constituted subcontracting of bargaining unit work. The District denied the grievance.

While the grievance was being processed through the contractual grievance procedure, the AV equipment request process continued without Bowe's involvement. What happened was this. After Molitor sent out her memo, staff returned their completed forms to her. After Molitor got them (the completed forms), she passed them on to Jeremy Eggers. He then inputted the information into the Filemaker database that he had already created. When he did this, Molitor gave him direction concerning the types of information to be entered, the data "fields" that she wanted sorted, and ways in which the database should be revised in light of the specific information that was coming back from the staff, but she performed none of this work herself. After the inputting of information into the Filemaker database was complete, Jeremy Eggers created a final report showing the AV equipment and supplies that had been requested and by whom. As she had done in previous years, Molitor then reviewed that report and decided which requests should be approved. Molitor then turned over the list of approved items to Eric Eggers, who obtained price bids for them. When he did this, Eggers did not limit the bid requests to just the vendors Bowe had used. Instead, he used numerous other

sources for obtaining prices including national chains like Best Buy and Office Max, as well as sources available on the internet. Eggers used the internet search engine "pricewatch.com", which generated about 50 different places where prices for the necessary equipment and supplies could be found. He then chose the four or five cheapest vendors and printed out the prices for Molitor's review. Once the printouts were generated and the final vendors approved, Molitor gave him (Eric Eggert) the District's credit card, and he ordered the items online. He testified that the entire bidding and ordering process took him three hours to complete. Jeremy Eggers testified that it took him about four hours to create the Filemaker database and four hours to enter the data.

POSITIONS OF THE PARTIES

Union

The Union contends that the District violated the contract by its actions herein. It elaborates on this contention as follows.

The Union begins its analysis of this case by reviewing the work in question, namely the maintaining of the equipment accountability system. The Union avers that it consists of soliciting, receiving and collating annual staff requests for audio/visual equipment; soliciting bids from public and private suppliers of this equipment; recommending such purchases to management; and then receiving and distributing such equipment once it has been purchased and delivered.

Having identified the work in question, the Union argues that that work has been normally and historically performed by bargaining unit members and that it was not work performed because of an emergency or a special project. To support this premise, it cites the grievant's testimony that he had done this work on an annual basis for approximately three years, and that his predecessor in the position, Jay Schroeder, had performed the same work prior to that. The Union also believes that the grievant's job description for the AV position establishes that this work was an essential part of the AV job position, and not just a haphazard event.

Next, it is the Union's view that the work which Molitor did was not *de minimis* in nature. To support this contention, it relies on the grievant's testimony that this work took him two to three weeks to perform each year. The Union reasons that work which is of that duration cannot possibly be *de minimis*.

The Union describes the District's case herein as nothing more than a character assassination of the grievant (i.e. that he was supposedly a lazy incompetent employee, who upon learning that his job might be eliminated withdrew into a shell and ceased to communicate with any other department employees). He was described by Mr. Weld as

possibly being "postal". The Union avers that the record evidence does not support that characterization. First, the Union notes that when Molitor testified that she was not happy with the way Bowe had performed the annual AV request work in the previous year (2000), she never discussed her dissatisfaction with him (i.e. Bowe). Second, the Union notes when Molitor held several meetings with the Eggers brothers to discuss the AV work, Bowe was not included in the meetings. Third, the Union calls attention to the fact that Molitor never directed Bowe to do the AV work in 2001, and that he (Bowe) never refused to do it. Fourth, as for Bowe supposedly being lazy, the Union cites Bowe's testimony that when he told co-workers that (i.e. that he was lazy), he was just joking. Finally, the Union avers that if the grievant's work performance was as poor as the District implied, he would have been disciplined for same. The Union points out that Bowe has never been disciplined for poor work performance. As the Union sees it, the District's character assassination of the grievant is therefore unwarranted and untrue.

