BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
WISCONSIN DELLS SCHOOL DISTRICT EMPLOYEES UNION LOCAL 1401-A, AFSCME, AFL-CIO	
and	Case 22 No. 42540 MA-5720
SCHOOL DISTRICT OF WISCONSIN DELLS	

Appearances:
Mr. Karl L. Monson, Membership Consultant, Wisconsin Association of School Boards, Inc., 122 West Washington Avenue, Room 500, Madison, WI 53703
Mr. Laurence Rodenstein, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana Court, Madison, WI 53719

ARBITRATION AWARD

Wisconsin Dells School District Employees Union Local 1401-A, AFSCME, AFL-CIO, hereinafter referred to as the Union, and the Wisconsin Dells School District, hereinafter referred to as the District, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The parties requested that the Commission appoint an arbitrator to resolve a dispute reflected in a grievance filed on behalf of Larry Landers. The Commission designated A. Henry Hempe, a member of the Commission, to serve as the arbitrator. The hearing, which was recorded but not transcribed, was held in Wisconsin Dells, Wisconsin, on September 27, 1989. Initial post-hearing briefs were filed by each of the parties on October 26, 1989; a reply brief was filed by the Union on November 9, 1989, and by the District on November 16, 1989.

ISSUE:

The parties stipulated the following issue for decision:

> Did the Employer violate the collective bargaining agreement by awarding the Custodian II position at the Wisconsin Dells Grade School to Don Chambers rather than to a more senior Custodian, Larry Landers?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS:

ARTICLE 2 - Management Rights

2.01 Except as otherwise provided in this Agreement, nothing herein shall limit the Employer in the exercise of the rights and functions of ownership or management, including, but not limited to, the right to manage the operations of the Employer and direct the working forces, the right to hire new employees, to assign work, to determine the number and location of its operations, the services required therein, and the quality of such service, including the means and processes of services and the materials used therein. This provision shall not be used to discriminate against any employee. (emphasis added)

Article 9 - Seniority

9.01 It is the policy of the Employer to recognize seniority. There shall be five (5) departments defined as follows for employees covered by Local 1401-A:

a. Maintenance and Custodial (including Laundry);
b. Clerical and Secretarial;
c. Food Service;
d. Aides;
e. Transportation.

. . .

9.03 Seniority shall consist of the total calendar time elapsed since the date of original employment with the School District of Wisconsin Dells in a bargaining unit position with the department named above; provided,

however, that no time prior to a discharge for cause of a quit shall be included; and provided that seniority shall not be diminished by temporary layoff or leaves of absence of less than one (1) year duration. To retain seniority upon recall from layoff, an employee must notify the Employer within five (5) work days of his/her intention to return and must report for work within an additional ten (10) work days.

. . .

9.07 Seniority is gained in employment of the School District of Wisconsin Dells in the department named in Section 9.01 and does not warrant the employee a guarantee of moving from one position to another, unless qualified for such open position.

9.08 Job Posting and Transfer

A. When filling vacancies within a job category or where new jobs are created within a job category in the bargaining unit, those regular employees with the most seniority in the job category shall be given preference in filling such vacancies, provided that among internal applicants, no employee is objectively superior on the basis of skill and ability.

. . .

C. Any employee selected to fill a vacancy shall be given at least fifteen (15) workings days to qualify, and this period may be extended by mutual agreement.

FACTUAL BACKGROUND:

Larry Landers began his employment as a full-time Custodian I with the Wisconsin Dells School District on March 10, 1986. Donald Chambers began his employment as a full-time Custodian I with the Wisconsin Dells School District on either July 1, 1987 or August 10, 1987. Sometime in mid-1988, Landers was appointed head or lead custodian at the high school, a position which he continued to hold for approximately six months. By virtue of the terms of the new labor agreement ratified by the District's school board on November 15, 1988, that position officially evolved into being described as a "Custodian II" position. Under the terms of that initial agreement, Landers' new position was required to be posted. Landers applied for the post; apparently so did Chambers; one other employe did also. Landers was interviewed for this job by Building and Grounds Supervisor Douglas Fisk and then School Superintendent (now retired) Gerald Peterson. The record is not clear whether the other applicants were also interviewed. In any event, a selection was made. Neither Landers nor Chambers was successful. The successful applicant was a District employe (Owens) with more seniority than either Landers or Chambers.

