STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

vs.

ST. FRANCIS SCHOOL DISTRICT, Respondent.

Case 75
No. 56657
MP-3441

Decision No. 29531-B

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Jill Hartley**, 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of Service Employees International Union, Local 150, AFL-CIO.

Davis & Kuelthau, S.C., by **Attorneys Mary L. Hubacher** and **Robert H. Buikema**, Suite 1400, 111 East Kilbourn Avenue, Milwaukee, Wisconsin 53202-6613, appearing on behalf of St. Francis School District.

ORDER AFFIRMING IN PART AND REVERSING IN PART EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND REVERSING EXAMINER'S ORDER

On June 22, 1999, Examiner Sharon A. Gallagher issued Findings of Fact, Conclusions of Law and Order with accompanying Memorandum in the above matter wherein she concluded that by filling a position with the less senior of two employes, Respondent had violated its 1997-2000 collective bargaining agreement with Complainant and thereby committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats. To remedy the violation, she ordered Respondent to award the position to the more senior employe and make him whole.

On July 9, 1999, Respondent timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats.

The parties thereafter filed written argument in support of and in opposition to the petition, the last of which was received on September 22, 1999.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

ORDER

A. Examiner Findings of Fact 1-3 are affirmed.

B. Examiner Finding of Fact 4 is affirmed as modified below:

4. The parties' 1997-2000 collective bargaining agreement. . .

C. Examiner Findings of Fact 5-11 are affirmed.

D. Examiner Findings of Fact 12-20 are set aside and the following Findings of Fact 12-13 are made:

12. Walter Stover, assistant to the superintendent of schools, was hired by the District shortly before the head custodian position was posted. Stover's job responsibilities include personnel.

Stover was responsible for establishing the process to be used by the District when filling the head custodian position. Stover reviewed the parties' bargaining agreement and concluded that the District had some discretion to exercise when deciding who should fill such a vacancy. Stover also decided that the process should include an interview by a committee. The District had previously used interviews when making initial hiring decisions but not when filling vacancies from among current employes.

Stover selected the questions to be asked of the applicants after reviewing the District's files and interview questions he had accumulated from his personnel experience acquired during prior employment. Unbeknownst to

Stover, some of the questions he selected from District files had been asked of applicant Goodenough in 1992 and 1993 when Goodenough applied for initial employment with the District.

The applicants for the head custodian position did not know what questions would be asked during the interview.

The questions Stover selected were related to the "experience, ability, and performance" of the applicants for the head custodian position and to the qualities the District believed a head custodian should have.

13. Stover selected the principal of the high school in which the head custodian would work (Monroe) and the District's long time head of building and grounds (Lapre) to join him on the interview committee.

The interviews were conducted on Friday, September 17, 1997. That day, shortly before the interviews began, Monroe and Lapre reviewed the three applicants' applications/resumes. Stover had previously reviewed this material. Stover then distributed the interview questions to Monroe and Lapre and they reached agreement on which one of them would ask each question. For questions 2-7 and 9, Stover's interview questions asked Monroe and Lapre to rate the answers of each applicant on a scale of 0-5 points. For questions 1, 8, 10a. 10b. 10c. 10d. and 11, there was no point scale provided. There was no discussion between committee members of what the "right" answer to any given question might be or whether certain questions were more important than others.

All applicants were asked the same questions.

On the questions for which points were awarded by all three interviewers, Monroe gave Goodenough a total of 29 points and Stelloh 26 points; Lapre gave Goodenough a total of 26 points and Stelloh 28 points; and Stover gave Goodenough a total of 30 points and Stelloh 31 points. Combining the point totals of all three interviewers, Goodenough received 85 points and Stelloh received 85 points.

Although the question sheet did not ask for an award of points for the answer to question 8, Lapre awarded points for this question as well. If Lapre's question 8 points are included in the cumulative total received, Goodenough received 89 points and Stelloh received 88 points.

The committee did not discuss their reactions to the applicants until all three interviews had been completed. At that point, they discussed the applicants and reached agreement that Goodenough was the best applicant and should be offered the position unless Stover's check of references over the weekend raised concerns the committee should discuss.

In reaching their decision, the committee considered the applications and resumes, the applicant's answers to the interview questions, the numerical scores received by the applicants on those questions for which scores were given, and Lapre's opinion and knowledge of each applicant based on his role as their supervisor. The committee concluded that Goodenough's superior communication skills, enthusiasm, concern for students and ability to prioritize/organize made him the best applicant.