Next, the Union comments on the interpersonal dynamics that exist in the technology department. The Union begins by recounting that Molitor's staffing proposal eliminated Bowe's position, and reclassified the Eggers brothers into higher paying positions. The Union avers that when Bowe protested Molitor's staffing proposal, this earned him the antipathy of the Eggers brothers and other bargaining unit employees. According to the Union, Bowe was thereafter ostracized, shunned and treated like a leper. The Union asks rhetorically "under such circumstances, who would like to hang around the Technology Office?"

Next, the Union urges the arbitrator to not be distracted by the Employer contention that the grievant jumped the gun and filed the instant grievance too early. The Union maintains in this regard that if Bowe had not filed the grievance within the timelines specified in the contractual grievance procedure, the Employer would no doubt be arguing that the grievance was filed too late (i.e. untimely). The Union asserts that this Employer argument is nothing more than a distraction intended to obfuscate the real issue herein.

The Union contends that the District did not prove that anyone other than Molitor did the AV work in question. Thus, it is the Union's view that the District failed to meet their burden of proof in this case. It makes the following arguments to support this contention. First, the Union maintains that no management person ever notified the Union until the day of the hearing that Molitor was not doing the AV work. In the Union's view, this raises suspicions about the amount of AV work that Molitor performed. The Union notes that when the grievance was being processed through the grievance procedure, the District Administrator responded in writing that "Sue Molitor is superv. [*sic*] of the department and her job description covers all responsibilities for the department." The Union interpreted this to mean that she has the right to do that work, so she did it. The Union also calls attention to the Administrator's testimony that when he was asked why he had not told the Union prior to the hearing that the AV work had been doled out to other bargaining unit employees, he replied

that he had not learned of that fact until a few days before the hearing. Second, the Union asserts that Molitor's memory seemed to fail her in recalling all the instances wherein she had done AV work. It notes in this regard that on direct exam, she said that the only AV work she did was the February 28 memo. On cross-examination, it notes that she said she did not have contact with any teachers. The Union then notes that in rebuttal, she acknowledged sending a catalog to teacher Wendy Schwak. The Union characterizes Molitor's refreshed memory as "convenient". Third, the Union contends that a final flaw in the District's case is that they did not produce a single page of written evidence which proves that the Eggers brothers did all of the remaining AV work. The Union characterizes this as absurd. The Union asks rhetorically if someone inquired of the District Administrator whether the 17 video terminals which the District purchased in 2001 were obtained at the lowest price, would he respond that no written records of that transaction existed? The Union answers that rhetorical question in the negative. It is the Union's opinion that such written documents may exist, but that the District signature or the contact person listed on those records is that of supervisor Molitor.

The Union asks that the arbitrator sustain the grievance and issue a monetary remedy. As the Union sees it, the remedy should be 120 hours of pay for Bowe at his old AV hourly rate. The Union avers that three weeks' pay (120 hours) is warranted because that was the length of time that Bowe had previously spent performing the AV work.

District

The District contends that the grievance should be denied. In its view, it did not violate the contract by its actions herein. It elaborates on this contention as follows.

The District begins its analysis of this case by focusing on the contract language which is alleged to have been violated, namely Article IX, Sec. 3. The District notes that that provision specifies that "no one outside the bargaining unit shall. . .perform work normally done by members of the bargaining unit. . ." The District submits that the AV equipment accountability work that had been "normally done by members of the bargaining unit" (i.e., the grievant) continued to be done by members of the bargaining unit (i.e. Jeremy and Eric Eggers).

The District avers that the only aspect of the entire equipment accountability project that was not done by members of the bargaining unit was the February 28, 2001 memo. The District acknowledges it was Molitor who edited the memo, sent it out and gave the responses she received to Jeremy Eggers for processing. According to the District, that was the extent of her involvement.

