

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**SERVICE EMPLOYEES INTERNATIONAL UNION,  
LOCAL 150, AFL-CIO, Complainant,**

vs.

**ST. FRANCIS SCHOOL DISTRICT, Respondent.**

Case 75  
No. 56657  
MP-3441

**Decision No. 29531-A**

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Appearances:

**Ms. Jill Hartley**, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212, on behalf of Complainant.

**Ms. Mary L. Hubacher**, Davis & Kuelthau, S.C., Attorneys at Law, Suite 1400, 111 East Kilbourn Avenue, Milwaukee, Wisconsin 53202-6613, on behalf of Respondent.

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER**

The Service Employees International Union, Local 150, AFL-CIO, on July 10, 1998, filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission, alleging that the St. Francis School District committed unfair labor practices within the meaning of Sec. 111.70(3)(a)(5), Stats. by refusing to award the position of Head Custodian to Richard Stelloh, in the context that the effective labor agreement between the Complainant and Respondent does not include final and binding arbitration of such disputes. On January 22, 1999, the Commission appointed Sharon A. Gallagher, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07(5), Stats. A hearing on the complaint was held at Milwaukee, Wisconsin, on February 12, 1999, and a stenographic transcript of the proceedings was made and received by February 19, 1999. Briefs and reply briefs were received and exchanged by

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the Examiner and the record herein was closed on April 26, 1999. The Examiner, having considered the evidence, briefs and arguments of the parties, and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

### **FINDINGS OF FACT**

1. Service Employees International Union, Local 150, AFL-CIO (hereafter Union) is a labor organization with its offices located at 6427 West Capitol Drive, Milwaukee, Wisconsin 53216.

2. St. Francis School District (hereafter District) is a municipal employer operating a public school system with its principal offices located at 4225 South Lake Drive, St. Francis, Wisconsin 53235.

3. At all relevant times, the District has recognized the Union as the exclusive bargaining representative of custodial employees employed at the District, including Grievant Richard Stelloh. The District and the Union have been parties to a series of collective bargaining agreements, the most recent of which is effective from July 1, 1997 through June 30, 2000. That agreement includes a complaint/grievance procedure for the resolution of disputes arising between the parties, but it does not provide for final and binding arbitration or any other means of final and binding resolution of such disputes. The collective bargaining agreement in effect provides in relevant part as follows:

#### **G. COMPLAINT/GRIEVANCE PROCEDURE**

In order to increase general efficiency in the St. Francis School District, to maintain the existing harmonious relationship between the District and its employees and to promote morale, equal rights, well being and security of employees, employees shall have the right to present grievances and the right to be heard and, in so doing, shall be assured freedom from restraint, interference, discrimination and reprisal in accordance with Wisconsin Statutes 111.70 and in accordance with the following procedures:

1. Complaint Procedure. Employees shall have the right to present complaints and the right to be heard. Any employee expressing a complaint of any nature shall, with or without his Union representative, attempt to resolve the situation orally with the Supervisor of Buildings and Grounds. If the situation cannot be settled between the employee and the Supervisor of Buildings and Grounds, an attempt shall be made

to resolve the situation orally with the Superintendent of Schools. If the situation still cannot be settled, it will then become the option of the Union to present the matter as a grievance.

2. Grievance Procedure. Officials at all levels shall receive and act promptly and fairly upon employee's grievances. A grievance alleges that the Agreement has been violated. The following procedure is hereby established to handle employee grievances:

- a. Any employee expressing a grievance of any nature shall, with or without Union representative, discuss the situation orally with the Supervisor of Buildings and Grounds. The Supervisor of Buildings and Grounds shall reach a decision and communicate it orally to the employee within five days after receipt of the grievance.
- b. If the grievance is not settled in Step a, the employee or Union representative may report the grievance in writing to the Superintendent. The Superintendent shall hold hearings and prepare recommendations to be presented to the District within ten working days after receipt of the grievance communication with notice to the employee and Union representative.
- c. If the grievance is not settled in Step b, the employee or a Union representative shall file a written appeal with the District. The District shall hold a hearing within ten working days of receiving appeal and shall notify the employee and Union representative of its decision, in writing, within ten days after completion of hearing.

