

AMERICAN ARBITRATION ASSOCIATION
CASE # 13 390 00809 07

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In the Matter of the Arbitration between

UNITED FEDERATION OF TEACHERS,
LOCAL 2, AFT, AFL-CIO

-and-

"Union"

ARBITRATOR'S

OPINION AND AWARD

NEW YORK CITY DEPARTMENT OF EDUCATION
"Department"

Re: Union Initiated grievance: Duties of School Secretaries

X-----X
BEFORE: ARTHUR A. RIEGEL, ESQ., ARBITRATOR

APPEARANCES:

FOR THE UNION:

MICHELLE DANIELS, UFT SPECIAL REPRESENTATIVE
HOWARD SOLOMON, DIRECTOR, GRIEVANCE DEPARTMENT
NOEL D. COHEN, ESQ.
JACKIE ERVOLINA, CHAIR, UFT SCHOOL SECRETARIES CHAPTER

FOR THE DEPARTMENT:

KAREN SOLIMONDO, ESQ., NYC DEPARTMENT OF EDUCATION OFFICE OF
LABOR RELATIONS
RUSSELL PLATZEK, ESQ., NYC DEPARTMENT OF EDUCATION OFFICE OF LABOR
RELATIONS

BACKGROUND

In accordance with the collective bargaining agreement between the parties (Joint Exhibit [JX]1) and consistent with the rules of the American Arbitration Association, the undersigned was designated to hear and finally determine the Union's claim that the Department violated Articles 5 and 15 of the school secretaries' collective bargaining agreement by assigning their duties to people who are not licensed school secretaries. Hearings on this matter were held at the offices of the American Arbitration Association on May 2, 9, October 31, November 6, 15, 16, December 11, 19,

20, 2007, January 16, 23 and February 6, 2008. The parties submitted written summations on or before February 7, 2008 and reply briefs on February 15, 2008.

The parties were represented and were given a full and fair opportunity to present relevant documentary evidence and to conduct direct and cross examination of witnesses. The record was closed on February 15, 2008.

ISSUE

At the outset the parties could not agree on the phrasing of the issue to be resolved by the Arbitrator. The Union stated the issue as follows:

Did the Department of Education violate Articles 5 and 15 of School Secretaries' Collective Bargaining Agreement when it allowed personnel who are not licensed School Secretaries to perform secretarial duties? If so, what shall be the remedy?

The Department's issue statement was as follows:

Did the Department of Education violate Articles 5 and 15 of School Secretaries' Collective Bargaining Agreement when it allowed personnel who are not licensed School Secretaries to perform clerical duties? If so, what shall be the remedy?

In the absence of an issue to which the parties have stipulated, the Arbitrator must decide which issue statement to adopt or to frame the issue based upon the record created. In this case, given that both issue statements are very similar, the undersigned finds that the entire record focused on specific secretarial duties rather than general clerical duties being performed by employees who are not licensed School Secretaries. Therefore, the issue as proposed by the Union is adopted.

RELEVANT CONTRACT PROVISIONS (JX1)

ARTICLE FIVE- LICENSURE, ASSIGNMENT AND APPOINTMENT

A. Regularized Licensure

The Board of Education shall provide for the regular licensure of school secretary personnel consistent with the needs of the instructional program and subject to applicable law and the by-laws of the Board of Education.

The Board has established regular licenses valid for service as a school secretary under regular appointment, or for day-to-day per diem service, or for full-term assignment, or for other service as a school secretary including bi-lingual service. All positions will be filled by persons holding such regular licenses except under the following circumstances:

1. Where a position must be filled to provide the services of a school secretary for which no person holding such regular license is immediately available after all efforts have been made to fill the position by a person holding such regular license;
2. Where the kind of school secretary work is not normally performed in the public schools and is temporary in nature;
3. Where a substitute school secretary intern is providing stenographic services for a department chairman in high schools.

ARTICLE 15 - MATTERS NOT COVERED

With respect to matters not covered by this Agreement which are proper subjects of bargaining, the Board agrees that it will make no changes without prior consultation and negotiation with the Union.

The Board will continue its present policy with respect to sick leave, sabbatical leaves, vacations and holidays except insofar as change is commanded by law.

All existing determinations, authorizations, by-laws, regulations, rules, resolutions, certifications, orders, directives, and other actions, made, issued or entered into by the Board of Education governing or affecting salary and working conditions of the school

secretaries in the bargaining unit shall continue in force during the term of this Agreement, except insofar as change is commanded by law.

ARTICLE 17 C. Arbitration (in relevant part)

A grievance dispute which was not resolved at the level of the Chancellor may be submitted by the Chapter to an Arbitrator if it involves the application or interpretation of this Agreement. Grievances involving the exercise of Board discretion under any term of this Agreement may be submitted to arbitration to determine whether the provision was disregarded or applied in a discriminatory or arbitrary or capricious manner so as to constitute an abuse of discretion, namely whether the challenged judgment was based upon facts which justifiably could lead to the conclusion as opposed to merely capricious or whimsical preferences, or the absence of supporting factual preferences.

A grievance may not be appealed to arbitration unless a decision has been rendered by the Chancellor at Step 3, except in cases where, upon the expiration of the 20 day time limit for decision, the Union filed notice with the Chancellor of intention to submit the grievance to arbitration and no decision was issued by the Chancellor within five school days after receipt of such notice.

The proceeding shall be initiated by the Union filing with the Board a notice of arbitration. The notice shall be filed within 15 days after receipt of the decision of the Chancellor under the grievance procedure or, where no decision has been issued in the circumstances described above. The notice shall include a brief statement setting forth precisely the issue to be decided by the arbitrator and the specific provisions of the agreement involved. The parties shall jointly schedule the arbitration hearings.

A panel of seven arbitrators shall be designated by mutual agreement of the parties to serve for any case or cases submitted to them in accordance with their ability to promptly hear and determine the case or cases submitted.

The parties agree to enter into a stipulation of facts whenever possible in advance of the hearing.

The parties seek the most expeditious decisions in arbitrations and will normally not file briefs or order transcripts. If either or both parties order a transcript, it will be on an expedited basis. However, if a party unilaterally files a brief, it shall be within five working days of the hearing or receipt of the transcript, if one is ordered. The other party shall have the right to file a reply brief within five working days of receipt of the brief.