Recognizing that the February 28 memo could be considered bargaining unit work, the District first questions whether it was. The District maintains it was not bargaining unit work. To support this premise, the District cites both contract language and Molitor's job description. With regard to the former (i.e. the contract language), it notes that the contractual Management Rights clause gives the District the right to control the direction and arrangement of all working forces in the system, to allocate the assignment of work to employees, and to determine the processes, techniques, methods and means of employee work performance (Article II, Section 2). The District asserts that this language gives it the right to allocate the assignment of work. Turning now to the latter (i.e. Molitor's job description), it notes that Molitor's old and new job descriptions provide that she is to "perform clerical duties. . .such as typing letters, reports, lists, make copies as needed." The District submits that this language clearly establishes that typing and copying letters and reports were part of Molitor's regular job duties. When the foregoing points are considered together, the District believes they establish that the February 28 memo was not bargaining unit work.

The District argues in the alternative that even if the February 28 memo did constitute bargaining unit work, it was only a *de minimis* amount of work. This premise is based on Molitor's estimate that it only took her a few seconds to type and distribute the memo. The District cites Elkouri for the proposition that even where a contract prohibits supervisors from performing bargaining unit work, the supervisory performance of a *de minimis* amount of work does not violate the contract. As the District sees it, what happened here was that Molitor simply had "a hand in passing" as it relates to the scope of the AV equipment project in its totality. The District cites numerous arbitrators who have applied the *de minimis* principle to the supervisory performance of bargaining unit work, and found no contract violation. It asks this arbitrator to do likewise.

Next, the District asserts that it had the contractual right to transfer the work from the grievant to other bargaining unit employees. To support this premise, it first cites the language in the Management Rights clause which gives it the authority to direct its workforce and operations. Specifically, it notes that it has reserved the right to: determine inventory, supplies and equipment procedures; control the use of school system property and facilities; direct all working forces in the system; determine the size of the working force and the allocation/assignment of work; establish quality standards and judge employee performance; determine the equipment to be used; plan, direct and control school activities; determine processes, techniques, methods and means of employee work performance; and assign workloads (see Article II, Section 2). It also claims that nothing in the agreement requires the District to continue any of its present programs in their present form and/or location. As the District sees it, the only limitation contained in the Management Rights clause is a reference to Article IX, Sec. 3, which as discussed earlier, prohibits non-bargaining unit employees from performing work that is normally done by bargaining unit employees. The District avers that so long as the work is performed by bargaining unit employees, it has the right to determine which bargaining unit employees will do the work.

Next, the District contends it also had legitimate reasons to reassign the AV equipment project from Bowe to Jeremy and Eric Eggers. It cites the following. First, Molitor had several concerns about the way the grievant had completed the project in 1999-00. Second, the District asserts that the grievant had made it clear that, even if he had the necessary computer skills to convert the project to the Filemaker database, which he did not, he was not interested in doing the work. To support this premise, it notes that on numerous occasions he told various people (including Molitor and the District Superintendent) that "I'm basically lazy, so whatever you can do to make my job easier, it's O.K. with me." Third, the District decided that its resources would be better utilized by transferring the AV equipment work from the grievant to the information systems specialists (the Eggers brothers) in order to streamline the process and expand the number of bidders. The District submits that is what happened because Eric Eggers' use of online resources improved the bidding process and resulted in considerable cost savings to the District. Additionally, it calls attention to the Eggers' testimony that the entire AV equipment project took them a combined total of twelve hours, compared to the two to three weeks the grievant normally spent on the project each year.

Anticipating that the Union may argue that the District never offered the grievant the opportunity to learn the Filemaker software program, the District responds that it had the right to decide not to train the grievant on Filemaker when there was already another bargaining unit employee who was well-versed in the program. The District asserts that the grievant's own behavior was a key factor in the District's decision in this regard. The District specifically cites the grievant's repeated comments that he was basically lazy, his refusal to communicate with his supervisor and other technology department staff, and his virtual disappearance from the office whenever his supervisor was present made retraining attempts futile. In the District's view, instead of attempting to improve his job skills or his relationship with co-workers, the grievant chose to plod through his days in a virtual "blue funk" doing as little as possible and communicating as little as possible in order to just get by.