4. The parties' 1998-2000 collective bargaining agreement also contains the following provision:

#### E. SENIORITY

1. Definition. Seniority according to this agreement shall consist of the accumulated paid service of an employee with the District. Paid service shall include sick leave or any other authorized leave approved by the District.

...

3. Vacancies and Transfers. Any and all vacancies which occur in any position within the bargaining unit shall be posted for a period of five working days, exclusive of Saturdays, Sundays and holidays. During that five day period, all bargaining unit members may have the option of bidding on the job. In an emergency the District representative may transfer an employee to another shift, job location or position not to exceed 30 working days. After the 30 working days the District representative shall post the position so other employees may apply. The District representative may consider experience, ability and performance in filling a position, but, when these are equal, seniority shall prevail. In case of a dispute, the employee may use the complaint/grievance procedure. A senior employee bypassed for a promotion or transfer shall also have the right to discuss the reasons for bypass with the District representative. When an employee is to be transferred involuntarily to another shift, job location or position, the employee will be notified one week in advance of the change. A conference will be held prior to implementing the change. A representative of the Union may be present at the conference if requested by the employee.

5. Grievant Richard Stelloh has been employed as a full-time custodian by the District since 1983. For his entire tenure with the District, Stelloh was employed at the District's High School building on either the third shift or the second shift. Tony Goodenough was hired by the District as a full-time custodian in 1993. Goodenough was employed as a third-shift custodian at Deer Creek Elementary School from 1993 until his promotion to the position in dispute, High School Head Custodian, on or about September 22, 1997.

6. In early September, 1997, the District posted the opening for Head Custodian vacancy which read, as follows:

...

#### **Head Custodian Vacancy**

Full time twelve month permanent position, with candidate beginning as soon as possible. Previous custodial experience is preferred.

Requirements:

- High school diploma.
- Valid Wisconsin driver's license with a good driving record.
- Must be able to lift and move up to 100 pounds unassisted.

- Must be able to work in elevated positions (scaffold/extension ladder), confined spaces, and work outdoors in all types of weather for extended periods of time.
- Must be able to use common hand and power tools.
- Familiarity with floor care processes is a plus.

Send letter of application and resume to:

Julie Hackbarth  
St. Francis School District  
4225 South Lake Drive  
St. Francis, WI 53235

**DEADLINE: September 12, 1997**

. . .

7. Three District employees responded to this posting in a timely fashion: Danny Smith (Union Steward with more than 20 years' seniority), Richard Stelloh and Tony Goodenough.

8. All three applicants submitted applications and resumes. Tony Goodenough's resume read as follows:

. . .

## **WORK HISTORY**

1993-Present *Custodian, St. Francis School District*

Responsibilities include cleaning, sanitation, maintenance, floor maintenance, equipment maintenance, snow removal and security of Deer Creek Elementary School.

1993-Present *Owner/Operator, TASC Cleaning*

Responsibilities include setting up cleaning schedules, purchasing supplies, operating on budget, customer service, general cleaning and sanitation, floor care, and carpet cleaning and equipment maintenance.

1992-1993 *Maintenance Person I, Franciscan Villa Nursing Home*

Responsibilities included maintenance, HVAC, painting, wallpapering, dry wall repairs, minor plumbing, carpentry, and snow removal.

1991-1992 *Janitor, St. Sylvester School*

Responsibilities included cleaning, sanitation, floor maintenance, snow removal, meeting set up, and security.

1988-1991 *Painter, After Hours Painting*

Responsibilities included painting, dry walling, dry wall repairs, caulking, tiling, texture spraying, varnishing, pressure washing, and high ladder work.

## **EDUCATION**

Graduate South Milwaukee Senior High School 1992

Grade point average: 3.3/4.0

Course work includes: Electronics, Business, and College prep.