Over the weekend, Smith decided to withdraw his interest in the position and so advised the District on Monday, September 20.

Stover's weekend reference checks did not produce any information that caused him to have concerns about the committee's decision to offer the position to Goodenough. On Monday, September 20, Goodenough was offered the position and he accepted.

E. Examiner Finding of Fact 21 is renumbered to Finding of Fact 14 and affirmed.

F. Examiner Finding of Fact 22 is reversed and the following Finding of Fact is made:

15. Goodenough and Stelloh were not equal in their experience, ability and performance. Goodenough was the best applicant for the head custodian position. The process used by the District to fill the head custodian position was not arbitrary.

G. Examiner Conclusion of Law 1 is affirmed.

H. Examiner Conclusion of Law 2 is reversed and the following Conclusion is made:

2. Respondent St. Francis School District did not violate the 1997-2000 collective bargaining agreement with Complainant Service Employees International Union, Local 150, AFL-CIO by awarding the head custodian position to Goodenough.

I. Examiner Order is reversed and the following Order is made:

The complaint is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 11th day of January, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

I dissent.

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

ST. FRANCIS SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING ORDER AFFIRMING IN PART AND REVERSING IN PART EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND REVERSING EXAMINER'S ORDER

BACKGROUND

The complaint alleges that Respondent District violated an existing contract (and thus committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats.) by failing to fill a unit vacancy with the more senior of two employes.

The Examiner's Decision

Because the contract does not provide for final and binding arbitration of alleged violations thereof and because the applicable contractual grievance procedure had been exhausted, the Examiner concluded it was appropriate to exercise the Commission's jurisdiction over the dispute.

Turning to the merits, the Examiner concluded that the parties' 1997-2000 contract obligated the Respondent District to award the head custodian position to more senior employe Stelloh instead of junior employe Goodenough. She therefore found the Respondent violated Sec. 111.70(3)(a)5, Stats., and ordered the District to place Stelloh in the position and make him whole.

She reasoned as follows:

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/

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.

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.

POSITIONS OF THE PARTIES

Respondent District

Respondent argues that the Examiner erred when finding a contract violation and asks that she be reversed.

Respondent asserts that it is only contractually obligated to consider the seniority of the applicants if their "experience, ability and performance" are "equal". Respondent contends that because the more senior applicant (Stelloh) was not equal to the more junior applicant (Goodenough) with regard to "experience, ability and performance", it was not required to and did not consider the applicants' seniority when filling the position.

Respondent alleges that by reaching a contrary conclusion, the Examiner impermissibly added language to the parties' contract and incorrectly evaluated the evidence in the record.

As to the applicable contractual language, Respondent asserts that the Examiner incorrectly applied a nonexistent "approximately equal" standard to the facts of the case. Respondent contends that there is no evidence that the parties intended the word "equal" to be given anything other than its ordinary meaning of the "same" or "identical". Had the parties intended a different meaning, Respondent asserts they would have so stated in the contract. Respondent argues that the Examiner gave the Complainant a contractual benefit that Complainant did not acquire at the bargaining table.

As to the evidence in the record, Respondent argues that the Examiner incorrectly evaluated the process used to evaluate the applicants' "experience, ability and performance." Contrary to the Examiner's analysis, Respondent contends that the applicants' numerical interview scores did not provide the sole basis for the interview panel's assessment of the two applicants. Rather, the interview panel considered all evidence it had concerning the applicants, including a supervisor's evaluation of both employes, when identifying the best candidate. Even if the analysis is restricted to numerical scores, Respondent notes that the applicants were not equal – Goodenough had a higher score than Stelloh.

Respondent urges rejection of the Complainant's attack on the legitimacy of the process used by Respondent to assess the applicant's qualifications. Respondent argues that the Examiner correctly rejected Complainant's position as to this aspect of the dispute.

Given all of the foregoing, Respondent asks that the Examiner be reversed and the complaint dismissed.

Complainant

Complainant argues that under the parties' contract, unless senior applicant Goodenough was clearly more qualified for the position, the Respondent District was obligated to award the position to Stelloh. When making the comparison of the two applicants, Complainant asserts that the Examiner correctly concluded that they were relatively equal and thus that Stelloh was entitled to the position.