In October, 1988, a Maintenance/Technician position vacancy had arisen in the District. Chambers had submitted a written application for this position on which he indicated a broad base of past experience in carpentry, general construction, plumbing, heating electricity and special skills in wiring and welding. The record is clear that Chambers had been interviewed for this position, but was unsuccessful in his bid for it.

On May 17, 1989, another vacancy for a Custodian II position arose, this time at the grade school. Both Landers and Chambers again applied, and this time were the only applicants. No interviews were conducted of either candidate. Chambers was awarded the position.

Douglas Fisk, the immediate supervisor of both applicants, recommended to then Superintendent Peterson that Chambers be promoted to the newest Custodian II vacancy. Fisk regarded both men as so close in seniority that he did not consider it a factor. His recommendation was based on the fact that all of Chambers' custodian experience for the District had taken place at the grade school which gave him greater familiarity with that facility than Landers. To Fisk, Chambers' greater familiarity with the building was a critical element because it eliminated any need for building orientation.

Then Superintendent of Schools Peterson acknowledged Fisk's recommendation of Chambers for the new Custodian II position vacancy. According to Peterson, Fisk was involved in the promotion decision to the extent that Fisk and Peterson conferred, Fisk made a recommendation, and the two men jointly agreed on the final decision.

Peterson stated that he concurred with Fisk's recommendation because he viewed Chambers as better qualified for the vacant Custodian II position at the

grade school. He said his judgement was based not only on Fisk's recommendation and underlying rationale, but on District's goal to have a person in each of its buildings who had completed a 14-hour asbestos training program. These reasons were consistant with those listed as forming the basis of the Board of Education's denial of Landers' grievance claiming he was entitled to the position set forth in a letter to the Union dated June 28, 1989, over signature of the new School Superintendent.

With respect to asbestos training, it appears that all custodians were required to receive two hours of asbestos awareness training. In addition to this, there was a 14-hour asbestos awareness course for which, according to Peterson, all District custodians had the opportunity to volunteer. Chambers had volunteered to participate in the course and had done so. Landers had not. Completion of the 14-hour course, however, was not a stated prerequisite of applying for the Custodian II position, and apparently District custodians were not aware that it would be a promotion consideration.

Finally, it appears that Chambers produced an impressive number of written testimonials to his successful functioning in the grade school building as a Custodian I. With one exception, these testimonials came from teachers in the building. The exception was written by the building's Custodian II whose impending retirement had caused the job posting to which Chambers and Landers had responded.

Joint exhibits 1, 2, 3, 4, and 5 were introduced and received into evidence. Union exhibits 1, 2(a), 2(b), 2(c), 2(d), 3, and 4 were introduced and received into evidence. Board exhibits 1(a), 1(b), 2, 3, 4, 5(a), 5(b), 5(c), 5(d), 5(e), 6(a), 6(b), 7(a), 7(b), 7(c), 8, 9(a), 9(b), 9(c), 9(d), 9(e) and 9(f) were introduced and received into evidence. All were reviewed and considered by the Arbitrator.

POSITIONS OF THE PARTIES

District:

The District avers that Don Chambers was awarded the position of Custodian II because the District believed him to be "objectively superior" to any other applicant in terms of "skill and ability." The District does not dispute that Landers' seniority with the District exceeds that of Chambers, but based on an employment contract between Chambers and the District (entered as an exhibit) believes his full-time status as a Custodian commenced on July 1, 1987. The District further notes that Chambers started part-time employment with the District on August 28, 1986.

While the District does not dispute that no interviews were conducted in connection with the Custodian II position vacancy posted on May 17, 1989, it points out that Chambers was interviewed in October of 1988 when he applied for the position of Maintenance/Technician, and Landers was interviewed in December of the same year when he applied for the Custodian II position at the high school. The District argues there was no reason to repeat the interview process with either Chambers or Landers since each had been interviewed for other positions several months earlier. The District further lists Chambers' completion of a 14-hour asbestos awareness training course as further evidence that he was objectively superior in skill and ability. This was a voluntary training session which took place on a weekend in April, 1988, at School District expense which, according to the District's brief, Landers had declined to attend. This, according to the District, was important because there was asbestos to be removed and/or handled at the District grade school, and federal regulations require both a 2-hour asbestos awareness training course and 14 hours of additional training for any maintenance and custodial staff members" . . . who conduct any activities that will result in the disturbance of ACMB . . . ."