Next, the District responds to the Union's claim that the hearing was the first time the District indicated that the AV work in question was not being done by Molitor, but was being done by bargaining unit members. According to the District, this claim is patently false and the Union's own exhibits belie this allegation. The District notes in this regard that when the Union learned that the AV technician position was scheduled for elimination, Union Representative Steve Day sent a letter to Human Resources Director Ashmore requesting that Ashmore respond in writing as to exactly who would be performing the AV work (See Union Ex. 8). Ashmore responded that the District intended to have bargaining unit members continue to do the AV work. The District argues that it is difficult to imagine a more clearcut response than Ashmore's statement that the District would be assigning the essential job responsibilities of the position "to new and existing AFSCME positions." (See Union Ex. 9).

Finally, the District contends that in the event the arbitrator finds a contract violation, and orders a remedy, the Union's requested remedy of three weeks' wages for the grievant is excessive and punitive. It elaborates as follows. First, it points out that the AV equipment accountability work continued to be performed by bargaining unit members, namely Jeremy and Eric Eggers. The District avers that there is nothing in the contract which preserves specific bargaining unit work to specific bargaining unit members. Building on that premise, the District maintains that so long as bargaining unit members perform the work, there is no contract violation. Second, the District believes that there is a question as to whether the typing and distribution of the February 28 memo constituted bargaining unit work at all. Third, the District asserts that even if Molitor did perform bargaining unit work by sending out the February 28 memo, the grievant never suffered a loss in pay by her doing that work. It calls the arbitrator's attention in this regard to the fact that the grievant continued to receive his full AV technician salary for the entire 2000-01 school year. Fourth, the District contends that even if the February 28 memo did constitute bargaining unit work, Molitor testified that it took her only a few seconds to do it. As the District sees it, three weeks pay is punitive, since it bears no relation to any actual damage that was possibly suffered by the grievant. The District also asserts that punitive damages are not an appropriate remedy in grievance arbitration.

DISCUSSION

My discussion begins with a brief overview of what this case is about. Previously, the grievant performed certain work maintaining the AV equipment accountability system. This past year, though, the grievant was not allowed to perform that work. Instead, the work was done by others.

At issue is whether the District violated the collective bargaining agreement by its actions herein. The Union contends that it did, while the Employer disputes that contention.

Since the basic subject matter of this case involves the question of who gets to perform certain work, the logical starting point for purposes of discussion is to ask rhetorically whether there is a contract provision which deals with same. There is; it is the Management Rights clause. That clause provides, in pertinent part, that the Board has the right to direct its workforce, to allocate the assignment of work to employees, and to determine how work gets done (the exact phrase which is used says "the determination of the processes, techniques, methods and means of employee work performance.") When the foregoing language is read together and given its commonly-accepted meaning, it gives the Board the operational right to assign work to employees.

The next question, contractually speaking, is whether any restriction or limitation is imposed on the District's management right to assign work. There is; it is found in Article IX, Sec. 3, which is entitled "Bargaining Unit Work". That section contains three sentences. In

the context of this case, sentences two and three are not applicable, so there is no need to review them here. The first sentence is applicable though. The first part of the first sentence prohibits non-bargaining unit employees from performing work that is normally done by bargaining unit employees. The second part of that sentence then establishes three exceptions to the principle just established. The three exceptions are 1) in cases of emergency; 2) special projects; and 3) for vacation replacement. When read in its overall context, I believe that the intent of this section is to protect the integrity of the bargaining unit and to prevent the removal of "work that is normally done by bargaining unit employees." If work normally done by bargaining unit employees were diverted in unlimited volume to non-bargaining unit employees, this would weaken the bargaining unit.

In the context of this case, none of the three exceptions in the second part of the first sentence are involved. Specifically, the District does not contend that this particular case involved an emergency, a special project or a vacation replacement. That being so, there is no need for the arbitrator to determine whether any of those three exceptions apply herein. It follows from this finding that just the first part of the first sentence of Article IX, Sec. 3 is involved here. That language will now be applied to the record facts.