Complainant also contends the selection process used by the Respondent District was flawed and thus that the decision produced by that process should be invalidated.

Given the foregoing, Complainant asks that the Examiner be affirmed.

DISCUSSION

We reverse the Examiner because we are satisfied that the Respondent District did not violate the parties' contract by selecting the less senior applicant as the high school lead custodian.

We begin by considering whether the Examiner correctly interpreted the applicable contract language. The contract states in pertinent part:

> The District representative may consider experience, ability and performance in filling a position, but, when these are equal, seniority shall prevail.

The Examiner concluded "This language constitutes a fairly typical 'relative ability' clause."

We disagree. As argued by Respondent, the Examiner's interpretation presumes that the phrase "relatively equal" or "approximately equal" had been used by the parties instead of "equal". Given the absence of the words "relatively" or "approximately", we conclude the parties intended that a narrower meaning be given to their contract than if they had bargained a "fairly typical 'relative ability' clause."

However, we also acknowledge the validity of Complainant's argument that because no two employes will ever be exactly "equal" in "experience, ability and performance", the parties could not have intended that a standard of precise equality be applied to applicants for a position.

Given the foregoing, we conclude the parties intended the word "equal" to mean "indistinguishable" or "virtually the same". We proceed to apply that contractual standard to the evidence in the record.

When filling the high school head custodian position, the District posted the position and asked interested employes to submit an application and resume. Three employes (Stelloh, Goodenough and Smith) applied.

The three applicants were separately interviewed on Friday, September 17, 1997 by a committee consisting of the high school principal (Monroe), the head of building and grounds (Lapre) and an assistant to the superintendent of schools (Stover). The interview committee was provided with copies of the applicants' applications and resumes shortly before the interviews began. The interview questions were selected by Stover from District files and from material he had used in prior places of employment. The same interview questions were asked of all applicants. The committee members took notes during the interviews.

Once the interviews were complete, the committee took a short break and then discussed the applicants. At the end of the discussion, the committee concluded that Goodenough was the best applicant for the head custodian position and would be offered the position unless his references did not support the committee's judgment. Stover's contact with references confirmed the committee's choice and the following Monday, Goodenough was offered and accepted the job. Smith withdrew his application before becoming aware that Goodenough had been selected.

Complainant argues that several aspects of the selection process itself warrant invalidation of the result reached. The Examiner rejected these arguments, citing the absence of any contract language that restricts the Respondent District's discretion when deciding how to evaluate applicants.

As discussed below, we also find these arguments unpersuasive.

We begin by agreeing with Complainant that even where, as here, there are no explicitly stated restrictions on how an employer evaluates applicants for a position, the employer may be found to have violated the contract if it exercises its broad discretion in an arbitrary or capricious manner. However, in our view, whether viewed separately or cumulatively, the concerns raised by Complainant do not establish that Respondent District proceeded in an arbitrary or capricious manner.

Complainant argues that the interview questions used were flawed because Stover was not sufficiently familiar with the contract language when he selected the questions. We reject this argument. So long as the questions used were rationally related to the job-related qualities the Respondent was seeking to measure, the extent of Stelloh's familiarity with the contract is irrelevant. The record amply demonstrates that the questions were rationally related to job-related qualities.

Complainant next contends that the interview committee's decision-making process was flawed because the committee members did not discuss: (1) whether all interview questions were equally important; (2) what were the correct answers to the questions; or (3) how various types of answers to the questions should be scored. We reject this argument. Absent explicit contractual restrictions, the committee was not obligated to proceed in any particular fashion as it considered the applicants' answers to the interview questions. To the extent Complainant generally argues the committee was proceeding in an arbitrary manner, we also disagree. One of the values of using an interview committee is the resultant diversity of perspective of the individual committee members. Thus, it is not arbitrary or capricious for each committee member to reach his own conclusion as to the value which should be placed on any given question/answer as part of his effort to determine the best qualified applicant.

Having concluded that the process Respondent District used to fill the head custodian position did not violate the contract, we turn to the question of whether the selection of Goodenough violated the agreement.

As decided earlier herein, unless Stelloh's "experience, ability and performance" is either better than Goodenough's or virtually the same as Goodenough's, Goodenough's selection did not violate the contract. Complainant does not contend that Stelloh is better than Goodenough so our inquiry is limited to whether the two applicants' "experience, ability and performance" are virtually the same.