The District points out that only three custodians in its employ had received the 14-hour asbestos awareness course, one of whom was a Custodian II at the grade school whose retirement created the vacant position for which both Landers and Chambers were applying. The District does not indicate at what school the third Custodian who had received the training was employed, but notes he had not applied for the vacant Custodian II position. This, according to the District, limited the District to selecting Chambers, given the District's desire that the new Custodian II have completed the extended asbestos awareness training course.

The District notes that since the commencement of Chambers' full-time employment with the District, he has been placed exclusively at the grade school. Thus, says the District, Chambers has a greater familiarity with the grade school building than that possessed by Landers.

The District also argues that the respective application forms for initial employment with the District submitted by Landers and Chambers appear to indicate a broader experience for Chambers which clearly makes him more qualified in skill and ability than Landers. Chambers' previous employment experience had included work as a salesman/driver for Coca Cola and involvement as a retail store clerk and maintenance person at a resort. In addition,

Chambers also claimed past experience in carpentry, general construction, plumbing, heating and electricity, with special skills in wiring and welding. Chambers had been raised on a farm where machinery break-down problems were handled by himself and other person on the farm.

In contrast, the District notes that Landers' application form shows that he had been a bus driver for the School District, that he previously worked for the Town of Dell Prairie as a road worker, and had a previous experience in cleaning buildings, plumbing, printing and painting.

Finally, the District argues that testimonial letters on behalf of Chambers were also considered and are further evidence that Chambers is objectively superior to Landers on the basis of skill and ability.

Based on all of the foregoing, the District argues that the Superintendent of Schools and the Building and Grounds Supervisor worked together to fill the Custodian II vacancy, that the Superintendent of Building and Grounds recommended Chambers for the vacancy, and that then School Superintendent Peterson considered a number of factors on which he based his recommendation to the School Board that Chambers deserved the promotion because of objective superiority. Specifically, the District asserts that Peterson considered: 1) the job application forms which demonstrated a greater experience on the part of Chambers; 2) the job interviews of both Landers and Chambers for other vacancies; 3) the testimonial letters on behalf of Chambers; and 4) Chambers' voluntary completion of the 14-hour asbestos training program.

The District acknowledges that neither candidate for the position was "tested" for the position, but asserts that testing was unnecessary because the work experience of both Chambers and Landers was already known. Besides, the District adds, Landers did not have the required asbestos training.

Nor is the District impressed that the earlier Custodian II vacancy at the high school was filled by the most senior applicant. The District acknowledges that the employe who won that position had more seniority than either Chambers or Landers, but contends there is no evidence that he was awarded the position solely on this basis. In any event, argues the District "one occurrence does not make a 'past-practice'."

In response to the Union argument that the labor agreement provides for a 15-day period for a newly promoted employe to qualify for the position, the District states that such provision refers only to the employe who was selected for the promotion. Since Landers was not selected, the provision does not apply to him, according to the District.

Finally, the District denies that Landers was ever employed as a Custodian II by the District, although it concedes that Landers had been assigned as a "lead worker" at the high school between July 1, 1988 and November 15, 1988. The District argues that the ratified contract created the position of Custodian II retroactive to July 1, 1988, and that Landers, if he wished the position, was required to bid for it in competition with other applicants. The District also concedes that the school board recognized Landers' 'lead worker' status as requiring something beyond his normal Custodian duties, and, therefore, compensated Landers' time as the 'lead worker' by giving him the difference between his Custodian pay and the Custodian II pay in addition to his normal Custodian pay. But, the District emphatically asserts, Landers never was classified as a Custodian II.

Position of the Union:

The Union believes the District's selection process was subjective, and that the Employer failed to provide any objective evidence that the junior employe was superior in skill and ability. It notes the District's admission that it failed to interview either of the prospective applicants specifically for the disputed position. It notes the District's admission that it did not test either of the applicants. It claims the District did not utilize any other objective tools or measurements to determine relative employe fitness. "Most tellingly" the Union emphasizes, "the District admitted that seniority was disregarded from its consideration because the competing applicants' seniority dates were 'relatively close'."

The Union believes these admissions constitute a prima facie case and that the District's selection of the junior employe violates the agreement because its actions in connection thereto were arbitrary. The Union cites authority which defines arbitrary action as including " . . . failure to properly weigh the various factors which are considered in the selection determination."

The Union views Building and Grounds Supervisor Fisk's admission that he disregarded the consideration of seniority as a selection factor as a critical shortcoming. The Union believes that the District's arbitrariness is further shown by its failure to consider Lander's six month experience as (what the Union regards) a Custodian II at the high school.

