

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 CHEQUAMEGON UNITED TEACHERS :
 (NON-TEACHING STAFF) : Case 28
 : No. 45975
 and : MA-6830
 :
 WEBSTER SCHOOL DISTRICT :
 :

Appearances:

Mr. Barry Delaney, Executive Director, Chequamegon United Teachers,
 Route 1, Box 1055, Hayward, Wisconsin 54843, appearing on behalf of
 the Union.
 Weld, Riley, Prenn & Ricci, S.C., 715 South Barstow Street, Suite 111,
 P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, by Mr. Stephen L.
 Weld, appearing on behalf of the District.

ARBITRATION AWARD

Chequamegon United Teachers (Non-teaching Staff), hereinafter the Union,
 and the Webster School District, hereafter the District or Employer, are
 parties to a collective bargaining agreement which provides for the final and
 binding arbitration of grievances arising thereunder. The Union, with the
 concurrence of the District, requested the Wisconsin Employment Relations
 Commission, hereafter Commission, to appoint a staff member as single,
 impartial arbitrator to resolve the instant grievance. On August 1, 1991, the
 Commission appointed Coleen A. Burns, a member of its staff, as arbitrator.
 Hearing was held on Wednesday, September 4, 1991, in Webster, Wisconsin. The
 record was closed on October 2, 1991, upon receipt of post-hearing written
 argument.

ISSUE:

The Union proposes the following statement of the issues:

1. Did the District violate Article 6 (1), Article 7 (1), and Article 7 (2) when it did not hire Dan Proffit as a Custodian?
2. Did the District violate the collective bargaining agreement when it changed the job description and qualifications for custodians without bargaining the changes or their impact?
3. If so, what is the appropriate remedy?

The Employer proposes the following statement of the issue:

1. Did the District violate Article 3 of the collective bargaining agreement when it changed the job description and qualifications for the vacant custodial position without bargaining the change or the impact of the change?
2. Did the District violate Article 7, Sections 1 and 2, of the collective bargaining agreement when it failed to award a vacant custodial position to grievant Dan Proffit?
3. If so, what is the appropriate remedy?

The undersigned adopts the following statement of the issues:

1. Did the District violate Article 3, Management Rights, when it changed the Custodian job description without bargaining the change or the impact of the change?
2. Did the District violate Article 6, Section 1; Article 7, Section 1; or Article 7, Section 2, when it did not hire Dan Proffit as a Custodian?
3. If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 3 - MANAGEMENT RIGHTS

All management rights, functions, privileges and authorities will continue to be possessed by the Employer during the term of this Agreement, subject to the provisions of this contract. Such rights shall include but not be limited to:

. . .

- B. The right to hire, promote, rehire, demote, transfer, assign, layoff, and recall employees to work.
- C. The right to judge the employees skill, ability, efficiency, and qualifications.

. . .

- E. The right to maintain the efficiency of employees, control and regulate equipment and other property of the Employer.
- H. The right to determine the assignment of work and the size and composition of the work force.

The exercise of aforementioned management rights shall be subject to the grievance procedure. It is agreed that in the exercise of such rights, the District will be in conformance with Wisconsin Statute 111.70.

ARTICLE 6 - SENIORITY

Section 1: It shall be the policy of the Employer to recognize seniority in filling vacancies, and in laying off or rehiring provided, however, that the application of seniority shall not materially affect the efficient operation of the School District of Webster.

Section 2: Seniority shall be based upon the actual length of continuous service commencing with the actual date of hiring the employee. Continuous service shall be inclusive of all paid absences and authorized leaves and school year layoffs. Authorized leaves of absences shall not include a leave to take other employment.

ARTICLE 7 - PROMOTION

Section 1: When it becomes necessary to fill a vacancy or a new position in the bargaining unit, the Employer, through the District Administrator, will provide each employee with a written notice of a vacancy or new position. Any employee interested in applying for the vacancy or new position shall attach his/her name to the notice and return it to the Administration office within ten (10) working days. Seniority shall be given preference in making promotions and filling job vacancies provided the qualifications of the applicants are relatively equal. Whether or not the Administrator has been reasonable in judging employee qualifications shall be subject to the grievance procedure.

Section 2: Employees selected for such vacancy or new position shall serve a trial period of two (2) weeks. Should the employee not qualify or should the employee so desire, he/she shall be reassigned to his/her former position without loss of seniority during the two (2) week period. After said trial period, the employee shall be permanently assigned to the position.

BACKGROUND

Prior to March, 1991, the Custodian job description was as follows:

JOB DESCRIPTION FOR SCHOOL CUSTODIAN

Primary Function

to clean and maintain the physical plant of the building to which assigned along with surrounding grounds.