Milwaukee Area Technical College 1993-1996

Boilers Low and High Pressure Certification Class

Native American History and Culture

College Trigonometry

## **INTERESTS & ACTIVITIES**

Foster parent Milwaukee County

Member of South Milwaukee Little League Board of Directors

Assistant Coordinator Senior Baseball

Coach SMLL 13-15 year old Senior Indians

Umpire for major and senior baseball state and district tournament

Coach St. Francis junior high boys basketball team

Part time worker for St. Francis athletics and recreation

...

9. Goodenough submitted the following four names as references: Craig Paprocki, Head Custodian, Deer Creek Elementary School; Marty McNew, Maintenance Director, Franciscan Villa; Mark Savers, Maintenance Director, St. Sylvester School; Frank Fruech, Owner, After-Hours Printing. Goodenough listed telephone numbers for only three of these four references.

10. Stelloh submitted the following letter as his resume:

I, Richard F. Stelloh, feel that I am qualified for the head custodian position at St. Francis High School because of my experience.

I have been an employee of the school district since May 16, 1984. I feel I have done a good job maintaining heat, cleanliness, and order at St. Francis High School.

I also feel that I could become a first rate head custodian at St. Francis High School. I believe that I possess the mechanical aptitude to do many more maintenance repairs than I do now. I have been self-employed on a part-time basis for the past eighteen (18) years. In those years, I have done many things, such as drywalling, wall papering, ceramic tiling, roofing, insulating, flooring tile, quarry tile, linoleum and painting. I also have remodeled entire kitchens and bathrooms. I have done cement work, from form to finish, and minor plumbing and electrical work. I also have done snow plowing in commercial and private settings.

The work I have done on a part-time basis, has been in commercial and private settings. I have worked on buildings from 110 units to single family residences.

I have had a lot of public contact while being on the Board of Directors for St. Francis Days and with the St. Francis Auxiliary Police. In the past years as custodian, I have had contact with teachers, students and parents.

I have accomplished all job functions described in the Job Functions for this Job Description. I have supervised the part time building maintenance workers. I have also supervised students who have had to do service for their behavior.

I feel that I am community oriented and could do a good job of maintaining the St. Francis High School to the level of pride and dignity that the teachers, students and public deserves.

11. On his application, Stelloh listed three references: Paul Lapre (Head of Buildings and Grounds, St. Francis School District); Danny Smith (Head Custodian, St. Francis School District); and Frank Grudzielanek, (Former Head Custodian, St. Francis School District).

12. Danny Smith submitted an application and resume and was interviewed for the vacancy but he decided to withdraw his name from consideration and remain in his position of Head Custodian at the Deer Creek Recreation Building.

13. Goodenough had first been interviewed by the District in 1992 when he had unsuccessfully applied for a custodial position at the District while he was still a high school student. In 1993, the District hired Goodenough following an interview in which he was asked some of the same interview questions (1 through 5, 9 and 10) that he was asked in 1997 during the interview for the Head Custodian position. Goodenough was the only candidate for Head Custodian who had been previously exposed to some of the interview questions. The District had never before required interviews of candidates for a Head Custodial position. At the time of the interviews herein, the Assistant Principal for Human Resources, Walter Stover, had just been hired by the District and the successful candidate for this Head Custodial position was the first person he hired for the District. Stover selected two District managers to sit on the interview team with him to determine which candidate would get the Head Custodian position at the High School. The team members were High School Principal Monroe and Building and Grounds Department Head Lapre. Stover had never worked with Lapre and Monroe prior to conducting these interviews and he met Lapre for the first time on the day of the interviews.

14. Prior to the commencement of interviews, Stover gave the team no instructions regarding what skills the Employer was looking for; Stover told each team member to rank each candidate on each question before the discussion occurred regarding their ranking but he did not discuss with the team how to assign point values to the answers given. Stover made available the resumes and applications of the interviewees just prior to the start of the interviewing process, but he failed to advise team members to look at them prior to the commencement of the interview process. Stover did not know that seven of the eleven questions he selected to be used in the interviews had been used during the interviews of Tony Goodenough in 1992 and in 1993. Stover did not follow his own team instructions because he did not total the points and rank the candidates until just prior to the instant hearing in this case.