The Union describes the instant contract language governing selection of

internal applicants for a promotion as a modified version of the "relatively equal" selection standard. The modification, according to the Union, is that the language here specifically requires objective evidence as proof that the junior employe is superior in skill and ability before overlooking the more senior candidate.

The Union describes supervisory opinion as largely subjective.

The Union contends that both Fisk's and Peterson's assertion with respect to Chambers' greater working experience in the grade school is an insufficient basis to support a finding that Chambers is objectively superior in skill and ability to Landers. Citing Hill and Sinicroppi (Management Rights, BNA Books at 319), the Union states that the question of ability and proper measurement of differences among various applicants depends on developing a set of criteria which can be used as a valid measure of relative employe ability.

According to the Union, doubt must be resolved in favor of the senior employe. A "relative ability" type of seniority provision does not mean that exactness or absolute equality is required, merely an approximate or near equality is all that is required, the Union suggests. In other words, the Union argues that for the junior employe to receive the position in question, the Employer must establish something more than a slight superiority.

The Union reiterates its belief that Chambers' six month experience in 1988 as a lead custodian at the high school was given no weight by the District in its selection decision, and that Chambers' familiarity with the layout of the grade school facility could be quickly overcome by orienting Landers to the grade school layout.

The Union notes that the District's failure to prepare job descriptions is further evidence that lacked any rational basis to differentiate between or among candidates.

The Union considers the District's contention that Chambers' 14-hour asbestos awareness training made him more qualified as having no merit and being raised merely to rehabilitate the District's position.

The Union asserts that the asbestos issue was raised by the District only after Step "C" of the grievance procedure. In any event, the Union argues that asbestos training is not pertinent, because: (1) such training was considered voluntary; (2) it is not a requirement for becoming a Custodian II (the current Custodian II at the high school is untrained); (3) asbestos work would be contracted out to a firm specializing in asbestos removal.

The Union does not believe that the District actually considered asbestos awareness training at the time it chose the junior employe. It argues, moreover, that the brief nature of asbestos awareness training make it something that could have been easily provided after selection.

Finally, the Union argues that in the absence of objective indicia, a trial period is the proper means for determining the fitness of the senior employe. The Union points out that the instant collective bargaining agreement provides for a brief trial period of 15 working days. It believes that Landers could have been oriented to the physical layout of the grade school during that time, or at least be able to be fairly judged as to whether or not he was suitable for a Custodian II position in the grade school building.

In summary, the Union asserts that both employes are well qualified for the Custodian II position but that the District has failed to meet its burden of providing objective proof for selecting the junior employe over the grievant. The Union requests that the grievant be made whole by awarding him the position of Custodian II, effective July 1, 1989.

District Reply

The District reasserts its belief that Landers was employed only as a Custodial "Lead Worker" from July-December, 1988, not a Custodian II.

The District does not deny that three custodians, including Landers and Chambers, applied for the vacant position of Custodian II at the high school in December, 1988, and that the person finally selected for that position was the most senior of the three. But, the District reasserts, there is no evidence in the record which indicates that seniority was the only reason the successful candidate was selected.

The District also believes that Building and Grounds Supervisor Fisk clearly indicated during his testimony that Chambers' previous work experience at the grade school was considered "among other factors." The District acknowledges that there were no job requirements specified for the Custodian II position at the Wisconsin Dells Grade School or any other Custodian II position in the school district. Therefore, according to the District ". . . it is only reasonable and prudent to select the person to fill any position with as many qualifications and as much experience as possible." The District again argues that Chambers' superior qualifications are demonstrated by comparing Landers'

job application with that of Chambers, as well as the written testimonials of teachers and co-workers on Chambers' behalf (of which Landers has none).

The District believes that although asbestos training was not considered as "necessary," it was considered ". . . more as an added qualification for the job."

Again acknowledging that the posting notice does not list any specific job requirements for the Custodian II position, the District argues that the Union's logic would require the Union to object ". . . if the Employer chose a job applicant who could talk, read and write over one who did not. . . as the employes were not told the qualifications were necessary for the job."

The District reiterated its view that interviews for the May, 1989 Custodian II vacancy were unnecessary when both Landers and Chambers had been interviewed only a short time before in connection with other position vacancies.

As to the Union assertion that there was no testing for the Custodian II position, the District rhetorically asks what there is to test. In this regard, the District restates its belief that Landers' and Chambers' qualifications are known from their job application forms as well as any training received while employed at the District. It reiterates its belief that the testimonials submitted on behalf of Chambers attest to the level of skill and ability of Chambers, but notes there were none submitted for Landers. The District asserts that ". . . these testimonials may be said to represent the best test since Chambers' peers and colleagues thought highly of his work competence."

