

ARTICLE VI

Seniority

. . .

Section 3.

When it becomes necessary to fill a vacancy or a new position in the bargaining unit, the Board will bulletin such vacancy or new position, asking for applications and the qualified employee within the bargaining unit with the longest period of service applying for the job or position, will be assigned to it. This bulletin will cover a period of seven (7) calendar days. The Superintendent of Buildings and Grounds shall determine whether such services are satisfactory. [Emphasis supplied.]

- (a) An employee being promoted or going to a new position, shall be granted 60 calendar days time to prove his qualifications.
- (b) Any employee failing, for any reason, to qualify for any job or new position may return to the position he formerly held.
- (c) In the event that there is no qualified employee within the bargaining unit to fill a vacancy or new position, the School Board may fill it at their discretion.

4. That Complainant Richard Vis, herein Complainant-Vis, resides at 1125 South 71st Street, West Allis, Wisconsin; that for approximately the previous ten years and at all relevant times Complainant-Vis was an employe of Respondent employed in bargaining unit maintenance positions; that his most recent position has been as a general maintenance electrician performing the repair and replacement of electrical controls; and that none of his positions with Respondent have included regular responsibility to direct the work of other employes.

5. That shortly prior to July 3, 1978, Respondent took applications from employes who desired to fill the position of head custodian at Whitefish Bay High School effective July 3, 1978; that Complainant-Vis, David Kettleson and two other employes applied therefor; and that Complainant-Vis was the most senior of all of the applicants.

6. That working under the direction of Superintendent of Buildings and Grounds Alan Bostad, the instant head custodian is responsible for the direction of 16 full-time and 4 part-time employes; that in relevant part, the head custodian plans and assigns the tasks to be performed by both daytime and evening custodial staff; that in

addition thereto, the head custodian performs cleaning and maintenance duties similar to that performed by subordinates; and that the following are the qualifications for the position of head custodian at Whitefish Bay High School:

1. Certification of good health signed by a licensed physician.
2. Considerable knowledge of the materials, equipment and methods commonly employed in general cleaning and maintenance work.
3. Considerable knowledge of occupational hazards and safety precautions.
4. Knowledge of the operation and care of vacuum cleaners, scrubbing machines and other custodial equipment.
5. Ability to plan, assign and supervise the work of subordinates and to train and instruct employees in cleaning, heating and maintenance operations.
6. Ability to make minor repairs to equipment and building fixtures.
7. Ability to understand and effectively carry out oral and written instructions.
8. Ability to work with personnel of varying temperaments.
9. Ability to establish and maintain effective public and co-worker relationships.
10. Ability to maintain accurate and complete records.

7. That Superintendent of Buildings and Grounds Bostad reviewed the qualifications of the employes applying for the instant positions and selected Kettleson and appointed him to the position; and that in doing so, Bostad testified that Complainant-Vis lacked "minimum qualifications" for the position, based upon the following factors: supervisory experience, custodial experience, ability to get along with his co-workers, work record, attitude toward the disputed job, ability to follow directions, and "any other of the qualifications that are listed on the job description."

8. That on June 23, 1978, Complainant-Vis filed a grievance concerning said selection, which grievance requested that he be assigned to the disputed position; and that said grievance was processed through all of the steps of the grievance procedure without resolution thereof.

9. That Complainant-Vis regularly fails to follow routine directions of management and fails to cooperate in being accessible for work assignments; that throughout his employment Complainant-Vis has had considerable difficulty in his relationships with fellow employes; and that Complainant-Vis has demonstrated a poor work attitude throughout his employment.

10. That Complainant-Vis lacks the minimum ability necessary to establish the working relationships with his supervisors and with employes who would be under his direction to perform the duties of the instant position; and that Complainant-Vis is not minimally qualified for said position.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

That, since Complainant-Vis was not minimally qualified for the disputed position, Respondent did not commit a violation of the parties' current collective bargaining agreement and, therefore, did not commit a prohibited practice within the meaning of Section 111.70(3)(a)5, Wis. Stats., when it refused to laterally transfer him to the disputed position.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

ORDER

That the complaint filed in the instant matter be, and the same hereby is, dismissed.

Dated at Milwaukee, Wisconsin this 13th day of June, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley H. Michelstetter II
Stanley H. Michelstetter II, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

The Complaint filed herein alleges Respondent committed prohibited practices within the meaning of Section 111.70(3)(a)1, 3, 4 and 5, Wis. Stats., by allegedly unilaterally establishing a new policy with regard to sick pay, vacation pay and days off of Complainant-Vis, and by refusing to promote him to the position of head custodian. The former issue was resolved during hearing, and Complainants withdrew all allegations except the allegation that Respondent violated Section 111.70(3)(a)5 by the failure to promote.