The voluntary labor arbitration rules of the American Arbitration Association shall apply to the proceeding insofar as they relate to the hearings and fees and expenses.

The arbitrator shall issue his decision not later than 30 days from the date of the closing of the hearings or, if oral hearings have been waived, then from the date of transmitting the final statements and proofs to the arbitrator. The decision shall be in writing and shall set forth the arbitrator's opinion and conclusions on the issues submitted. The arbitrator shall limit his decision strictly to the application and interpretation of the provisions and shall be without power or authority to make any decision:

1. Contrary to, or inconsistent with, or modifying or varying in any way, the terms of this Agreement or of applicable law or rules or regulations having the force and effect of law;

2. Involving Board discretion under the provisions of this Agreement, under by-laws, or under applicable law, except that the arbitrator may decide in a particular case whether the provision was disregarded or applied in a discriminatory or arbitrary or capricious manner so as to constitute an abuse of discretion, namely whether the challenged judgment was based upon facts which justifiably could lead to the conclusion as opposed to merely capricious or whimsical preferences or the absence of supporting or factual reasons.

3. Limiting or interfering in any way with the powers, duties, and responsibilities of the Board under the by-laws, applicable law, and rules and regulations having the force and effect of law.

The decision of the arbitrator, if made in

accordance with his jurisdiction and authority under this agreement, will be accepted as final by the parties to the dispute and both will abide by it.

Special Circular No. 31- 1976-77 (UX2)(in its entirety)

Postings for School Aides, Family Workers, Health Aides and School Business Managers (DX6-11)

FACTS

The Union surveyed the schools and alleged that in a minimum of 141 schools personnel not licensed as School Secretaries were performing certain duties that, in its view, should have been assigned to secretaries (UX1). The Union filed a Step III grievance on December 22, 2006 alleging that this was a violation of Articles 5 and 15 of the school secretaries' CBA (JX 2). A Step III hearing was held on January 24, 2007 and , in a decision dated April 9, 2007, the grievance was denied (JX 3). The Union demanded the arbitration of the grievance (JX 4). The instant proceeding was convened to adjudicate the dispute.

In an effort to expedite the proceeding, the parties stipulated to the accuracy of the Union's survey (UX1). Based upon this stipulation, the Union rested and the Department began its response to the underlying grievance.

Many of the employees allegedly performing duties of school secretaries are represented by DC 37. A procedural dispute related to this matter arose at the May 9, 2007 hearing date. The Department made an application to adduce testimony from a representative of DC37 and to permit him to be present at the hearing. The Union objected on the grounds that DC 37 has no standing in a contract dispute between the Department of Education and the United Federation of Teachers.

The Union submitted a letter brief dated October 3, 2007 in which it argued its position. The Department responded to the Union's written arguments in a letter brief dated October 18, 2007.

The Arbitrator issued a ruling on this matter on October 24, 2007. In it the undersigned ruled that a DC 37 representative would be permitted to testify as a fact witness at the instant proceeding and that s/he would be permitted to attend the hearings as an observer.

POSITIONS OF THE PARTIES

CONTENTIONS OF THE UNION

The Union contends that the Department violated Articles 5 and 15 of the secretaries' contract when it assigned secretarial duties and tasks to school aides, paraprofessionals, family workers, parent coordinators and business managers. It asserts that the grievance should be sustained.

It posits that Article 5 of the CBA indicates that secretarial positions must be filled by licensed secretaries. It notes that the contract provides for three exceptions to this dictate. It insists that none of these exceptions applies in this case.

It adds that Special Circular 31, 1976-77 is relevant here. It stresses that the circular was developed as a result of a Step 3 grievance decision involving a situation similar to this one.

It indicates that Special Circular 31 outlined the duties of secretaries, school aides, paraprofessionals and family workers. It emphasizes that the circular has never been modified or superceded. It argues that it is still in effect and must be observed per Article 15 of the CBA.

The Union maintains that the circular identifies eight categories of duties performed by school secretaries. It urges that the duties of the other titles in Special Circular 31 include tasks that

are unlike those of secretaries and, where they are assigned clerical work, the duties are not the same as those performed by secretaries.

It maintains that it has proven that out-of-license personnel in all five boroughs have been assigned secretarial duties. It adds that the Department has conceded that this is so.

The Union recalls that, at Step 3, the Department's only argument was that there was a past practice in place and that the Union had waived its right to enforce Special Circular 31. It rejects this argument and asserts that an inconsistent practice within the school system cannot be defined as binding past practice.

It points out that the language of Article 5 regarding secretarial positions being filled by licensed personnel is clear and unambiguous. It indicates that there cannot be a binding past practice in the presence of such contract language.

The Union argues that, if the testimony of the Department's witnesses is viewed in a light most favorable to it, the witnesses would only represent 30 schools or about 2% of the number of schools in the city.

It insists that their actual testimony does not fully support the Department's assertions. It concludes that the Department has argued that non-secretaries have been performing all of the categories of the secretarial duties referenced in Special Circular 31. In its view, the Department's witnesses did not support this contention.

It adds that the testimony of a DC37 representative, Henry Garrido, is based on his intermittent observations at eight schools. It opines that this testimony is unreliable. The Union recalls that, when it could not demonstrate the presence of a binding past practice, the Department argued that Special Circular 31 is outdated and irrelevant. It urges that there are many circulars as

old or older than Circular 31 and are still in effect.

It recalls that the Department asserted that some secretarial duties should be considered tasks of people holding other titles. It insists that Article 15 must be honored until the parties negotiate changes to the responsibilities of secretaries.

It points out that the Department asserted that changes in technology have transformed certain duties alluded to in Special Circular 31 to those done by school aides. It maintains that the means of performing certain tasks may have changed but the tasks have not.

The Union states that the Department raised for the first time at arbitration that the Union waived its right to have the instant matter arbitrated because it had not pursued similar grievances to arbitration. It cites numerous arbitral decisions that preclude the parties from raising particular issues for the first time at arbitration.

With respect to the substance of this argument, it cites to arbitral precedent as well as to Elkouri and Elkouri in support of its position that there was no such waiver. Moreover, states the Union, it successfully rebutted the substance of the Department's argument through an analysis of the lower step grievances alluded to by the Department.