I begin my analysis on this point with a detailed review of the work in question. The work, of course, involves maintaining the AV equipment accountability system. That work consists of soliciting, receiving and tabulating annual staff requests for AV equipment, soliciting bids from suppliers for the approved items, recommending items for purchase and distributing the equipment once it has been delivered.

The work just identified has normally been performed by bargaining unit employees. The following shows this. For the past three years, it was all done by Bowe, and prior to that it was done by his predecessor.

This past year though, Bowe was not allowed to perform this work. Instead, it was done by others. Specifically, some of it was done by the Eggers brothers and some of it was done by Molitor. A detailed analysis of who did what follows.

The bulk of the work which Bowe used to do was assigned to and performed by the Eggers brothers. Jeremy Eggers inputted (i.e. entered) the specific information on the completed forms into a database, and used that database to generate a list of the equipment requests (i.e. the AV equipment that had been requested and by whom). Eric Eggers then obtained price bids for the approved items from various vendors, and subsequently ordered those items online. For purposes of emphasis, it is repeated that all this work was previously assigned to and performed by Bowe.

Since the Eggers brothers performed the work identified above, rather than Bowe, it is apparent that what the District was transfer that work from Bowe to the Eggers brothers. That transfer of work (from Bowe to the Eggers brothers) had a contractual basis. As previously noted, the Management Rights clause gives the District the right to direct its workforce and assign work. One part of assigning work is deciding who gets to perform it. In this case, the District decided to assign the AV equipment accountability work to the Eggers brothers, rather than to Bowe. This managerial decision to transfer this work from Bowe to the Eggers brothers was not unreasonable, arbitrary or capricious. In so finding, it is specifically noted that the Employer's right to assign work is limited by Article IX, Sec. 3 (which prohibits non-bargaining unit employees from performing work that is normally done by bargaining unit employees). However, that contractual limitation does not preclude the District's transfer of work here because the AV work in question is still being performed by bargaining unit employees. Consequently, the transfer of the AV equipment accountability work from Bowe to the Eggers brothers did not violate the collective bargaining agreement.

Next, the focus turns to the AV work which Molitor performed. Her involvement in the AV equipment request process in 2001 can be summarized as follows. First, she sent a memo and an order form to the District's staff for them to use in making requests for AV equipment and supplies. When she did this, Molitor did not draft these documents from scratch. Instead, she opened up the electronic copy of the memo and order form Bowe had sent out the previous year and made some changes to them. Second, after Molitor sent out her memo, staff returned their completed forms to her. She then gave them (the completed forms) to Jeremy Eggers for processing. Third, at Eric Eggers' request, she sent a catalog to teacher Wendy Schwak. Insofar as the record shows, the foregoing was the extent of her involvement in the 2001 AV equipment request process. Having just identified what she did do in the equipment request process, the focus turns to what she did not do. Specifically, she never inputted any forms into the database, never used the database to generate a list of the equipment requests, and never obtained price bids from vendors. Those duties were all performed by Jeremy and Eric Eggers.

The District raises two defenses concerning the work Molitor performed. The first is that the February 28 memo was not bargaining unit work, and the second is that, even if it was, that work was *de minimis* in nature. These contentions will be addressed in the order just listed.

The first defense is addressed as follows. While the District contends that the February 28 memo was not bargaining unit work, it is assumed for the purpose of this decision that it was bargaining unit work. The reason this assumption was made will become clear later in the discussion that follows.

Given that assumption concerning the nature of the February 28 memo, my analysis on this point begins with the premise that Molitor performed bargaining unit work when she: 1) sent the February 28 memo to District staff; 2) gave the completed forms to Jeremy Eggers for processing; and 3) sent a catalog to a teacher. The question of how long it took her to perform these three tasks will be addressed later. Here, though, what is important is that Molitor did indeed perform some bargaining unit work. This is exactly what is proscribed by Article IX, Sec. 3 (namely, that supervisors are not to perform bargaining unit work unless one of the three exceptions apply). In this case, none of the exceptions apply, so she should not have done that work. Since she did perform some bargaining unit work, the District violated Article IX, Sec. 3. The effect of that contract violation will be addressed next.