Organizational relationships:

1. directly responsible to Head Custodian

2. coordinates efforts with Principal

Illustrative key duties:

1. Cleaning and operations:
 - a. Sweep each room each day
 - b. dust each room each day
 - c. mop and polish as necessary
 - d. wash windows as necessary
 - e. collect trash each day
 - f. sweep halls twice each day
 - g. sweep and mop floors in cafeteria daily
 - h. clean sinks and fountains each day
 - i. keep sidewalks shoveled in winter
 - j. lock and unlock all doors at end and start of each day
 - k. turn lights on and off at start and end of each day
 - l. keep main entrance to building clear and neat at all times
 - m. raise and lower flag each day
 - n. clean bathroom floors, sinks, mirrors, and toilet bowls each day
 - o. fill all dispensers each day
 - p. set up all rooms for evening use as directed each day
 - q. keep storage areas clean and organized

2. Maintenance
 - a. Report all damage or wear of school facilities each day to Head Custodian.
 - b. Make any repairs as necessary.
3. Other

Perform other duties as requested by the Principal, or Head Custodian.

In March of 1991, the District developed a new Custodian job description which stated as follows:

SCHOOL DISTRICT OF WEBSTER
Job Description

TITLE: Custodian

- QUALIFICATIONS:
1. Custodial work experience.
 2. Must have basic plumbing, painting, electrical and carpentry skills.
 3. Should have valid Wisconsin driver's license.
 4. Adaptable to working around students.
 5. Demonstrated aptitude or competence for assigned responsibilities.

REPORTS TO: Head Custodian

JOB GOAL: To provide students with a safe, attractive, comfortable, clean, and efficient place in which to learn and develop.

PERFORMANCE RESPONSIBILITIES:

1. Cleaning and operations:
 - a. Sweep and dust each room each day.
 - b. collect trash each day.
 - c. sweep halls each day.
 - d. mop and polish floors as necessary.
 - e. clean sinks and fountains each day.
 - f. clean bathroom floors, sinks, mirrors, and toilet bowls each day.
 - g. fill all dispensers each day.
 - h. lock and unlock all doors at end and start of day.
 - i. raise and lower flag each day.
 - j. turn lights on and off at start and end of each day.
 - k. wash windows as necessary.
 - l. keep sidewalks shoveled in the winter.
 - m. keep storage areas clean and organized.
 - n. vacuum all carpet (sic) each day.
 - o. handle related duties as assigned.

- p. clean chalkboards regularly.
- 2. Maintenance
 - a. perform minor electrical, plumbing, painting, and carpentry repair as necessary.
 - b. reports major repairs needed promptly to the head custodian.
 - c. reports any damage to school property to the building principal.
- 3. Other
 - a. perform other duties as requested by the head custodian or building principal.

TERMS OF EMPLOYMENT: Twelve month year. Salary range \$7.46 to \$8.38 as established by the master agreement.

EVALUATION: Performance on the job will be evaluated by the head custodian and building principal.

On or about March 11, 1991, the District sent the following memo to all support staff:

There will be a custodial position available April 1, 1991. Qualifications include: some experience in custodial work and the ability to do minor maintenance repair.

If you are interested you may obtain an application form from the School District Administration office. Closing date for applications will be March 22, 1991.

A similar notice was published in a community newspaper.

Daniel Proffit, a District bus driver, and Evelyn Engebritsen, a District secretary, applied for and were interviewed for the position. The District also interviewed applicants who were not District employees. The position was awarded to one of the outside applicants, Tim Daggy.

On April 18, 1991, the Union filed the instant grievance alleging that the District violated Article 3, Management Rights, of the collective bargaining agreement when it changed the qualifications for custodians and their performance responsibilities without notifying the Union and without giving the Union the opportunity to bargain the change and the impact of the change prior to the implementation of the new working condition. The Union requested that the District return to the status quo until the District had bargained with the Union over the issues involved. The grievance further alleged that the District violated Article 6 (1), Article 7 (1) and Article 7 (2) when the District failed to award the custodial vacancy to Dan Proffit, hereafter the Grievant. The grievance was processed through the grievance procedure, denied at all steps, and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES

Union

The Employer's interpretation of Article 7(1), fails to take into

consideration the language of Article 6(1). The two articles must be interpreted so that there is harmony between the two. Article 6(1) clearly states that the District must recognize seniority in filling vacancies, provided the application of seniority shall not materially affect the efficient operation of the District. Thus, seniority controls unless the District can demonstrate that placing Dan Proffit into the custodial position would have a negative effect on the efficiency of the operation of the District. The District has not shown this.

The last sentence of Article 7(1) of the collective bargaining agreement clearly states that the parties have agreed to allow the grievance arbitrator to determine if the District has been reasonable in judging employe qualifications for filling the vacancy. The District was not reasonable in judging Dan Proffit's qualifications for the position of custodian.

Article 7(1) comes into play only when two or more bargaining unit employes apply for a vacancy and they can do the job as per Article 6(1). The District cannot select an outside individual to fill a vacancy even if the outside individual might have more qualifications where, as here, the bargaining unit candidate can do the job.

Whether one looks at the old job description or the new job description one finds that the primary responsibilities are cleaning. There is nothing in the record that suggests that Dan Proffit cannot perform these cleaning responsibilities. Nor is there anything in the record to demonstrate that Dan Proffit would not be able to report needed major repairs or damages.

The old job description required the custodian to "make any repairs as necessary." The new job description requires the custodian to "perform minor electrical, plumbing, painting and carpentry repair as necessary."