The District seeks to distinguish the case cited by the Union as providing a definition of "arbitrary" on the basis that the facts in the case cited by the Union are different from the facts of the instant case. It believes other authority cited by the Union actually support the District's position.

The District re-argues that Peterson considered Fisk's recommendation of Chambers, plus the interviews, plus the work experiences, plus the testimonials, plus the additional asbestos training, before recommending to the School Board that Chambers be selected for the Custodian II position.

The District does not believe that Chambers' and Landers' qualifications are close and contends that Chambers' was clearly superior in terms of skill and ability over Landers'.

The District again states that the Union's reliance on the "trial period" provision of the labor agreement is misplaced as it applies only to the person selected, and that Landers was not selected.

Finally, the District asserts that ". . . the Union's argument that the District gave no weight to Landers' six months experience as a Custodian II (more correctly 'lead man' - see above) in its selection decision is not true. . . ", and claims there is no evidence in the record to support the Union's contention." Moreover, the District contends, the arbitration authority cited by the Union regarding training periods and experience is misplaced since the issues in the instant case are centered on distinctions of skill and ability.

Union Reply

In its reply, the Union argues that the District made no affirmative effort to limit subjective factors. According to the Union, the District replaced testing with supervisory opinion, the experience factor was selectively applied, and ". . . seniority was redefined so as to eviscerate the contractual meaning of this fundamental principle of industrial relations."

The Union asserts that the District ignored the factors in its selection decision which favored Landers and gave instead on due value to self confirming subjective considerations.

The Union perceives a portion of the District's original brief as asserting that Landers is not more senior than Chambers, and notes that according to the seniority list provided by the District, itself, Landers' seniority date is 17 months greater than that of Chambers.

The District asserts that Landers, in fact, had pertinent experience as a Custodian II at the high school, and that this is supported by both Landers' uncontradicted testimony as well as the written response of Superintendent Peterson to a grievance filed on Landers' behalf for retroactive pay for his Custodian II experience in 1988.

In addition, the Union cites a seniority list prepared by the District in 1988 which shows Landers to be classified as a Custodian II.

The Union again rejects the District argument that asbestos training was

an essential requirement for becoming a Custodian II, pointing out that the candidate selected over Chambers (and Landers) for the vacant Custodian II position at the high school in December, 1988, hadn't received the 14 hour asbestos training either. The Union restates its view that Building and Grounds Supervisor Fisk stated the complete basis for his recommendation of Chambers was the direct work experience of Chambers at the grade school. The Union believes that the testimony of then School Superintendent Peterson regarding asbestos training does not support a District contention that this factor was considered at the time Peterson made his recommendation of Chambers to the School Board, and suggests it was only made on an ex post facto basis.

Finally, the Union asserts that experience as a Custodian II should be considered at least as significant as physical familiarity with the building.

DISCUSSION

This case is about two employes, Larry Landers and Donald Chambers, both employed as Custodian I's at the Wisconsin Dells School District, both aspiring to become Custodian II's, both applying for the same vacant Custodian II position. One, Chambers, was successful, though less senior than the other, Landers.

Landers now complains that the promotion criteria employed by the District was arbitrary, subjective, and, therefore, contrary to the provisions of the labor agreement in effect between the parties.

Both sides appear to agree that this case is controlled by the language contained in Article 9, Section 9.08(a) of the parties' labor agreement which provides as follows:

> A. When filling vacancies within a job category or where new jobs are created within a job category in the bargaining unit, those regular employes with the most seniority in the job category shall be given preference in filling such vacancies, provided that among internal applicants, no employe is objectively superior on the basis of skill and ability.

The Union does not claim that Chambers was unqualified to receive the promotion. Neither does the District claim that Landers was unqualified to receive the promotion. Rather the District claims Chambers was awarded the promotion because he was objectively superior to Landers on the basis of skill and ability.

The Union does not believe that the District has demonstrated this. From this premise it argues that the more senior Landers should have received the promotion based on the language of the labor agreement.

Each candidate had been interviewed several months earlier as each had applied for other vacant positions. Neither candidate, however, was either interviewed or tested for the Custodian II position ultimately awarded to Chambers. The District argues that the previous interviews made new interviews of the applicants a superfluous exercise. Similarly, it acknowledges that neither candidate was objectively tested for the vacant Custodian II position awarded to Chambers, but persuasively argues that testing also was unnecessary because the qualifications and previous employment experience of each man was not only objectively ascertainable, but was well known. I agree.