15. The interview questions Stover selected came from two banks of questions – questions on file at the District and questions Stover had brought with him from his previous



job in Iowa. Stover never talked to anyone at the District about the District's past selection policies or practices and Stover never consulted the collective bargaining agreement before selecting the interview questions.

16. An analysis of the Interview Team's rankings of the interview questions indicates that Goodenough and Stelloh received the same ranking from Team member Lapre on the questions Lapre scored for both candidates; that Stover ranked Stelloh one point higher than he ranked Goodenough; and that Monroe ranked Goodenough three points higher than he ranked Stelloh. The Interview Team never discussed the meaning of the word "qualified" nor did it conclude that Stelloh was less qualified than Goodenough.

17. After the interviews were completed and the Team decided to hire Goodenough, Walter Stover attempted to call references regarding the candidates to determine if any information existed which might change the interview team's decision to hire Goodenough as the Head Custodian. Stover decided not to call two of Stelloh's references, (Team member Lapre and interviewee Danny Smith), because Stover felt those references were inappropriate. At no time had the District indicated to any of the applicants that certain types of references would be considered inappropriate by the District.

18. Stover called Stelloh's reference Frank Grudzielanek, the only reference Stover found acceptable on Stelloh's application. Stover then called Robert Freuch, one of Goodenough's references. Stover failed to reach any of Goodenough's other references. Stover did not discuss his reference checks with Lapre and Monroe and these were not a basis for the Team's selection of Goodenough for the position. On the following Monday, Stover called Goodenough to indicate that he had been the successful candidate for the job.

19. Although Principal Monroe was Stelloh's direct supervisor, he never observed Stelloh working and never evaluated Stelloh during Stelloh's tenure at the High School. Indeed, no evaluations were performed on Stelloh or Goodenough by any District manager. Neither Goodenough nor Stelloh ever worked first shift consistently. Stelloh had worked his entire tenure with the District at the High School building while Goodenough had been employed at the Elementary School. No one had filed any complaints regarding Stelloh's communication skills or his relationships with faculty or students during his tenure with the District. The District did not test whether the three applicants could lift 100 pounds, as stated in the posting requirements, although Stover stated the posting was used to show the requirements for the job.

20. During discussions following the interviews, Stover took notes of the discussions and those notes indicated that there were no negatives to list regarding Stelloh, but that Goodenough had two negatives: Goodenough was spread too thin in terms of outside activities and he lacked mechanical experience.

21. The selection of Goodenough was grieved by Richard Stelloh, and it was processed through the contractual grievance/complaint procedure to that procedure's completion. The contract grievance/complaint procedure does not provide for final and binding arbitration.

22. Based upon the ranking of Stelloh and Goodenough by Interview Team members, the spread of points between Stelloh and Goodenough failed to show that there was a definite, distinct or clearly discernible difference in the ability and experience of Stelloh and Goodenough, as measured by the District's interview process. Therefore, as Goodenough and Stelloh were approximately equal based upon the interviews conducted by the District, seniority should have been the controlling factor in selecting the Head Custodian at the High School, pursuant to Section E. As Richard Stelloh was more senior than Goodenough and the two are equal in ability and experience, Stelloh should have received the position and the District's decision to place Goodenough in the position was therefore arbitrary.

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

### CONCLUSIONS OF LAW

1. Grievant Stelloh exhausted the grievance procedure set forth in the parties' collective bargaining agreement, and thus, the jurisdiction of the Wisconsin Employment Relations Commission may be invoked to determine the merits of his grievance regarding the promotion to Head High School Custodian.

2. The District's failure to place Richard Stelloh in the Head Custodian position at the High School on or about September 22, 1997 violated the provisions of Section E of the parties' collective bargaining agreement, and therefore violated Sec. 111.70(3)(a)(5), Stats.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

**ORDER**

IT IS ORDERED THAT Richard Stelloh be immediately placed in the Head Custodian position at the High School and that the District make Stelloh whole in all pay and benefits including that he be paid at the rate of pay in effect for that position, effective September 22, 1997 and forward.