Complainant argues that the objective evidence in the record (applications, resumes, and the points given each applicant by each committee member based on responses to interview questions) establishes that Stelloh and Goodenough were close enough in

"experience, ability and performance" for Stelloh's greater seniority to become relevant and determinative under the contract.

We agree that the point scores received by Goodenough and Stelloh are "equal"/virtually the same. However, we do not share Complainant's view that it was inappropriate for the interview committee to also consider: (1) the answers to interview questions for which scores were not given; (2) Lapre's knowledge of the applicants from his supervisory perspective; and (3) the committee's judgment that Goodenough's interview conveyed greater enthusiasm, concern for students, communication skills, and ability to organize/prioritize than was conveyed by Stelloh. These considerations are all relevant to the skills and abilities needed by a successful head custodian. In particular, Goodenough's ability during the interview to convey enthusiasm, concern for students, communications skills and the ability to organize/prioritize abilities was a valid component for the committee to consider when concluding that he and Stelloh were not "equal" and that Goodenough was the better applicant.

Given all of the foregoing, we have concluded that Respondent District did not violate the contract when it selected Goodenough. Therefore, we have reversed the Examiner's Conclusion of Law 2 and ordered the complaint dismissed. We have modified her Findings of Fact to reflect our view of the record evidence.

Dated at Madison, Wisconsin this 11th day of January, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

ST. FRANCIS SCHOOL DISTRICT

DISSENTING OPINION OF COMMISSIONER A. HENRY HEMPE

Richard Stelloh, a custodian with some 16 years of loyal service with the St. Francis School District, sought the position of head custodian for the District's high school.

However, he was not the only qualified School District employe seeking promotion to that position. There were two other competitors. One ultimately dropped out. The other, Tony Goodenough, also a District custodian, remained.

Tony Goodenough was both a qualified and plausible candidate. A District custodian since 1993 and apparently well-liked by students in his building, Mr. Goodenough is also the sole proprietor of TASC Cleaning. His resume shows previous experience in maintenance, heating, ventilating and air conditioning, minor plumbing, dry walling (repair), carpentry and snow plowing. A high school graduate with a 3.3/4.0 G.P.A., he has also taken courses at Milwaukee Area Technical College in boiler certification, college trigonometry, and Native American history and culture. He is a Milwaukee County foster parent, a member of the South Milwaukee Little League Board of Directors, a coach for junior high age boys basketball and baseball, and an umpire for major and senior baseball state and district tournaments.

But Richard Stelloh's record is also impressive. His resume shows that he has ". . .done a good job of maintaining heat, cleanliness and order at St. Francis High School." He is experienced in snow removal, and has done part-time work in buildings ranging from single-family residences to those containing 110 units. He has had part-time, private employment for many years in a number of skilled blue collar occupations including drywalling, wallpapering, ceramic tiling, roofing, insulating, painting, floor tiling, cement work from form to finish, and minor plumbing and electrical work.

In addition, it appears that Mr. Stelloh has not only accomplished all of the functions described in the job description for the position he sought, but has supervised part-time maintenance workers as well as students performing disciplinary work service. He is familiar with teachers, students and parents with whom he apparently maintained reasonably good relations. His personnel record with the school district shows no instances of discipline or correction. As with Mr. Goodenough, Mr. Stelloh has also been active in his community with service that includes membership on the Board of Directors of St. Francis Days and on the St. Francis Auxiliary Police.

All in all, the competing resumes appeared to present a difficult choice for the School District employer.

Yet, Richard Stelloh had every reason to expect his application would be successful. Not only did the position description for the desired job list only duties with which he was familiar and expert, *but the applicable labor contract guaranteed that seniority would prevail when the experience, ability and performance of competing applicants were rated as equal.* Mr. Stelloh, of course, has approximately 10 years more seniority with the St. Francis School District than Mr. Goodenough.

But Richard Stelloh did not receive the promotion he sought. Tony Goodenough was awarded the promotion. According to the employer, Mr. Stelloh's experience, ability and performance were not equal to that of the winning candidate.

That conclusion, however, was not supported by the scoring results of the 3-person interview team. Based on the answers provided by each candidate to the same series of questions asked by the interview team, no member of the 3-person interview team can be fairly said to have found any significant overall difference between the qualifications of the two candidates. On the questions for which points were awarded by all three interviewers, one interviewer rated Stelloh superior by two points; another (the least experienced interview team member in the Human Relations area) rated Goodenough superior by three points; the remaining team member scored Stelloh superior by one point. As the majority notes, when the point totals of all three interviewers are totaled, Goodenough and Stelloh each garner 85 points.