The Union rebuts the Department's claim that it distorts the meaning of Circular 31. It points out that this circular was developed as a result of a grievance over ambiguity about which titles can perform specific tasks. It stresses that the Circular was designed to remedy the lack of clarity.

It further rejects the Department's assertion that the Circular is devoid of any reference to exclusivity. It argues that giving credence to the Department's claim would render the Circular meaningless.

Moreover, states the Union, all job descriptions describe particular jobs to the exclusion of others. It adds that the first page of Circular 31 refers to the licensure required to be a secretary.

The Union denies the Department argument that Special Circular 31 is outmoded. It points out that Article 15 places no time limitation on the applicability of Department rules and regulations and requires compliance with them during the term of the CBA. It asserts that, if the Department believes the Circular needs to be revised, it needs to negotiate such changes when the contract expires.

It recalls that the Department asserted that the creation of new titles is a relevant consideration. It maintains that the creation of a new title does not vitiate an old one. It adds that the Department claims that School Business Managers have historically performed secretarial duties. It observes that this title was not created until 2005.

In response to the Department's claim that its witnesses were supportive of its position, it reiterates its contention that some of this testimony was supportive of the Union's position. As to the argument that it is management's right to delegate duties, it opines that Article 15 limits management's rights in this area and were it otherwise Article 15 would be moot.

It notes the Department's claim that the school system would be harmed if only school secretaries did secretarial work. It responds that there should be a price paid for violations of law and contracts.

It observes that Special Circular 31 is in effect. It posits that the Department conceded that non-secretaries are performing secretarial tasks. It stresses that there is no past practice of other personnel performing secretarial duties.

The Union argues that the grievance must be sustained. As a remedy, it seeks a

reaffirmation of Special Circular 31 and its redistribution to the schools. It requests that the Department be ordered to seek and desist from the complained of actions. It asks the Arbitrator to retain jurisdiction over this matter pending the implementation of the remedies fashioned.

CONTENTIONS OF THE DEPARTMENT

The Department contends that it did not violate the collective bargaining agreement. It avers that the grievance must be denied.

It observes that the Union argued that Special Circular 31 sets forth secretarial duties and that their assignment to people holding other titles is improper. It asserts that the Union's position is flawed.

It maintains that nowhere in Special Circular 31 is there a statement of the tasks at issue in this case. It adds that the circular does reference clerical tasks to be done by school aides. In its view, this language encompasses the duties at issue here. It notes that employees in other titles have historically and routinely performed some of the complained of clerical tasks. It contends that the Union's claim of exclusivity relative to these duties fails.

It urges that Special Circular 31 was issued at a time when conditions were drastically different from those extant at this time. It suggests that currently there are new titles that were not in effect in 1976. It posits that the Union's attempt to rigidly enforce a dated document turns a blind eye to the changes that have occurred in past 30 years.

It insists that the Union has been aware of the fact that other titles have been performing the at-issue tasks and has chosen not to pursue the matter to arbitration. It argues that the Union has waived its right to currently grieve the instant issue.

The Department asserts that its witnesses have stated that secretaries and employees other

than secretaries have performed the tasks at issue in this case. It avers that these duties are not the exclusive province of secretaries.

It stresses that Special Circular 31 does not require that only secretaries perform the at issue tasks. It urges that the circular does not indicate that the duties at issue here must only be performed by secretaries. It states that there has historically been an overlap in duties between secretaries and school aides as well as other titles.

It indicates that Special Circular 31 was issued over 30 years ago and that there have been significant changes with respect to the operation of schools. It suggests that the role of the secretary has become more specialized and technical and that they have assumed duties not enumerated in Circular 31. It claims that the school aides have been assisting the secretaries and have performed a variety of clerical tasks. It argues that the application of Special Circular 31 in the manner urged by the Union ignores a longstanding practice in the schools and is akin to trying to force a square peg into a round hole.

The Department argues that the Union has waived its right to contest the longstanding practice under review in this case. It cites *Burgos* as a 1999 grievance that dealt with the matter at bar. It points out that the grievance was denied at Step 3 and not taken to arbitration. It also alludes to a 2003 grievance that was also not pursued to arbitration.

The Department cites to Elkouri and Elkouri relative to management's rights. It stresses that these rights include the delegation of duties. It suggests that the Union has not claimed that any of the job tasks have been negotiated but that the Department negotiated against itself by limiting its ability to delegate duties and to adjust them since 1976.

It avers that had the Union actively opposed the changes in practice as they emerged ,it

would have avoided the substantial harm demanded to the Department, the affected titles and the schools, particularly the small schools. It urges that the Union should be estopped from bringing this late claim.

It concludes that Special Circular 31 does not prohibit non-secretarial titles from performing the tasks at hand. It asserts that the evidence indicates that these tasks have historically and routinely been performed by various employees. It insists that the Union has distorted the meaning of Circular 31 and its argument flies in the face of an undisputed longstanding practice.

It rejects the assertion that the Department violated Article 5 of the CBA. It stresses that it has never placed a non-secretarial title in a secretarial position. It adds that Article 5 does not confer exclusivity relative to the performance of certain duties on secretaries.

In terms of its premise that conditions have changed since 1976, the Department points out that many administrators do their own typing. It observes that the Union would preclude this practice from continuing.

It notes that the Union misstated the Department's position relative to the survey it tabulated (UX1). It argues that this survey supports the argument that there has been a historical and longstanding practice of an overlap in clerical duties performed by secretaries and other employees.

The Department denies the Union claim that the Department failed to establish that a past practice exists relative to the instant matter. It maintains that there has been an open and longstanding practice and that the Union was aware of it. It notes that the Union declined to contest the practice and has waived its right to do so at this time.

It argues that the Union asks the Arbitrator to impose a work rule that does not exist. It also opines that the Union wants the contract and Special Circular 31 to be read such that the at issue

tasks are the exclusive province of secretaries. It contends that the grievance must be dismissed.

OPINION

After reviewing the documentary and testimonial evidence, the undersigned finds that the grievance must be sustained. The analysis must begin with a description of the Union's case in chief.

The Union produced a survey (UX1) in which it identified 141 schools in which school individuals other than licensed school secretaries (school aides, paraprofessionals, school business managers, parent coordinators, PTA presidents, family workers, health aides, neighborhood community workers, F status teachers, crisis intervention teachers, staff developers, and others) were fulfilling one or more of the following functions: payroll, admissions, discharges and/or interclass transfers, typing letters, observation, bulletins, etc., ordering supplies and/or books, handling student files, handling teacher files and managing the general office. The parties stipulated to the accuracy of the document and the Union rested its case.