At the outset of the hearing the parties stipulated to all relevant aspects of the remaining allegation except the interpretation of the trial period provision of Article VI, Section 3, and Complainant-Vis' qualification for the disputed position. Over Respondent's objection, I allocated the burden of proceeding with the evidence to Respondent on the basis of my interpretation of the relevant agreement. At the same time, I reserved determination of the appropriate allocation of the burden of persuasion. That issue is discussed herein.

POSITIONS OF THE PARTIES

Complainants allege that the agreement requires that the most senior applicant be awarded a posted job regardless of his or her qualifications, except where the applicant clearly lacks the qualifications.^{1/} They allege the employe can be removed during the sixty day trial period if he or she fails to demonstrate minimum qualifications for the position. Accordingly, they conclude Complainant-Vis should be permitted a trial period. Alternatively, they allege Complainant-Vis has minimum qualifications for this position. They allege the position requires only minimal nonsupervisory direction of fellow employes. They deny this responsibility requires that the directed employes "like" the head custodian. They deny Complainant-Vis is unable to get along with fellow employes. Specifically, they dismiss the testimony of Respondent's supporting witness Bessette on the basis it is she, not Complainant-Vis, who is unable to get along with fellow employes. They allege Complainant-Vis has clearly

^{1/} An example would be inability to walk.

demonstrated the ability to perform the manual duties performed by the head custodian. Further, they allege he has already satisfactorily performed "supervision" at the level required by this position.

Respondent agrees that the senior applicant is entitled to a posted position if minimally qualified. It denies that an applicant is entitled to a trial period unless he or she is minimally qualified. It contends the Employer's determination of qualifications should be affirmed unless arbitrary or capricious. Respondent alleges Complainant-Vis lacks "minimum qualifications" (unspecified by Respondent) as evidenced by his:

1. disciplinary record (including offenses for which no discipline was imposed),
2. excessive absenteeism,
3. excessive injuries,
4. repeated failure to follow directions, and
5. lack of supervisory and custodial experience.

In any case, Respondent alleges that Complainant-Vis' record--of misconduct, failure to follow directions, uncooperative attitude and poor attendance--alone justifies its judgment.

DISCUSSION

Article VI, Section 3 clearly states that the "qualified employee . . . will be assigned to" the vacant position. (Emphasis supplied.) Where, as here, an employe demonstrably does not possess a minimum qualification for a position, the Respondent need not afford the employe a trial period. I conclude it is the better administration of this provision to require that, after the Complainant-Union establishes that an employe has properly applied for a position and possesses more seniority than the successful applicant, the Respondent must establish as a contractual affirmative defense that the employe lacks a minimum qualification for the position.^{2/}

The determinative aspect of this case is whether Complainant-Vis lacks the minimum ability to establish the relationships with directed employes and with supervising management sufficient to perform the duties of the instant position. In essence, this determination rests on Bostad's judgment that Complainant-Vis does not have the requisite

^{2/} Stolper Industries, Inc., (12165-A, B) 7/74.

ability. I conclude that this judgment is entitled to weight if and only if it is supported by specific and understandable evidence.^{3/}
A review of the record establishes that it is.

Bostad testified Complainant-Vis was unnecessarily argumentative with him and with fellow employes, and otherwise had difficulty getting along with employes. This testimony was corroborated by credible testimony from two fellow employes both as to their own difficulties with Complainant-Vis and their perceptions of other employes' difficulties with him. Further, in addition to numerous verbal warnings, Complainant-Vis was twice reprimanded in writing for his relationship with fellow employes well prior to the occurrences of this dispute.^{4/} I am satisfied that Bostad's judgment in this regard is both honest and valid.

It is also Bostad's position that Complainant-Vis cannot be relied upon by management to follow its directions. Bostad credibly testified that he reprimanded Complainant-Vis at least weekly for not following directions. He also regularly reprimanded Complainant-Vis for not turning in work orders as directed. Complainant-Vis also routinely failed to keep Bostad's secretary informed of his whereabouts as required. Taken with evidence establishing Complainant-Vis' work avoidance attitude, I conclude Bostad's judgment in this regard is well supported. I am, therefore, satisfied that Respondent had established by a clear and satisfactory preponderance of the evidence that Complainant-Vis lacks the minimum ability to establish the relationships with management and fellow employes necessary to perform the duties of head custodian. Therefore, Respondent did not commit a prohibited practice within the meaning of Section 111.70(3)(a)5 when it refused to transfer Complainant-Vis to the instant position.

Dated at Milwaukee, Wisconsin this 13th day of June, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley H. Michelstetter II
Stanley H. Michelstetter II, Examiner

3/ Ford Motor Company, 2 LA 374, @ p. 376 (1945).

4/ Exhibits 5a and 5e.