Dated at Oshkosh, Wisconsin, this 22nd day of June, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Sharon A. Gallagher /s/

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Sharon A. Gallagher, Examiner

**ST. FRANCIS SCHOOL DISTRICT**

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER**

The issue raised by the complaint are whether the District violated the collective bargaining agreement by failing and refusing to place Richard Stelloh, a more senior employe, in the position of Head Custodian at the High School rather than promoting Tony Goodenough, a less senior employe, effective September 21, 1997.

**POSITIONS OF THE PARTIES**

**Union**

The Union urged that the District has the burden to prove that Goodenough was substantially more qualified for the position than Stelloh. The Union noted that the contract contains a “relative abilities” clause wherein seniority becomes the deciding factor when employes or applicants are being considered for a job, and they have nearly equal qualifications to perform that job. However, the Union urged that the term “equal” does not mean exactly equal. Rather, arbitrators have construed “equal” to mean “relatively or substantially equal”. The Union argued that its burden of proof is limited to a showing that a more senior qualified employe was passed over for a position, and that it is the Employer’s burden to show that the junior employe was substantially superior to the senior employe who was passed over if seniority is not to become determinative. In the Union’s view, the junior employe must be head and shoulders above the senior employe, in order for the employer’s choice of the junior employe to stand.

In the Union’s view, the District selection process was arbitrary and capricious, and its decision to give Goodenough the position cannot stand. In this regard, the Union noted that District manager Walter Stover never looked at the collective bargaining agreement before selecting interview questions; that the committee never discussed the questions or how to properly score the answers given and that no discussion was had regarding what an acceptable answer to each question would be, nor did the team engage in any discussion of the key criteria for each answer or how each question would be weighted, if at all. Indeed, Goodenough’s prior exposure to a majority of the interview questions tainted the interview process, in the Union’s opinion.

The interview team improperly awarded the job to Goodenough based upon his interview enthusiasm and his ability to communicate well with the team. In this regard, the Union noted that both Lapre and Monroe highly praised Goodenough’s attitude and communications skills. Further, the interview team considered the candidates’ actual

experience and ability only after deciding that Goodenough was the top choice. Thus, references were not checked objectively or checked only to find out if there were any possible problems, to validate the team's decision to give the job to Goodenough. Also, the Union noted that unit employes were never contacted regarding the applicants' ability to work with them and that the team members were unfamiliar with each of the applicants' work records at the time of the interviews. Thus, the Union urged that Goodenough's ability to interview well does not equate to substantial superiority.

The Union noted that the interview committees' notes failed to show that Goodenough was substantially superior to Stelloh. The Union observed that the maximum number of points on the interview was 35 and that the difference between Stelloh and Goodenough was less than 10 percent of that maximum number which does not support the District's conclusion that Goodenough should be awarded the job. Furthermore, the Union noted that Stover rated Stelloh higher than he had rated Goodenough; that Lapre failed to score all of the questions on his interview sheet; and that Monroe's rating of three points difference between Stelloh and Goodenough failed to show that Goodenough was, in fact, superior to Stelloh.

Therefore, as the interview procedure was arbitrary and capricious, the District's decision must be set aside. The Union urged that Stelloh be placed in the job with full back pay.

### **District**

The District argued that an employer's assessment of whether an employe is more qualified should not be disturbed unless the decision is unreasonable, arbitrary, capricious, discriminatory or in bad faith. The District noted that the Union must prove that the District's decision was improper in this way, and that the Union has failed to meet this burden of proof. In this regard, the District noted that the employes who applied for the Head Custodian position were not equal, and the employer had a reasonable basis for finding this to be the case. On this point, the District noted that all of the applicants had the same opportunity to put written information before the District; that they were all asked the same questions and they had the same opportunity to tell the District about their abilities at the interview; that the District selected an experienced interview team with no preconceived notions of who should be selected; and that seniority did not come into play because the candidates were not equal.