It must be added that the Department did not concede that this stipulation represented its agreement that the grievance must be sustained. It averred that the non-secretary personnel identified in the survey were appropriately performing the duties in question.

The Union demonstrated that school aides and others not licensed as secretaries have been performing secretarial functions. That being said, the gravamen of this case was whether it is appropriate for school aides, paraprofessionals, health aides and school business managers to perform secretarial duties. The Department asserted that the word *clerical* should be substituted for *secretarial*. To the extent that there is a myriad of non-secretarial clerical duties performed in schools, the focus here must be on secretarial duties and, where they are clerical in nature, the

clerical duties must fall under the job description of school secretaries.

For its part, the Department insisted that, even if the Union's statement of the facts is accurate, Special Circular 31, 1975-76, a document at the core of the Union's case, is no longer relevant due to the passage of 32 years between its issuance and the present time, the change in conditions and the creation of new positions since 1976. It argued that the tasks in question are not the exclusive province of school secretaries. It also observed that there has been a long history of non-secretaries performing these functions. The final element of the Department's argument is that the Union has waived its right to file and arbitrate the instant grievance.

While it is true that this is a contract grievance in which the Union bears the burden of proving that the CBA was violated, the ultimate question to be resolved is whether the Department's response to the grievance should be credited. This is so because the Union's *prima facie* case was the subject of a stipulation of facts (UX1). In other words, the Department's contention is that the facts as stated by the Union, even if true, do not constitute a contract violation. The following is an analysis of the opposing arguments.

WHETHER SPECIAL CIRCULAR 31, 1975-76, IS STILL APPLICABLE

A central issue in this case is Special Circular 31, 1976-77. The following is an analysis of the circular.

Special Circular 31 was issued on November 8, 1976 (UX2). It was written at the direction of Joseph Brennan, a Step 3 Hearing Officer. Mr. Brennan heard a Step 3 grievance concerning the Union's claim that there was a *growing and widespread practice in the schools to use school aides to perform services which should be performed by school secretaries "holding such regular licenses"* (UX3).

In his decision, Hearing Officer Brennan found: *A circular should be prepared by the Division of Personnel in time for the opening of schools in September, 1976 which will define which secretarial and clerical duties are within the scope of those holding the license of school secretary and those services which may be performed by others such as aides and paraprofessionals.* It is uncontested that Special Circular 31, 1976-77, is the circular that was the subject of Hearing Officer Brennan's finding.

Special Circular 31 became part of the then Board of Education's *Manual of Personnel Policies and Procedures*. This set of regulations was to be filed as Section 6AA of that manual.

The purpose of the circular was to identify the duties that are within the scope of licensed school secretaries and those tasks that may be performed school aides, paraprofessionals and secretary-interns. Secretary-interns have no bearing on the instant matter and will not be referred to again in this decision.

Item 2 of Special Circular 31 concerns school secretaries. The first paragraph of this section indicates that school secretaries are regularly licensed pedagogical employees who perform services of a secretarial and confidential nature. It then outlines the duties and responsibilities of school secretaries. These duties are enumerated as item 2.1 through 2.8.

2.1 indicates that secretaries interpret, apply and disseminate information contained in general and special circulars and other official memoranda. 2.2 sets forth the requirement that secretaries maintain records and worksheets and prepare (and sign) reports concerning pupil accounting, personnel, requisitions and supplies, school funds and finance. 2.3 states that secretaries keep the staff informed of current requirements concerning absences and leaves as well as the reviewing and forwarding of needed application forms. 2.4 notes that secretaries are responsible

for the preparation of confidential records for staff and pupils (including CARs, time cards, transfer of records, and transcripts of records). 2.5 says that secretaries are responsible for the preparation of various payrolls, for the distribution of paychecks and resolution of any discrepancies related to the paychecks. 2.6 specifies that secretaries order and type requisitions and inventories of supplies and equipment. 2.7 lays out the typing responsibilities of secretaries and their role in the preparation and reproduction of materials related to school administration. The final item, 2.8, posits the duties of secretaries concerning the appearance and function of the school office (files, mail, bulletin boards, mailboxes, office supplies, telephones, arranging for substitute teachers, and acting as receptionist).

Section 3 of Circular 31 concerns school aides. It describes school aides as hourly employees. It states that school aides relieve teachers of non-teaching or those activities that do not require professional skills. It notes that school aides can assist teachers in the lunchroom. It adds that they can perform related work.

The circular sets forth 11 areas of tasks to be performed by schools aides. 3.1 states that they can relieve teachers of various monitorial and patrol duties. 3.2 alludes to the handling, distribution and storage of textbooks and a number of categories of other materials and supplies. It adds that school aides maintain inventories. 3.3 observes that school aides accession and mend classroom and central library books. 3.4 indicates that school aides function as assistants to school treasurers and have duties related to the collection, counting and depositing of money. 3.5 states that school aides assist with classroom clerical work including the operation of duplicating equipment. 3.6 says that school aides review reports, notes, library lists, etc. 3.7 relates to the supervision of children who arrive or leave by school bus. 3.8 concerns the checking of milk deliveries and the distribution

of milk. 3.9 and 3.10 deal with school aides' duties in the lunchroom and 3.11 sets forth clerical duties done by school aides including post cards to the parents of absent pupils and the issuance of subway and bus passes.

Item 4 of the circular refers to paraprofessionals. It emphasizes that paraprofessionals may perform clerical duties incidental to and related to the main tasks to which they are assigned.

4.1 concerns family workers. It sets forth the duties of the family workers and indicates that they perform work related to their job description.

4.2 describes educational assistants as individuals who work in classrooms under the supervision of classroom teachers. It points out that educational assistants perform work that is consistent with their specified duties.

The Union argued that Special Circular 31 is dispositive of the distinctions in duties between school secretaries and the other titles referenced in the circular. The Department maintained that this is not so.

The Department asserted that Circular 31 does not make specific reference to the eight areas of duties that the Union identified as part of this grievance, i.e., payroll, admissions, discharges and interclass transfers, typing letters, observation reports, bulletins, etc., ordering supplies, books, handling student files, handling teacher files, managing the general office.