If the District can demonstrate that it considered sufficient objective criteria to establish a reasonable basis for its conclusion that Chambers was objectively superior in skill and ability to Landers, whether or not it reinterviewed the men or tested them is immaterial. While interviews and formal test procedures can be useful tools to glean objective information about job candidates, if the objective information sought can be obtained through other means the absence of specific interview or testing procedures is not a cause for legitimate complaint.

Two witnesses testified on behalf of the District, Douglas Fisk and Gerald Peterson.

Building and Grounds Supervisor Douglas Fisk testified that Chambers' greater familiarity with the grade school building was the critical basis of his recommendation that Chambers receive the promotion. According to Fisk, awarding the Custodian II position to Chambers obviated any need to orient some other person to the grade school facility. With Chambers already in place, Fisk saw no reason to make a change.

At another part of his testimony, Fisk also stated that Chambers' greater familiarity with the building was "one of the factors" which formed the basis of his recommendation. However, he identified no others. Fisk was very candid though, in acknowledging his total disregard of Landers' greater seniority, based on his perception that Chambers and Landers were relatively close in seniority.

Measuring which candidate had greater familiarity with the grade school facility is a matter susceptible to objective determination, under the facts of this case. Landers' employment experience with the District was exclusively at the high school; Chambers' employment experience with the District was exclusively at the grade school. Under these circumstances, for Fisk to conclude that Chambers had greater familiarity with the grade school facility was a reasonable and objective conclusion for Fisk to make, and was germane to the issue at hand.

In the absence of further evidence, however, Fisk seems to have placed an inordinant amount of weight on this conclusion which he identified as having been the critical basis for his recommendation. Nothing in the record suggests any differences between the grade school facility and the high school facility which would be of any significance to a professional custodian. The record, for instance, is barren of any evidence suggesting that the grade school had a different heating system than did the high school, that the grade school had a different electrical system than did the high school, or that the plumbing maintenance requirements at the grade school significantly differed from the plumbing maintenance needs at the grade school. Certainly, if there were significant differences between the two facilities from the standpoint of custodial duties, it is fair to infer that they would be known and enumerated by Building and Grounds Supervisor Fisk. That they were not strongly suggests that any orientation to the grade school facility which Landers would have needed would have been both minimal routine, and pro forma.

However, with Chambers already at the grade school, Fisk stated he saw no reason to make a change. It is at this point his disregard of seniority mars his assessment. Had Fisk considered that Landers had the greatest seniority and was thus entitled to a certain contractual preference, a reason for change might have been perceived. But Fisk's disregard of seniority in formulating his promotion recommendation is directly contrary to the explicit mandate of Section 9.08(A) of the parties' labor agreement. Neither that section (nor any other contractual provision of the parties' agreement) provides Fisk a basis for disregarding the greater seniority of Landers merely because he perceived it to be relatively close to that of Chambers. That Fisk disregarded Landers' greater seniority in making his promotion recommendation contravenes the parties' agreement and seriously flaws the recommendation which Fisk subsequently made.

That recommendation was made to then Superintendent Peterson. Peterson was not comfortable in saying that he followed the recommendation, but characterized his conference with Fisk as resulting in a "joint decision." According to Peterson, however, such recommendation was not the only factor which he considered.

It seems clear that Peterson was aware of the "critical basis" of Fisk's recommendation, i.e., Chambers' greater familiarity with the grade school facility. But Peterson also testified that Chambers' voluntary completion of the 14-hour asbestos awareness course was also a factor in his decision, and was based on a District goal to have a person in each building who had completed the 14-hour asbestos awareness training. To bolster the point, the District submitted into evidence certain Federal Environmental Protection Agency rules which appear to require that all school maintenance and custodial staff members who may work in a building containing asbestos receive awareness training of at least two hours, and those who conduct any activities resulting in the disturbance of asbestos receive 14 hours of additional training.

The Union is dubious of the District's claim. It notes that the 14-hour asbestos awareness training is not a prerequisite of the Custodian II position, that District employes were never told that completion of the 14-hour course would be a promotion factor to be considered, and that the person awarded the Custodian II vacancy at the high school in December, 1988 over both Landers and Chambers was an individual who had not received the 14-hour asbestos awareness training. In short, the Union contends that the 14-hour asbestos awareness training issue was contrived as an after-the-fact justification of the Chambers promotion only after the instant grievance had been aired in front of the School Board, and then not publicly, but in closed session.