The District urged that under the contract, seniority could only be considered if candidates are judged to be equal. In this regard, the District contended that whether the Examiner would have reached the same conclusion as the District is not the issue. Thus, the District argued that it was fair and reasonable and exhibited good faith in its decision, which was not arbitrary, capricious or discriminatory. On this point, the District urged that the performance of candidates in an interview is an appropriate consideration when the questions

are related to the nature of the duties of the position. The District noted that during the interviews, Goodenough was judged to be superior to Stelloh based upon his responses to the safety question, his ability to communicate with students in stressful circumstances, his ability to prioritize work and his expression of his skills and experience which he would bring to the position, as well as Lapre's judgment of his work performance. The District noted that Lapre was Goodenough and Stelloh's supervisor.

Thus, Stelloh was not selected because his experience, ability and performance were not equal to Goodenough's and therefore the District was neither required nor allowed to look at seniority as a factor to make its decision regarding the successful candidate. The District noted that two of the interview team members rated Goodenough superior and that the District's reference check brought information indicating that Goodenough was a better candidate for the position than Stelloh. Thus, the District argued that it is not for the Examiner to decide if she would have reached the same conclusion as the District, but rather whether the evidence supports the District's finding that Goodenough was more qualified than Stelloh. The District argued that the evidence fully supported its finding.

The District noted that the Union admitted at the Board hearing herein that there was nothing wrong with the interviews or the questions asked therein. As a general matter, the use of an interview team is considered to be fair and reasonable. Furthermore, the District observed that Stover had no knowledge or intent to favor anyone by his selection of the interview questions, and did not know that any of the applicants had previously been exposed to them. Also, no evidence was offered that Goodenough's exposure to some of the interview questions four years earlier made the interview process arbitrary. In this regard, the District noted that the Union offered no evidence that Goodenough had been told the best answers to the interview questions; or that the answers to the interview questions for a non-supervisory position four years earlier would be identical to the ideal answers given in 1997 for a supervisory position. In any event, the District argued that Stelloh failed to answer the interview questions in detail in order to showcase his experience, ability and performance and that this fact makes irrelevant the fact that Goodenough had had prior exposure to the interview questions.

Finally, the District asserted that the Union had failed to prove that the most senior employe had been promoted to Head Custodian openings in the past. In any event, Stelloh was not the most senior employe who applied for the position (Smith was the most senior), so that even if the Union had proved that seniority alone should be used to determine the successful candidate, Stelloh would not have been selected. Therefore, the District urged that the Examiner deny and dismiss the grievance in its entirety.

### **Reply Briefs**

The Union chose not to file a reply brief.

The District raised some of the same arguments it had raised in its initial brief on reply. Those arguments are not reiterated here.

### **District**

The Union's use of the argument that the junior employe cannot be properly selected unless he/she is substantially more qualified than the senior employe is improper in this case. Here, the contract does not qualify the term "equal" and the Examiner must apply the ordinary meaning of the term. Thus, the junior employe need not be head and shoulders above the senior employe, as the Union has urged. Rather, the contract merely requires that the candidates be identical or equal before seniority comes into play.

The District argued that the cases cited by the Union are inapposite, as the contracts involved therein used the term "relatively equal" or "essentially equal", not "equal", the term used in the effective collective bargaining agreement. Therefore, the District's decision should be upheld because the contract here states that seniority can only be considered if the applicants are equal or identical, and Goodenough was clearly more qualified than Stelloh based upon this record. The District noted that Lapre assessed Goodenough as superior to Stelloh and the District urged that this assessment must be given great weight as Lapre was the direct supervisor of both employes.

The District objected to the Union's argument that the District conducted a "popularity contest" to select the Head Custodian. Ironically, the District noted that the search for a Head Custodian would have been a popularity contest had the District contacted the employe references listed by Stelloh on his application. Further, the District stated that the scores of the applicants in the interview were only a part of what the committee considered in reaching its decision.