Under Special Circular 31, payroll comes under item 2.5. Admissions, discharges and interclass transfers are referenced in items 2.2 and 2.4. The typing of various materials is noted in item 2.7. Ordering supplies and other materials is noted in item 2.6. The handling of teacher and student records is reflected in item 2.4 and the management of the office is described in item 2.8. Therefore, Section 2 of Circular 31, in certain instances specifically and in others, generally,

identifies the duties that were the subjects of this matter.

The Department also stressed that Circular 31 was issued in 1976 and that there have been significant changes in conditions in the schools since then. It suggests that the changed conditions since then must be considered. 5

Some of the changes since 1976 that are relevant, in the Department's view, concern the advent of computers such that administrators and others now do their own typing. It also pointed out new titles have been created since 1976 and that Circular 31 could not have anticipated them.

Turning now to the Department's assertion that many administrators now do their own typing or word processing, the record suggests that such is the case. Many of the administrators who testified at the hearing indicated that they word process their own documents. It must be added, however, that a significant number of the Department's witnesses stated that, where administrators do not do their own typing/word processing, this task is performed by secretaries and no one else.

The grievance did not suggest that administrators word processing their own documents constituted a violation of the contract. However, even if one views the grievance narrowly, it must be noted that previously administrators may have hand-written their documents and then given them to secretaries for typing. Thus, when administrators word process their own papers, they do so in lieu of hand writing them. It would strain logic for secretaries to be required to re-type the same document that the administrator word processed simply because s/he preferred to do so rather than to write it in long hand. Therefore, the undersigned need not reach the issue of whether supervisors doing their own typing violates the secretaries' contract. Where they do so instead of handwriting documents, precluding administrators from typing or word processing their own papers would be

a hyper technical interpretation of the relevant CBA.

In a broader sense, there can be no doubt that there have been significant technological changes since 1976. However, the record indicates that the tasks performed by school secretaries have remained substantially unchanged. What has changed is the technology used in the completion of the tasks. Certainly computers are currently used for payroll and pupil accounting functions, as well as for ordering materials and for word processing. Having said that, the instant grievance concerns the duties in question and not the equipment used in doing them.

Thus, there is no evidence that the duties set forth in Special Circular 31 have changed. The question therefore remains whether those duties, irrespective of whether they are done with pencil and paper or computers, may be performed by personnel who are not school secretaries.

As to the creation of new titles, the Department cited the titles of *Health Service Aide* and *School Business Manager* and *Parent Coordinator*. The Department produced the job description of *Health Service Aides* (DX8).

This job description specifically says that *Health Service Aides* (health aides) assist in the provision of health services to students and staff, administer first aid, maintain health records and perform related work. Related *work* must be seen in the context of the provision of health services, the administration of first aid and the maintenance of health records. This term cannot be read to mean secretarial or clerical chores done by secretaries that have nothing to do with maintaining health records and the other items listed.

The job description goes on to outline typical tasks performed by health aides. Many of these tasks are clearly related to the categories of duties and responsibilities alluded to above. There are certain tasks that may be clerical in nature. However, they are specifically related to what health

aides do. For example, assisting in the review of health records to note immunization status is part of the maintenance of health records and the issuance of warning letters and exclusion notices are duties of these personnel to assure compliance with relevant law and school regulations.

The Arbitrator has reviewed the job description of health aides and concludes that nothing in the document suggests that these aides are authorized to perform duties done by school secretaries. Moreover, Joseph LoSchiavo, a Deputy Director at the Department's Division of Human Resources, testified at the hearing. He has jurisdiction over employees on the H-Bank payroll. He made it very clear that there was no intention for the holders of many of the titles at issue in this proceeding to assume duties performed by secretaries. Health aides must come under this statement.

The job description of health aides set forth their exclusive duties. None of these duties overlap with those of school secretaries. In sum, the creation of the health aide title does nothing to alter the meaning of Circular 31.

The second new title to be considered is that of *School Business Manager*. Mr. LoSchiavo was involved in the creation of that title. He specifically said that people holding this title were not expected to take on the duties of secretaries.

In addition, the Department admitted the job description of School Business Managers into evidence (DX10). This title was created in 2005. The general duties of the School Business Manager include responsibilities concerning budget, contracts, and personnel and non-administrative responsibilities. The document lists 12 bullet items outlining duties and responsibilities. None of these items indicate that the School Business Managers are expected to perform secretarial functions.

Some of the testimony indicated that School Business Managers prepare requisition forms. The job description does refer to school purchases and compliance with purchasing procedures.

However, it must be recalled that Mr. LoSchiavo played a role in creating the position. He stated that School Business Managers' role in the purchase of materials and supplies was to deal with Department contracts with vendors. By contrast, Special Circular 31 deals with the actual preparation of requisitions. There is a significant difference between these two functions.

He added that the School Business Managers might have oversight responsibilities on payroll matters in connection with personnel being on appropriate budget lines. He said the School Business Managers are totally divorced from anything to do with pupil accounting duties and typing/ word processing school documents..

The job description of the School Business Manager must be read in the context of Mr. LoSchiavo's testimony that School Business Managers were never intended to assume the roles of school secretaries. This leads the undersigned to conclude that the development of the title of School Business Manager has no impact on the terms of Special Circular 31. The duties of the School Business Managers are separate and distinct from those of school secretaries.

The final new title created was that of *Parent Coordinator*. There was no job description put into evidence. However, Mr. LoSchiavo discussed the title. He said that the parent coordinators were to play no role in admissions, discharges and interclass transfers. He indicated that the parent coordinators might have a tangential role relative to student records to the extent that parents may have questions about their children and the answer to the questions might be found in the students' records. He suggested that the parent coordinator might have to access student records in order to retrieve the information needed by parents.

Mr. LoSchiavo asserted that parent coordinators are expected to create a welcoming environment in the schools and to serve as *ombudspeople*. He noted that they attend PTA meetings and might be required to do some other night work. At the end of his testimony, he included parent coordinators when he said that the creation of this title was not designed for its holders to take on secretarial duties. Thus, the creation of this title, like the other new titles created, does not alter the meaning of Special Circular 31 in terms the duties assigned to school secretaries.