Whether or not the 14-hour asbestos training is an ex post facto justification is unnecessary to determine. What is clear is that it was not a prerequisite for Custodian II's and it was not utilized as a promotion factor in December, 1988 when Landers and Chambers were both bypassed for the Custodian II position vacancy at the high school in favor of an applicant who, like Landers, had not received the 14-hour training. There is nothing in the record to suggest why 14-hour asbestos awareness training is disregarded in December, 1988 when awarding one Custodian II promotion, but relied on only five months later in making another Custodian II promotion. It does not appear that Federal regulations changed within this five month period; indeed, the EPA rule received into evidence is dated October 30, 1987.

Under these circumstances, the best that can be said of the District's professed consideration and reliance on completion of the 14-hour asbestos awareness training as a promotion factor in this case is that it appears to be a whimsical standard capable of collapse or erection without notice to those

employes it might be presumed to affect. Not withstanding the District's presumed sincerity in erecting this standard as a promotion factor in the instant matter, reliance on a standard so easily erected or collapsed appears to smack of more than a little arbitrariness. If it was a factor in May, 1989, it should have been one in December, 1988. If it was not a factor in December, 1988, employes should not be required to guess that it might be a factor the following May.

The District also submitted a number of written testimonials on Chambers' behalf. All except one were written by teachers at the grade school, are highly complimentary of Chambers, and urge favorable consideration of his bid for the Custodian II opening at the school. The District claims that Peterson relied on these, as well, in making his promotion recommendation to the School Board. As evidence of Chambers' political or interpersonal skills, they are invaluable; they are, however, no evidence that Landers does not possess similar skills. Moreover, while they are written by well educated, professional teachers, none of those teachers claimed to possess any professional background, training or expertise as a building custodian. Viewed in that light, the letters become subjective evaluations of Chambers' personality - a matter not in issue.

Included in that packet of testimonial letters, however, was a communication from Paul S. Camacho, the incumbent Custodian II at the grade school whose imminent retirement created the May, 1989, position vacancy. Camacho endorsed Chambers as being knowledgeable in small repairs, (and) in areas of plumbing, carpenter and mason work. Camacho went on to say that Chambers has knowledge with the layout of the building, in area water lines, sewage lines, drainage lines and with steam lines. Camacho concludes that Chambers ". . . knows how to lead, and organize in working plans." He describes Chambers as having ". . . the ability to be a head custodian."

This is objective evidence of Chambers' ability. It is also the closest thing to a job description of the Custodian II post which appears in the record, and has value in that respect. Significantly, however, it identifies no special or unusual custodial needs of the grade school facility. Moreover, any conclusion as to Chambers' being objectively superior to Landers drawn from this document would be unwarranted. Camacho's communication does not purport to compare the two men. The most that can be said of it is that it is competent evidence that Chambers would be a qualified Custodian II. This, as with Chambers' personality, is not in issue.

The District also states the respective employment applications of Chambers and Landers were compared and evaluated by Superintendent Peterson and that such comparison was another factor in the promotion recommendation to the School Board. The District's candor in acknowledging this comparison is praise-worthy; it is also damaging to the case the District seeks to make. For if the comparison described by the District was actually made, it was akin to rolling loaded dice!

The application form submitted by Landers was for initial employment with the District, was dated February 6, 1986, and obviously outlined none of the custodial skills or abilities Landers acquired or demonstrated in the course of his employment as a custodian for the District, for he had not yet been hired by the District. Chambers' application, on the other hand, was dated October 4, 1988 - more than two years after he had become a part-time custodian with the District and more than a year after he had become a full-time custodian with the District, was submitted in connection with his bid for a Maintenance/Technician position, not one for Custodian II, and relied, to a limited extent, on additional skill he had gained at the District. Review of this application reveals only that its author possessed some custodial and maintenance skills. One can fairly infer that Chambers' application establishes him as objectively superior to Landers, only if the skills and abilities that Landers had demonstrated since his initial date of employment with the District in March of 1986 are also included in the comparison formula. This was not done. Based on the District's professed reliance on the comparison which was made, another flaw in District objectivity is exposed.