The Union's argument that the total point scores should be ignored because the committee members did not agree on point values to be assigned to each question is ludicrous in the Union's view. It was the Union's burden of proof to show that the District's selection of Goodenough was arbitrary and the Union failed to do this. The District also took exception to the Union's contention that Stover did not check the collective bargaining agreement before selecting the questions and developing the selection process. Finally, the District noted that the same questions one would expect to be asked in any interview were asked in the interviews

in question, and that Stelloh failed to distinguish himself in those interviews. Therefore, the District urged that the decision to promote Tony Goodenough should be affirmed and the grievance dismissed in its entirety.

### DISCUSSION

Section E of the effective labor agreement dictates that the District “may consider experience, ability and performance in filling a position. . .” (emphasis supplied). This language allows but does not require the District to consider any or all of these items in filling a vacancy. In the instant case, it is undisputed that the District never objectively assessed or measured the job performance of Goodenough or Stelloh. Therefore, the performance factor is not in issue herein. The remainder of Section E indicates that when experience, ability and performance “are equal, seniority shall prevail.” This language constitutes a fairly typical “relative ability” clause. The use of the word “equal” herein does not mean that the candidates’ experience and abilities must be judged to be exactly equal, but only that they are nearly or approximately equal, before seniority becomes controlling.

The record in this case is clear that the sole yardstick the District employed to measure the experience and ability of candidates for the Head Custodian position were the interviews it conducted. This is because the results of the reference checks that Stover did were never reported to Lapre and Monroe and did not enter into the Interview Team’s decision-making process. In addition, the evidence herein failed to demonstrate that Lapre, Stover and Monroe considered the candidates’ resumes. In this regard, I note that Stover did not make the candidates’ applications and resumes available to Team members until a few minutes before the interviews began; that Lapre stated he did not recall reading the candidates’ applications and resumes; that Stover admitted that he failed to urge Team members to study the applications and resumes before ranking each candidate; and that Team members did not read or study the resumes prior to or during the interviews.

However, unlike the Union, I find no fault with the District’s interview process, given the broad discretion granted the District in Section E to consider, if it chooses, ability, experience and performance. Whether Goodenough was previously exposed to some of the interview questions, the substantive content of those questions, the procedures followed prior to, during and after the interviews, whether Team members studied the candidates’ resumes and were properly instructed regarding the interview process are not relevant to, or determinative of this case. 1/

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*1/ In addition, I note that there is no language in the labor agreement which restricts the District in its choices regarding how best to test for or measure applicants for vacancies.*

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The Union has argued that the District must show that Goodenough is “head and shoulders” above Stelloh. I disagree. In this case, the Union has the burden to prove that the contract was violated. Section E states that if the District finds that the candidates’ ability, performance and experience (which it may consider) are “equal, seniority shall prevail.”

The evidence is clear in this case that Lapre gave Goodenough and Stelloh the same scores on the questions he scored for both of them; that Stover gave Stelloh one more point than he gave Goodenough; and that Monroe (the least experienced Interview Team member in the Human Resources area) gave Goodenough three points more than he gave Stelloh. A difference of two or three points which is less than 10% (based on a perfect score of 35) is simply an insufficient basis on which to find that Stelloh is not equal to Goodenough. As discussed above, there is no requirement in “relative ability” cases (even where, as here, the operative term used is “equal”) to prove candidates are exactly equal before the employer must use seniority to determine which candidates should receive the position. In my view, a difference of only two or three points between Goodenough and Stelloh requires a conclusion that they are equal in the qualifications the District chose to measure, as no definite, distinct or clearly discernible difference existed between them. Therefore, the District should have selected Stelloh based upon his greater seniority and it was arbitrary of the District not to do so. I have therefore ordered the District to place Stelloh in the position and to make Stelloh whole from September 22, 1997 forward.

Dated at Oshkosh, Wisconsin, this 22nd day of June, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Sharon A. Gallagher /s/

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Sharon A. Gallagher, Examiner

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