In sum, the Department contended that Special Circular 31 is no longer relevant because it is dated and inconsistent with changes in technology and with the development of new positions. The Arbitrator disagrees.

The Department is correct when it states that this circular is now almost 32 years old. However, the record is clear that it has never been modified or rescinded. While, as a result of technological advances, the way that duties are performed may have changed, the duties of the secretaries have not changed. In addition, there is no overlap between the duties of the paraprofessionals identified in Circular 31 and the newly created positions and those of school secretaries. In the absence of such modification or rescission, the undersigned must conclude that the Special Circular as written in 1976 survives to this day.

WHETHER THE DUTIES ASSIGNED TO SCHOOL SECRETARIES IN SPECIAL CIRCULAR 31 MUST BE PERFORMED BY SCHOOL SECRETARIES EXCLUSIVELY

This element of the Department's argument was a rejection of the Union's assertion that the duties of school secretaries as set forth in Circular 31 are exclusive to secretaries. This aspect of the Department's case concerns the paraprofessional titles enumerated in Special Circular 31.

The Department stressed that the Union posited that the tasks at the core of the instant controversy (payroll, admissions, transfers, interclass transfers, typing, ordering supplies, handling

student and teacher files and managing the general office) must only be performed by school secretaries. It denied this premise and indicated that multiple titles, including that of school secretary, may perform these duties.

The resolution to this dispute is found within Special Circular 31. The predicate to the section devoted to school secretaries is that secretaries are licensed pedagogues. The circular says that the secretaries perform services of a general and often of a confidential nature. It then sets forth those duties. The circular is clear that the eight categories of duties listed in the section devoted to school secretaries are to be performed by individuals holding the license of School Secretary.

The Department's argument is that the fulfilling of the functions in question is not the exclusive responsibility of secretaries. This contention bears further discussion.

At the core of the Department's argument is the statement that the holders of non-secretary titles are permitted to perform secretarial/clerical tasks. As previously noted, Circular 31 sets forth the duties of school aides and paraprofessionals. The Department averred that school aides, family workers and family associates perform clerical tasks that overlap with those of secretaries. It pointed out that school aides perform such tasks as handling instructional supplies, maintaining inventories, assisting with classroom clerical work of a routine nature and *other clerical tasks*.

With respect to school aides, the term *clerical* or *clerical tasks* appears twice. Item 3.5 says that aides can assist with *classroom clerical work of a routine nature including operation of duplicating equipment*. In this context, the term *clerical work* is modified by *classroom*. This cannot be construed to mean secretarial duties since secretaries are non-classroom personnel.

The second reference to *clerical tasks* is found in item 3.11. This allusion is to the sending of post cards to the homes of students who have been absent and to the issuance of subway and bus

passes.

The terms of this item suggest that the *clerical tasks* performed by aides *include* the two items listed above. However, since proper licensure is required for the performance of secretarial duties and school aides are not so licensed, the term *clerical tasks* must refer to non-secretarial clerical duties.

Moreover, even if one accepts that aides might perform clerical tasks other than the two listed in 3.11, the language in section 2 that requires the proper licensure of school secretaries must lead to the conclusion that even if an expansive view of *other clerical tasks* in 3.11 is accepted, the *other clerical tasks* cannot be those listed in items 2.1 through 2.8. It should be recalled that the undersigned found that the tasks at issue in this case are subsumed in items 2.1-2.8 of Circular 31.

The Department noted that aides handle instructional supplies and maintain inventories. The handling, storage and distribution of instructional materials and the maintenance of inventories do not overlap with duties performed by secretaries. The job description of school secretaries does not include these duties. Thus, the performance of these tasks is not at issue in this matter.

The Department asserted that family workers assist with registration and attendance. It relied on an April 2, 2007 download from the Department's website (DX6). Two other documents, Special Circular 31 (UX2) and an untitled job description of the family worker title (DX7) indicate that family workers assist with the recruitment and registration of children. However, both documents identify the nature of the position and nowhere does it refer to clerical work that overlaps with duties of secretaries. In fact, the final phrase in the job description is *performs related work*. That must be read in the context of the services that family workers provide to families in terms of home and in-school visits with parents, the identification of family needs, referrals of the

families to public and private agencies, home visits of absentee students and assistance to classroom teachers. Thus, the context in which the phrase *recruitment and registration of children* is used is related to assistance provided to parents whose children are being recruited to attend school and to be registered to attend. This description is not of a clerical function. If it were, it would have been labeled as such.

The Department also claimed that the job description of family associates indicates that these personnel perform clerical duties that are also done by secretaries. It pointed to item 12 of the job description (DX7) to indicate that family associates *assume administrative responsibilities that may be designated by the principal*. However, this document goes on to indicate that the *administrative responsibilities* might be planning the nature of, dates of, and arrangements for parents' meetings, home visitation schedules, etc.

This item makes no reference to clerical responsibilities that fall under the job description of school secretaries. Moreover, when item 12 is put in the context of the other 12 items on the job description, it is apparent that the work of family associates deals with families, children, PTAs, community agencies and school boards. In sum, the undersigned concludes that the job description of family associates does not indicate that there is an overlap between their roles and that of school secretaries.

In its written arguments, the Department referred to the testimony of Renee Harper. She currently works at the Division of Human Resources in the Division of School based Support Services.

It asserted that Ms. Harper claimed that family workers may be responsible for ATS data entry and for handling student files. Ms. Harper did refer to these functions. ATS is a

computerized system for the reporting of student attendance.

It should be noted that the record contains a list of activities and tasks that are not to be considered responsibilities of school secretaries. Many of these items come directly from non-secretary job descriptions in Circular 31. Others do not. Some of the items in the latter category are: collecting student attendance from teachers, collecting and scanning student attendance rosters, correcting attendance rosters, assisting teachers in carrying student files for re-organization or admission/transfer purposes, distributing documents, collecting roll books and packaging test materials.

As indicated, the scanning of student attendance rosters was one of those items. That being the case, Ms. Harper's testimony relative to ATS identifies a specific application of the scanning of attendance rosters.