Notwithstanding this apparent qualification equality of the candidates, following a thirty-minute caucus the interview team emerged with a "consensus" recommendation that Mr. Goodenough receive the promotion.

Qualification parity between two finalists was reflected even on the School Board, where Board members apparently split almost equally between the two candidates. When the district administration's decision in favor of Mr. Goodenough was appealed by Mr. Stelloh and

the Union to the School Board, Mr. Stelloh reportedly lost his appeal by a margin of only one vote. 1/

1/ Tr. 37. The transcript account suggests Stelloh's loss may have been due to aggressive, impolitic statements by the union representative who, in his presentation on Mr. Stelloh's behalf, managed to offend Board members and at least one administrator. That, of course, is merely speculation. What is not speculative is that a reasonably well informed body of reasonable school district policy makers were apparently unable to reach a consensus among themselves as to which of the two candidates was better qualified. That, of course, is the same problem initially faced by the three members of the school district interview team, and is another strong indication of the qualification parity existing between Mssrs. Stelloh and Goodenough.

The School District contends that it was justified in awarding the promotion to the least senior applicant. It insists that Mr. Goodenough's qualifications were superior to those of Mr. Stelloh.

The hearing examiner was not persuaded. While she did not fault the District's interview process and disagreed with the Union's contention that the District must demonstrate that Goodenough is "head and shoulders" above Stelloh, 2/ she disagreed with the District's

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2/ Both the majority and I are in agreement with the Examiner's approval of the District's interview process and her disagreement with the Union's "head and shoulders" argument.

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argument that in the absence of any modifiers "equal" means "identical" or "exactly equal". The examiner determined "equal" means "nearly or approximately equal". Based on that finding, the hearing examiner concluded that the labor agreement between the parties mandated that the more senior applicant (Stelloh) receive the promotion and so directed, together with a make-whole order.

The majority disagrees. In a sequence I find confusing at best, the majority first appears to lean towards the school district:

> "Given the absence of the words 'relatively' or 'approximately', we conclude the parties intended that a narrower meaning be given to their contract than if they had bargained a "fairly typical 'relative ability' clause."

The majority next appears to support the examiner:

> "However, we also acknowledge the validity of Complainant's argument that because no two employes will ever be exactly "equal" in "experience, ability and performance", the parties could not have intended that a standard of precise equality be applied to applicants for a position."

But in the end, the apparent majority support for the examiner's interpretation quickly evaporates:

> "Given the foregoing, we conclude the parties intended the word "equal" to mean 'indistinguishable' or 'virtually the same'".

The majority's semantics are circuitous: first, credence is given to the interpretative approach urged by the District; next, to that of the examiner; in the end, as a practical matter, the majority returns to the result favored by the District. For I find no meaningful difference between the "identical" or "exactly equal" interpretation urged by the District on the one hand and the "indistinguishable" or "virtually the same" interpretation adopted by the majority. The words are different but the practical effect is the same. 3/

3/ Curiously, the majority did not consider whether a version of the converse was not just as plausible, e.g., "given the absence of the word "exactly" (as a modifier of "equal") we conclude that the parties intended a* broader *meaning be given to the contractual provision."

The majority's apparent attempt to straddle the issue merely serves as camouflage for an interpretation that effectively sabotages the "relatively equal" clause negotiated by the parties. 4/ For as even the majority acknowledges, "no two employes will ever be exactly

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4/ As the citations submitted by the parties demonstrate, there are essentially two pathways taken by private arbitrators in similar cases. One adopts the more rigid approach favored by the majority. See, WEATHER SHIELD MNF., 96 LA 338, 342 (WYMAN, 1990), in which the arbitrator found "equal" was equivalent to "the same" or "identical", noting that "(i)f the parties intended a less severe application of the term, they could have and should have included it in the language when it was constructed." The other offers the greater flexibility favored by the examiner. See POLORON PRODUCTS OF PA, INC., 23 LA 789, 792 (ROSENFARB, 1955), in which the arbitrator defined "equal" as "substantial or relative equality", noting, "(w)ere it otherwise the purpose of seniority in layoffs, that is in job security, would be essentially destroyed."

