

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
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 GENERAL DRIVERS AND HELPERS UNION :
 LOCAL NO. 346 :
 :
 : Case 49
 : No. 43935
 and : MA-6114
 :
 HAYWARD COMMUNITY SCHOOL DISTRICT :
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Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by
 Ms. Marianne Goldstein Robbins, appearing on behalf of the Union.
 Weld, Riley, Prenn & Ricci, S.C., by Mr. Stevens L. Riley, appearing on behalf

ARBITRATION AWARD

The Employer and Union above are parties to a 1987-1990 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the promotion grievance of Ted Crandell.

The undersigned was appointed and held a hearing in Hayward, Wisconsin on October 10, 1990, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, both parties filed briefs, and the record was closed on November 5, 1990.

STIPULATION ISSUES:

1. Did the District violate the collective bargaining agreement when it denied the lead custodian position to the senior applicant, Ted Crandell?
2. If so, what remedy is appropriate?

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE III - SENIORITY

Section 5 - Promotions:

All new and vacated positions shall be posted at each school for a period of five working days. Such posting shall state the job to be filled, the date the job is to be filled, qualifications for the job, and the rate of pay. Interested employees may apply for posted vacancies by notifying the business office, in writing, of their interest, during the posting period specified above.

New positions and vacancies shall be awarded to the most qualified applicant; provided, however, that before anyone is hired from outside the bargaining unit, qualified bargaining unit employees will be given preference. Where qualifications are equal, seniority shall prevail. The qualification of employees shall be determined by the District based on physical fitness, knowledge, skill, and efficiency. Any current part-time or seasonal employee may make application for year round vacancies. An employee being promoted to a higher paying position shall serve a probationary period of ninety (90) calendar days. In the event the Board determines that employee is not qualified to fill the position before the end of the probationary period, the Board reserves the right to return the employee to his former position at his former rate of pay.

FACTS:

Grievant Ted Crandell had been employed by the District as a custodian for 29 years when, about January, 1990, he answered a posting for lead custodian in the District's high school. Two other custodians also applied for the position, which was awarded to Earl Oiler, who had been employed by the District for four years. Crandell, who was highest in seniority among the District's custodians, filed a grievance contending that the denial of his application violated Article III, Section 5 of the Agreement.

The job posting itself was relatively brief, specifying only that the

lead custodian "must have experience with electrical and mechanical systems." Crandell testified that he had worked with mechanical and electrical systems at the District's Stone Lake School and at the high school, and had done maintenance on the electrical system at Stone Lake School replacing contacts and bad parts in the control system. Crandell testified that he had four years' Navy experience as a boiler tender, maintaining boilers on ships, and had repaired various plumbing and other mechanical and electrical items for the District. He also testified that at one time he had owned a laundromat and had done all of the maintenance himself, replacing bearings and clutches on washers and dryers. Crandell testified that he had substituted for the prior lead custodian at the high school, Allan Thedens, several times for periods of weeks at a time when Thedens was ill, and had been praised for his work by management at the time.

Maintenance Head Leonard Serauskas testified, as did Administrator Greg Joseph and Business Administrator Michael Downey, that the three met to discuss the qualifications of Crandell and Oiler and decided to promote Oiler because they felt his qualifications were superior, particularly in the area of leadership abilities. Serauskas stated that the lead and regular custodians' work are identical for the most part but that the lead has some supervisory responsibility. Serauskas testified that Oiler was competent to do the same work as Crandell, but in addition had twenty years' experience as head custodian at a high school in Wheaton, Illinois. He stated that since Oiler's employment at the District he had been put in charge of the outside summer crew in the summer of 1987, 1988 and 1989, and did an effective job. Serauskas criticized Crandell specifically only in two respects, however. Serauskas testified that he moved Crandell from Stone Lake School to the high school in 1980 (Serauskas' first year in the District) because he felt that the cleanliness at Stone Lake School was not up to par. He also testified that Crandell did not volunteer for overtime, while Oiler took all of the overtime he could get and also found additional work to do beyond the minimum in his position at the middle school. Serauskas testified that the management group gave weight to Oiler's 18-20 years as a supervisor. Serauskas also testified that Crandell had had a doctor's restriction during part of the 1980's, and had been restricted in particular from lifting over 25 pounds. Serauskas stated that the lead custodian has more heavy work than other custodians, because it is a day job when all of the commodities are delivered to the school and the lead custodian unloads the trucks.