The handling of student files is another matter. Item 2.4 of Special Circular 31 indicates that the preparation and maintenance of confidential student records falls under the purview of school secretaries. Federal law (FERPA) makes these records confidential. In addition, there is nothing in the family worker job description that provides family workers with access to student records

Furthermore, Ms. DeSanctis, the principal of Richmond Hill HS, testified on behalf of the Department. She stated that school aides had been responsible for handling student records in the record room over a three year period in her school and that she knew that this was improper. This testimony is in sharp contrast with that of Ms. Harper who indicated that the handling of files was part of the duties of school aides.

To conclude this section of the instant Opinion, Special Circular 31 refers to school secretaries, school aides and paraprofessionals. It subdivides the class of paraprofessionals into

family workers and educational assistants. The above analysis indicates that there is no overlap in duties assigned to school secretaries and the other titles.

The term *clerical* appears in the school aides job description but it is used in connection with tasks that have nothing to do with secretarial duties. As to family workers and educational assistants, both of these titles are described in terms of the duties performed. In this section of the circular the word or term *clerical* or *clerical duties* does appear but, as with school aides, they are in connection with the duties of family workers and educational assistants. In both job descriptions the phrase *performs related work* appears. The key word is *related*. The work done by people holding these titles is *related* to the job description. In neither case is the performance of secretarial or clerical tasks done by secretaries included in the job description. Therefore, the phrase *performs related work* is to be read in the context of the specific job description and cannot be construed to mean that they can perform duties related to a different job description, i.e. that of school secretaries. The same is true of the use of *clerical duties* in the introductory paragraph of Section 4 of Circular 31.

The Arbitrator has previously discussed titles that were created after the issuance of Circular 31. The undersigned relies on the job descriptions in evidence and the testimony of Mr. LoSchiavo in which he stated that these titles were not intended to include roles of school secretaries.

The undersigned concludes that the duties of school secretaries are separate and apart from those of the other titles under review. The record shows functions of school secretaries, as set forth in Special Circular 31, must be performed by individuals who hold the license of school secretary. Unless the school aides, family workers, educational assistants, school business managers, parent coordinators and health aides hold that license, they cannot be assigned the school secretaries's

duties set forth in Section 2 of Special Circular 31.

WHETHER THERE IS A PAST PRACTICE OF ASSIGNING SECRETARIAL DUTIES TO PERSONNEL OTHER THAN SECRETARIES

The term *past practice* is a term of art. It suggests that in the presence of ambiguous contract language, a *past practice* takes on the significance of explicit contract language. The nature of a past practice is the first issue to be explored.

Elkouri & Elkouri¹ defined binding past practices as being: (1) unequivocal, (2) clearly enunciated and acted upon, (3) readily ascertainable over a reasonable period of time as a fixed and established practice of the parties. This treatise added an alternative definition. It referred to (1) consistency (repetition), (2) clarity (uniformity) and (3) acceptability (mutuality). It must be noted that, in order for a practice to be considered binding, all of the elements must be present.

The undersigned takes arbitral notice of the fact that there are about 1500 schools in the New York City schools. At most, the record developed at the hearing indicates that the practice in question exists in 175 schools. This can hardly be considered unequivocal.

There is nothing in the record to suggest that the *practice* was clearly enunciated. The undersigned did a thorough review of many job descriptions and in no instance was there a statement that non-holders of the school secretary's license would be assigned the duties of school secretaries. Additionally, there were no other documents introduced that would have satisfied this element of the definition.

Finally, the testimony of witnesses representing specific schools varied. In different schools different unlicensed personnel performed different tasks of secretaries. Thus the practice varied

¹*How Arbitration Works*, Sixth Edition, page 609

from school to school and the length of time during which the practice existed also differed from school to school. In some cases the practice was in place for a reasonable period of time and in others, it did not. Certainly titles created as recently as 2005 cannot satisfy this element of the definition.

The last item to be touched on is the issue of whether the contract language is ambiguous. There can be no binding past practice in the presence of clear and unambiguous language.

Article 15 of the CBA of the school secretaries indicates that all *regulations* issued by the Department shall remain in force through the life of the contract. A careful reading of the first paragraph of the circular reveals that Frank Arricale, the then Executive Director of the Division of Personnel of the then Board of Education and the signatory to Special Circular 31, characterized the contents of Special Circular 31 as *regulations* and that these regulations were to become part of the *Manual of Personnel Policies and Procedures*. Since Special Circular 31 is comprised of regulations, the implementation of its terms is required under Article 15.

The terms of Circular 31 are clear and unambiguous. It states that secretarial duties must be performed by holders of the license of school secretary. In the presence of such clarity, there can be no binding past practice of employees not holding the license of school secretary fulfilling the duties of school secretaries.

In short, based on the elements of past practices and the presence of clear and unambiguous language, the Arbitrator finds that there is no binding past practice to have people who are not licensed school secretaries perform the duties assigned to school secretaries in Special Circular 32.

WHETHER THE UNION WAIVED ITS RIGHT TO GRIEVE AND ARBITRATE THE INSTANT MATTER

The essence of that Department's argument is that the Union was aware the non-secretaries

have performed the at-issue tasks and declined to contest this fact through the arbitration process. It pointed to grievances related to the issue at bar that were denied in 1999 and 2003 and were not pursued to arbitration. It insisted that, accordingly, the Union waived its right to litigate this matter at this time.

The Union rejected the Department's argument by citing to Elkouri & Elkouri. It also pointed to precedential decisions written by panel arbitrators of the Department and the Union.

With respect to the two grievances alluded to, *Burgos* (1999) and *Sarney* (2003), *Burgos* (UX8) was denied at Step 3 in October 1999 and *Sarney* (UX7) was denied at Step 3 in May 2003. It is un rebutted that Deidre Burgos filed her own grievance. It was not Union initiated. Burgos left the school in which the grievance arose. The grievance became moot since there was no remedy available to the grievant. The Department's argument might have been much stronger had this been a Union initiated grievance.

Wendy Sarney also filed her own grievance. The evidence suggests that this matter was the subject of a demand for arbitration (UX12).

The record suggests that there have been other grievances related to the instant matter. There was Step 2 denial in 2000 by the Superintendent of Manhattan high schools (UX9). The grievance was withdrawn after the issue was resolved (UX13).

There was another Step 2 decision in 2000 (UX10). This one was in District 22. It dealt with secretary positions in summer school. In that case, the grievance was sustained and Superintendent Comer agreed to seek secretaries to cover positions that had been assigned to school aides.