Having found a violation of Article IX, Sec. 3, the focus turns to the question of what remedy should be imposed under the circumstances.

I find that the remedy requested by the Union (namely, three weeks' wages for the grievant) is not warranted. My rationale is this. First, Bowe did not lose any pay as a result of Molitor's doing that work. He was, in fact, paid his full AV technician salary for the entire 2000-2001 school year, at which point he was laid off. Second, as has already been noted, what happened here is that the work that Bowe formerly performed (i.e. the AV equipment accountability work) was transferred from him (Bowe) to the Eggers brothers. It bears repeating that this reassignment of work was contractually permissible. That being so, the District could transfer that work from one bargaining unit employee to another. There is nothing in the contract that preserves the AV accountability work to Bowe.

Having found that the Union's requested remedy is not appropriate here, the question remains what remedy is appropriate. A criteria which arbitrators traditionally use to help them determine remedies in cases like this one is to look at the amount of time that it took the supervisor to perform the bargaining unit work in question. In accordance with that generally-accepted view, I will do likewise.

The focus now turns to the amount of time that Molitor spent doing bargaining unit work connected to the AV equipment project. It has already been noted that the bargaining unit work which she performed was as follows: 1) she created and sent the February 28 memo; 2) she gave the completed forms to Jeremy Eggers for processing; and 3) she sent a catalog to a teacher. With regard to the first matter, Molitor estimated that it took her just seconds to create the February 28 memo. While her time estimate seems low to the undersigned, the fact remains that what she did was open up the electronic copy of the memo and form Bowe had sent out the previous year and make some changes to them. Even if it took her more than seconds to do this, I am persuaded that it probably took no more than a couple of minutes (to do it). The focus now turns to the second and third matters wherein Molitor performed bargaining unit work (i.e. her giving the completed forms to Jeremy Eggers for processing and

sending a catalog to a teacher). Although Molitor gave no estimate as to the length of time it took her to perform those two tasks, I surmise that it took her just minutes to do both. When all three of these tasks are considered together, I am persuaded that it took Molitor just minutes to perform them. In my view, the work that Molitor performed had no measurable or significant impact on the bargaining unit. That being so, I find that the *de minimis* principle (as it is known in labor relations circles), applies herein.

Having just found the amount of work which Molitor performed qualifies as *de minimis*, this still leaves the question of what remedy to impose for the Employer's violation of Article IX, Sec. 3. I find that no monetary remedy is warranted because of the *de minimis* amount of time involved. Nonetheless, some type of remedy is warranted. The remedy which the undersigned finds appropriate under the circumstances is a cease and desist order. In my view, such an order will help ensure that this particular type of contract breach is not repeated. Accordingly, the District is directed to cease and desist from having supervisors perform bargaining unit work (unless one of the three exceptions exist), and henceforth comply with Article IX, Sec. 3.

Given this conclusion, I believe it is unnecessary to address the parties' remaining arguments. Thus, no comment will be made about: 1) Bowe's past work history; 2) the interpersonal dynamics that exist in the technology department; 3) when the grievance was filed; and 4) when the Union became aware that the Eggers brothers had performed the bulk of the AV equipment accountability work that Bowe previously performed.

In light of the above, it is my

AWARD

That the Employer violated the contract when the grievant's supervisor performed work normally done by the grievant. However, the amount of time that the grievant's supervisor spent doing that work was *de minimis*, so no monetary remedy is awarded herein. Instead, the remedy which the undersigned finds appropriate is this: the District is directed to cease and desist from having supervisors perform bargaining unit work (unless one of the three exceptions exist), and henceforth comply with Article IX, Sec. 3.

Dated at Madison, Wisconsin, this 31st day of January, 2002.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
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