Under these circumstances, there appears to be some substance for the Union's complaint that the District's failure to either reinterview or provide objective testing to the two applicants for the May, 1989, vacancy resulted in an arbitrary and subjective decision being made. New interviews, objective testing, or comparisons which had the same finish line may still have revealed Chambers as objectively superior to Landers in skill and ability. Given the comparisons and evaluative efforts made by the District, however, that is a matter which at this point is speculative, at best.

Perhaps most damaging from the standpoint of the District is the total failure of either Fisk or Peterson to consider Landers' apparently successful tenure as lead or head custodian at the high school for approximately six months, beginning in mid-1988. The District's argument that the position then occupied by Landers was not really a Custodian II position but only that of a lead person fairly blushes of an unpersuasive sophistry.

In the first place, there is no written basis by which to compare the

existing Custodian II position with that of "lead custodian" since it is clear that there are no job descriptions for either. Second, in a memo to Landers from then School Superintendent Peterson, dated January 18, 1989, Peterson specifically accepted Landers' contention that he had been functioning as a Custodian II for the last six months and agreed to pay him retroactive pay as Custodian II as of July 1, 1988; third, on a seniority list prepared by the District, dated November 22, 1988, Landers was listed as a Custodian II. The only reasonable conclusion which can be drawn from these facts is that the duties and responsibilities which Landers fulfilled as "lead custodian" at the high school the latter half of 1988 were either identical or substantially similar to those of a present Custodian II.

Significantly, nowhere does the District contend that Landers performed unsatisfactory service during his experience as lead custodian. Nowhere does the record contain any reference to any disciplinary action being taken against Landers. Nowhere does the record suggest even a hint of evidence that Landers required special instruction or was unable to exert effective leadership, or was unsatisfactory in any respect. Based on these omissions, the inference must follow that Landers functioned successfully as a lead custodian.

It is also significant that Landers was elevated to this position on July 1, 1988. Clearly, the EPA asbestos awareness regulations were known to the District at that time; yet Landers was still selected. Presumptively in mid- year of 1988 the District must have known that Chambers had completed the 14-hour asbestos awareness training and Landers had not; yet Landers was still selected. It would thus appear that the asbestos awareness training standard for promotion to Custodian II on which the District relied in May, 1989, had collapsed (or been ignored) as a standard in not only December, 1988, but July 1, 1988, as well.

Finally, interviews, employment applications, resumes, and objective testing procedures are all designed to facilitate accurate predictions of future employment success. But, in many cases, they offer only indirect indications, for the applicant has not had any experience in the job for which he is applying. Thus, in those instances where the applicant applies for a job identical or substantially similar to one he has already performed for the same employer common sense would appear to suggest that review of the employe's past performance on the similar job would offer a compelling means of accurately predicting his chances of success in the position to which he aspires.

Inexplicably, there is no evidence of this fundamental assessment being made in the instant case. Neither Fisk nor Peterson testified to giving any consideration whatsoever to Landers' apparently successful previous six month experience as a lead custodian. Although the District now argues that this factor was considered, such argument appears to be based on wishful thinking instead of evidence. The District's paucity of proof in this regard must be regarded as fatal to a case already foundering.

* * * *

> Arbitrary action is the failure to properly weigh the various factors which are considered in the selection determination. . . . It is the failure to properly and fairly investigate all factors. It is the failure to afford each candidate a full, fair and impartial opportunity to have his qualifications considered. South Central Bell Tel Co., 52 LA 1104, 1108-09 (Platt, 1969).

Measured against this description, the term "arbitrary" seems to accurately characterize much of the underlying basis on which the District, itself, claims to have relied. The sole, small sliver of "objective superiority" carved by District assessment of the candidates' respective grade school building familiarity is consumed by the conflagrations of arbitrary, subjective evaluation which followed. It is a record, in my view, which is insufficient to conform to contract mandate.

Accordingly, based on the foregoing and the entire record, it is my decision and

AWARD

1. The Employer violated the collective bargaining agreement by awarding the Custodian II position at the Wisconsin Dells Grade School to Don Chambers rather than to a more senior Custodian I, Larry Landers.

2. As a remedy, the District is ordered to make the grievant whole by awarding him the position of Custodian II, forthwith. Upon successful completion by the grievant of the 15 day qualification period described in Section 9.08(c) of the collective bargaining agreement, the Employer shall make him whole by awarding him full back pay for said position, retroactive to July 1, 1989.

3. The Arbitrator shall retain jurisdiction for a period of 60 days in

the event either party has questions with respect to the implementation of this award.

Dated at Madison, Wisconsin, this 7th day of February, 1990.

By _____
A. Henry Hempe, Arbitrator