'equal' in 'experience, ability and performance'". By insisting on a definition of "equal" that inserts "indistinguishable" or "virtually the same" as modifiers of "equal," as a practical

matter the majority grants substantial licensure to this Employer to ignore the relative

seniority clause negotiated by the parties. Under this approach the contract language negotiated becomes a nullity, for the Employer is empowered to substitute whatever subjective standards it may find expedient and exigent to justify its deviation from seniority.

Unfortunately, that appears to have occurred in this matter. The District justifies its deviation from seniority herein by listing several areas in which its interview team purportedly rated Mr. Goodenough higher than Mr. Stelloh. These areas included initiative on the job, communication skills, insights into the duties of the job, and priority for safety. 5/

5/ St. Francis School District's Memorandum in Support of Its Petition for Review, at 25.

Comparative ratings in these areas appeared to be highly subjective and based solely on interview team members' perceptions of the respective interview responses of the two candidates.

For instance, each candidate was asked what he would do if confronted with a puddle of red fluid on the floor. Goodenough answered that he would first section off the area to prevent any students from being exposed to the fluid until he could determine what the fluid was and clean it up. Stelloh's more succinct response indicated that he would put up some protection and then clean up the fluid. 6/ Both answers appear to be correct, but Stelloh is now faulted

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6/* Ibid.*, at 17.

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by the District's attorneys for not articulating any concern about keeping others away to protect them from exposure to the fluid (even though Stelloh expressly stated he would put up some protection.) 7/

***7/* Ibid.**

In responding to the question of what he would do if he encountered a weeping student, Goodenough's response was again deemed superior: Goodenough stated he would first check to make sure there was no one around who might be harming the student before seeking a counselor to help the student; Stelloh indicated he would talk to the student and get some help. On this basis District attorneys now argue that Goodenough was deemed to be better able to communicate with students under stressful situations.

Even with dubious inferences such as these, the fact remains that two interview team members ranked Stelloh ahead of Goodenough, one team member ranked Goodenough ahead of Stelloh, with the entire team awarding each candidate the same number of points. Absent District development of a more precise gauge to measure candidate qualifications than was used in the instant matter, in my view the interview team scoring reflects a dead heat. 8/

8/ Arguably, under these facts the same result could have been reached even under the "indistinguishable" or "virtually the same" standard adopted by the majority – unless, of course, the evaluator chooses to magnify picayune or inconsequential, stylistic differences into "distinguishable" qualification imbalances.

Mr. Goodenough may indeed be more verbally agile or garrulous than Mr. Stelloh, or at least have more finely tuned interview skills. But the interview committee was not interviewing candidates to fill a vacant political or public relations slot, a position of a radio talk-show host, or a job in retail sales or telemarketing. The job to be filled was simply that of a head custodian for the high school building. Moreover, none of the areas now cited by District lawyers to justify the District's deviation from seniority were listed in any fashion on either the position description or the notice of the position vacancy.

This is not to suggest that Mr. Goodenough is unqualified to fill the head custodian position. Clearly he is a capable employe who may be expected to advance even further. But just as clearly from the record emerges the inescapable conclusion that Mr. Stelloh's experience, ability and performance as the same pertain to the sought-after position of head custodian at least equalled that of Mr. Goodenough. In the absence of a "relative equality" contractual clause as to promotions, awarding the position to Mr. Goodenough is supportable. But under the "relative equality" clause as interpreted by the hearing examiner, Mr. Stelloh was entitled to the promotion.

The principle of seniority has been a long-time article of faith for many labor unions. It has been advocated as a basis for both employer and employe actions, including layoff, recall, vacation selection, transfer, shift selection, and promotion. It is usually urged as providing a means of decision-making that is objective, predictable, fair, and conducive to stable labor relations. It is praised as having provided an effective protection against age discrimination.

Sometimes seniority provisions are resisted by employers who may perceive their implementation in some areas as an impediment to efficient management – an unwarranted intrusion into matters best left to managerial discretion. Sometimes, employer resistance may be justified.

Resolving seniority provision disputes requires legal acumen, balance and common sense. Contrary to the view of the majority, in my view the result reached by the examiner competently reflects each of these qualities. I would affirm her decision in its entirety.

Dated at Madison, Wisconsin this 11th day of January, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

gjc
29531-B.D