Crandell testified that he had a back condition in the last year of his work at Stone Lake, and could not bend over. Following therapy, however, he built his back muscles up, and testified without contradiction that he now unloads semi-trucks without assistance for the school. Crandell also testified that although he was scheduled for an interview for the lead custodian position, the interview was never held, and that he was informed on the morning of the interview that Oiler had been selected. Crandell testified that he had acted as supervisor of a grader operator and truck driver from time to time in his capacity as an elected town board member. He obtained, and the Union introduced into evidence, letters in support of his promotion to lead custodian, from the District's retired lead custodian at the high school and from Serauskas' predecessor as maintenance chief.

Since the Union's inception about 1986, the grievant has served as the sole Union steward. One grievance in particular, filed by the grievant himself, appears to have aroused some resentment on the part of management; the grievant claimed overtime pay for hours he was not offered, but the Union dropped the grievance when management produced at a grievance meeting a prior letter from the grievant stating that he did not want overtime. Joseph testified that this grievance affected his view of Crandell only in that he felt Crandell lacked record-keeping skills.

Downey testified that he felt Oiler was superior in initiative because Oiler did extra things that Crandell did not do. But Downey admitted on cross-examination that through a reduction in staff the District had lost one job at the high school, and that the high school custodians did not have time for extra jobs, while the middle school and elementary school custodians were not as heavily loaded. Downey also testified that Oiler had had an accident many years ago, resulting in a limp, but that this did not affect his physical performance.

Custodian Jeff Coddington, a lifelong resident of Stone Lake, testified that he was familiar with the school because he was a student there during the period Crandell was custodian, and continues to visit the school from time to time delivering things. Coddington testified that Crandell always did a good job at Stone Lake School and the floors were always very clean, cleaner than at present when only a part-time custodian is assigned there. Serauskas, in opposition to this testimony, testified that Stone Lake was cleaner after Crandell left.

THE PARTIES' POSITIONS:

The Union's Position

The Union contends that the grievant has a clean work record and has been praised by management when substituting for the then-lead custodian. The Union

notes that two retired supervisors provided letters in support of the grievant and specifically in support of his leadership abilities, and that former student Coddington testified that Stone Lake School was always kept very clean. The Union notes that the period in which Serauskas first came to work for the District coincided with the onset of the grievant's back trouble, which has since been remedied.

The Union contends that under Article III, Section 5, seniority prevails where qualifications are equal, and terms this a "relative ability" clause. The Union contends that numerous arbitrators have found that ability cannot be precisely measured, and therefore the term "equal" does not mean exactly equal but substantially equal. The Union argues that the grievant has an understanding of heating, ventilating, and air conditioning systems equal to that of Oiler even in the Employer's view, and that leadership or supervisory skills were not called for in the posted notice. The Union argues that the preference given Oiler, even on supervisory grounds, is not supported by the record, because Crandell has served as lead custodian when the prior lead was absent for extended periods and was commended for that performance. By contrast, the Union notes, management has relied on a one-sentence written remark made by a distant school principal in another state. The Union also argues that the fact that Oiler was able to look for extra things to do is irrelevant in view of the fact that a management witness conceded that the high school custodial position has more demanding basic duties. The Union points to the lack of an interview for Crandell as evidence that the District made no objective determination of qualifications. The Union notes that the contract allows a ninety (90) day probationary period for any promotion, thus giving the Employer a final opportunity to determine an employee's fitness for a promotion, and requests that the Arbitrator order that the District award the lead custodian position to Crandell and make him whole for all losses.

The Employer's Position:

The Employer contends that the parties, in agreeing on the language of Article III, Section 5, deliberately chose language which gave the District substantial discretion in making promotion decisions. The District argues that unlike a "most senior qualified" clause, the language in use here clearly gives the Employer the right to use four criteria -- physical fitness, knowledge, skill and ability -- to measure qualifications. Seniority only comes into play when the qualifications are equal. The District cites several arbitrators as stating that under language of this kind, the employer's determination is subject to challenge only if it is arbitrary or capricious.

The Employer contends that it acted reasonably and not arbitrarily or capriciously in determining that Oiler was more qualified than Crandell without interviewing Crandell. The District contends that its long employment of Crandell made it fully aware of Crandell's abilities and qualifications, and that an interview was a formality not necessary in view of several distinctions between the two applicants. The District argues that the most conspicuous difference was that Oiler had substantial experience, prior to his employment with the District, as a head custodian at Wheaton North High School in Wheaton, Illinois. The District notes that according to Oiler's references, he performed his responsibilities in that District in an exemplary manner.