Finally, there was 1998 Step 3 decision which sustained a grievance filed in PS 174Q in

which aides were performing the duties of secretaries. Evidently, there had been a Step 2 decision in which the grievance had been sustained but not implemented. The Step 3 decision ordered the principal to cease and desist from assigning secretary work to school aides and to implement the Step 2 decision.

A review of the cited cases suggests that *Burgos* was the only Step 3 denial that was not taken to arbitration. The others either were taken to arbitration or were resolved such that arbitration was obviated.

A study of the citation in Elkouri and the arbitral decisions leads the undersigned to conclude that, as here, a single instance, particularly given that there was no remedy, cannot be viewed as a waiver of a party's right to file and arbitrate a Union-initiated grievance. The arbitrators describe multiple valid reasons for not pursuing a grievance. Arbitrator Feinberg specifically identified a grievance becoming moot as being one such rationale. That is what happened in *Burgos* and that case does not stand for the proposition that the Union can be precluded from filing a subsequent Union-initiated grievance.

CONCLUSIONS

A significant underlying concern of the Department's is the budgetary implications of the instant matter on small schools with limited budgets. The creation of a solution to this issue is not within the power of the Arbitrator. The jurisdiction of the undersigned is limited to the interpretation of the collective bargaining agreement and that limitation has been respected.

It must be added that this statement is not to denigrate or minimize the Department's position in this regard. However, this may be an issue that can be the subject of bargaining between the parties. Perhaps a meeting of the minds can be arrived at that will meet the needs of both

parties.

As to the matter at hand, the following is a summary of the Arbitrator's findings:

1. The record indicates that personnel not holding the license of school secretary have been performing duties appearing on the job description of school secretaries.

The basis for this finding is a Union survey (UX1) stipulated to by the Department. In addition, the testimony of the Department's witnesses was consistent with the data found on the survey.

2. Special Circular 31, 1975-76, is in force at this time.

3. This circular is self-described as a set of regulations.

4. Article 15 of the collective bargaining agreement requires that regulations and other matters continue in force during the term of the Agreement.

5. With respect to school secretaries, Special Circular 31 highlights the licensure requirements for employees to perform the duties of school secretaries.

6. Special Circular 31 identifies eight (8) categories of duties that are to be performed by school secretaries.

7. The Union survey (UX1) identified seven duties that are being performed by employees not licensed as school secretaries, payroll, admissions, discharges and interclass transfers, typing letters, observation reports, etc., ordering supplies, materials and books, handling student files, handling teacher files, managing the office. These seven items are subsumed within the categories of duties assigned to school secretaries in Special Circular 31.

8. Special Circular 31 also provides the job descriptions of school aides, family workers and educational assistants. There is no overlap in the duties of these three positions and those of school secretaries. Thus, school aides, family workers and educational assistants may not perform duties of school secretaries that are enumerated in Section 2 of Special Circular 31.

9. Three positions have been created since the issuance of Special Circular 31, health aides, school business managers and parent coordinators. There is

no overlap in the duties of these three positions and those of school secretaries. Thus, health aides, school business managers and parent coordinators may not perform duties of school secretaries that are enumerated in Section 2 of Special Circular 31.

10. There is no binding past practice of school aides, family workers and family associates, educational assistants, health aides, school business managers and/or parent coordinators performing the duties of school secretaries.

11. The Union did not waive its right to file the instant grievance and to have it arbitrated.

The Union claimed that two contract provisions, Articles 5 and 15, were violated. The Department asserted that the assignment of duties falls under the management's rights provision of the CBA and, therefore did not breach the Agreement.

It is well settled that management retains the virtually unfettered right to manage its operation except to the extent that the management prerogative in question was not relinquished through the collective bargaining process. The results of the bargaining limits management's rights by the terms of the provisions of the collectively negotiated contract. In this case, the grievance cites two specific articles that were the product of negotiations. Thus, management did not retain the rights implicit in this matter.

The first provision at issue is Article 5. This article concerns the licensure of school secretaries. It requires the filling of all school secretary positions with individuals holding the license of school secretary. The Department asserted that it has never placed an unlicensed person in a school secretary position. However, this article provides three exceptions to the licensure requirement. Two of them are relevant here.

Exceptions 1 and 2 focus on the services provided by and the work done by school secretaries. Thus, this contract provision makes it necessary that licensed school secretaries perform

the tasks delegated to school secretaries.

Moreover, the representatives of two of schools who testified on behalf of the Department had no secretaries. To the extent that all of the duties of school secretaries were being performed by unlicensed personnel, regardless of the number of secretaries needed in those schools, in effect unlicensed people were filling a whole or partial school secretary's positions.

Article 5 sets forth the requirement that personnel employed as school secretaries must be licensed as school secretaries and Special Circular 31 mandates that, even in schools that employ school secretaries, the duties of school secretaries must be performed by licensed school secretaries. The record is clear that personnel not licensed as school secretaries have been performing the duties of school secretaries. Thus, Article 5 of the school secretary's collective bargaining agreement was violated.

Article 15 was also the subject of the grievance. This provision mandates that Department regulations remain in effect during the life of the collective bargaining agreement. As previously found, Special Circular 31, 1975-76, was identified by its author, Frank Arricale, the Executive Director of the Division of Personnel, as a set of regulations. Thus, a failure to follow the terms of Special Circular 31 constitutes a violation of Article 15. The Arbitrator has concluded that the terms of Special Circular 31 have not been followed and, therefore, Article 15 was violated.

In sum, based upon the above, the Arbitrator concludes that the Department violated Articles 5 and 15 of the school secretaries' contract when it permitted personnel who do not hold the license of school secretary to perform the duties of secretaries and makes the following

AWARD

1. The grievance is sustained.
2. The Department of Education is to cease and desist from assigning the duties of secretaries to personnel who are not licensed as school secretaries.
3. The Arbitrator will retain jurisdiction of this matter to resolve any disputes related to the implementation of this Award.

Dated: March 14, 2008
Hewlett Harbor, NY



ARTHUR A. RIEGEL, ESQ.
ARBITRATOR

AFFIRMATION

STATE OF NEW YORK)
COUNTY OF NASSAU)

I, Arthur A. Riegel, Esq., affirm that I am the individual described in and who executed the foregoing instrument, which is my Opinion and Award.



ARTHUR A. RIEGEL, ESQ.