The District points to Crandell's history of back problems as some evidence that the two applicants were not equal in physical fitness, while admitting that physical fitness was not the controlling factor in this case. The District contends that in the judgment of the selection committee, Oiler had demonstrated the ability to motivate other employees to do top grade work and to work together well. The District contends that Oiler had been self-directed and effective in directing other employees in charge of the outside crews in the proceeding two summers. The District also notes that Oiler found additional tasks to perform when he had completed the basic list of duties, unlike Crandell. The District also notes that by his prior attitude towards overtime the grievant made himself less desirable for a position requiring overtime. The District contends that the emphasis it placed on leadership abilities was well within its discretion under the contractual language, and that numerous arbitrators have supported the principle that where such a determination is reasonable, an arbitrator should not substitute his or her judgment for that of the employer. The District requests that the grievance be denied.

DISCUSSION:

I find initially that there is nothing in the record which would tend to disqualify either the grievant or Oiler from the position of lead custodian. Simply put, both have held lead positions for periods of some duration over a number of years in the District, and there is no evidence that either had performed in anything less than the best fashion. The District's attempt to demonstrate that the grievant was in poor physical condition was not supported by record evidence, and furthermore the District itself minimized its importance in the promotion decision. And indeed, the alleged one-year substandard performance about 1980, which is the only criticism leveled against the grievant's work by the District, could be explained by the fact that this was the period of his back injury.

It is clear that the District has given substantial weight to Oiler's experience elsewhere. This is evidenced primarily by documents provided by Oiler in his original, 1983, application for employment with the District, at which time he was not hired. But Oiler's application at that time stated that his salary was \$5.50 an hour, and Serauskas admitted he did not know the details of this salary level in relationship to the responsibility claimed by Oiler. And the fact that the grievant had, at one time, indicated a preference not to have overtime carries little weight when he applies for a new job and specifically offers to take the overtime which comes with the job. Meanwhile, the grievant's prior grievance is the only instance of poor judgment of which he is accused, and it is insufficient to overcome the grievant's undisputed adequacy on the lead custodian job when substituting for Thedens. In this context it is significant that the grievant's substitution for the prior lead custodian was for periods of two or three weeks in each year when Thedens took vacation, and for two periods of six weeks each when Thedens was on sick leave. These lengths of time, contrary to the District's contentions, appear long enough to constitute something more than "chair-warming". Also, there is no evidence that the grievant was less efficient than Oiler; though Oiler found additional work to do in the middle school, Downey testified that because of a reduction in staff at the high school the custodians there were busier.

The fact that the District did not interview the grievant thus assumes some significance. Here, both employees contending for the lead custodian position were presumably qualified. The District made a decision that one was better qualified than the other; but in doing so it relied on second-hand information provided by Oiler in his original application, and in a 1986 telephone reference check. It explicitly admits that it gave this evidence substantial weight. It is unavoidable that in choosing this approach the District opened itself to a complaint of inequity in its methods, because it did not give the grievant the logical opportunity of an interview to present and/or emphasize his supporting statements from retired supervisors of the Hayward District or his past experience supervising a town highway crew.

If there were any evidence in the record that clearly identified the grievant as either unqualified or significantly less qualified than Oiler, the District's procedural lapse might matter little. But here, the District claims the right to exercise discretion in what is obviously a "close call." Discretion in judgment can only be exercised where a fair attempt to secure the facts has been made. In this instance the District's failure to interview Crandell justifies a finding that the two applicants could not have been equally considered. The fact that Crandell was interviewed in 1986 in connection with an earlier lead custodian vacancy does not, contrary to the District, justify its failure to interview him in 1990. The grievant clearly had additional points to emphasize by 1990, including his two six-week periods of substituting for Thedens, which might well have carried weight had the District proved willing to listen to them. Finally, the District has the protection of the ninety (90) day probationary tryout provided for in Article III, Section 5, in the event that for some reason not evident in the record before me the grievant proves not qualified.

For the foregoing reasons, and based on the record as a whole, it is my decision

AWARD

1. That the District violated Article III, Section 5 of the collective bargaining agreement when it denied the lead custodian position to the senior applicant, Ted Crandell.

2. That as remedy, the District shall, forthwith upon receipt of a copy of this Award, award Ted Crandell the lead custodian position, and shall make him whole for any losses suffered by virtue of the District's refusal to promote him.

Dated at Madison, Wisconsin this 22nd day of January, 1991.

By _____
Christopher Honeyman, Arbitrator