Testimony of the custodians clearly demonstrates that repairs take very little, if any of the yearly 2,080 hours of work. The District employs a head custodian to whom the other custodians refer repairs and to whom the District has provided training in making these repairs. The custodians who testified at hearing, either had no experience, or very little experience, in the fields of plumbing, painting, electrical and carpentry work prior to assuming their custodial positions. Even if it could be shown that Dan Proffit had no skills in these four areas, the amount of work done by custodians in these areas is insignificant.

The second question on the interview sheets speaks to the general knowledge and background needed for the position of custodian. Averaging the response of the interviewers, Dan Proffit had an average of four while Tim Daggy had an average of 3.9. Since Dan Proffit received a higher total composite score on background and knowledge for the custodial position than did the successful candidate, it is irrational for the Employer to now say that to hire Dan Proffit would materially affect the efficient operation of the District as per Article 6(1).

The record does not establish that, during the interview, Dan Proffit was asked a specific question about his plumbing and carpentry skills. Consequently, it is not reasonable for the District to now say that the lack of such skills (if any) would materially affect the efficient operation of the District. As demonstrated by Dan Proffit's testimony and Joint Exhibit Four, Proffit has had extensive work experience and college training in these two areas.

During the initial meeting with the Administration concerning this grievance, Union representative Barry Delaney asked for the reasons why Dan

Proffit was not hired. The Superintendent provided two reasons, i.e., that Dan Proffit did not express clearly how to wire a single pole light switch and that the head custodian, Mr. Spafford, said that Dan did a lousy job painting the "W" on the gym floor when he was working as a custodian during his junior and senior years of high school.

In regard to the wiring of an electrical light switch, Dan Proffit stated at the interview that he said it does not make any difference how you wire the two wires (not counting the ground wire) to the switch. Dan Proffit's testimony was corroborated by Custodian Mackyol, who testified that he has changed light switches for the District. After a lengthy question and answer session, both Superintendent Anderson and Head Custodian Spafford testified that nothing negative would happen if the two wires were switched. Mr. Spafford went on to acknowledge that the light switch question was a poor one and the interviewer should have asked about a wall socket, rather than a light switch.

Even if Dan Proffit did not know how to wire a light switch, this fact would not be material to the determination of qualifications for the custodial position. First, custodians do not spend much of their total work year wiring switches. Secondly, it does not take much time to teach someone how to wire a light switch. Custodian Mackyol estimated that it takes 10 to 15 minutes to teach someone to wire a light switch. Head Custodian Spafford estimated that it would take between 20 and 30 minutes.

Custodians do not do much painting and when painting, they do not paint letters. When Dan Proffit was a student custodian, he painted all of the classrooms and the gym walls in the elementary school. No one complained of this work. In fact, the District did not repaint this work for eight years. The record fails to establish that Proffit's painting skills would materially affect the efficient operation of the District.

If there was any doubt of Proffit's having a material affect upon the efficient operation of the District, then Article 7(2) is applicable. Article 7(2) gives employes a two week trial period to see if he/she is qualified. The District never gave Dan Proffit this trial period.

The District violated the contract when it failed to award the vacant custodial position to Proffit. In remedy of this contract violation, the Union requests that Dan Proffit be placed in the position that was filled by Tim Daggly and that Proffit be reimbursed for any wages and benefits (including insurance premium payments, retirement contributions, holiday pay, vacation pay etc.) that he did not receive retroactive to the first work day the vacancy was filled by a non-bargaining unit member.

The Employer states that they have the right to change the custodial job description and qualifications because of the management rights reserved to the District in Article 3 of the collective bargaining agreement. This article contains the following sentence: "The exercise of the aforementioned management rights shall be subject to the grievance procedure. It is agreed that in the exercise of such rights, the District will be in conformance with Wisconsin Statute 111.70." Given this provision, there can be no doubt that the grievance procedure can be used to determine if the District has the unilateral right to change a job description without notifying the Union prior to implementing the change and prior to bargaining the change and/or its impact.

The WERC has drawn a line between aspects of a job description which a District may unilaterally change and those which must be bargained to agreement or impasse with the Union. Under the WERC standard, the question is whether plumbing, painting, electrical work and carpentry duties are fairly within the

scope of responsibilities applicable to the kind of work performed by the custodians. As demonstrated by the testimonies of the custodians, they either do no duties related to plumbing, carpentry, electrical and painting or, if they do, it is only occasional and minimal.

Placing of skills on the job qualifications and job description for present custodians not only affects wages, hours and working conditions, but also affects whether employes can keep their custodial jobs and whether other employes can transfer into the custodial department without these skills. The District should be ordered to go back to the status quo, ordered to bargain the issue, and ordered to bargain the impact of changes in the custodial qualifications and job description.

District

The District's right to unilaterally amend job descriptions is supported by WERC decisions and arbitral case law. Performing plumbing, painting, electrical and carpentry tasks are certainly within the scope of responsibilities ordinarily performed by custodial employes. While minor plumbing, painting, electrical and carpentry tasks may not have been performed by all current and past custodians on a regular basis, nor even have been the primary task of those individuals, all the custodians who testified at hearing have performed at least some of these tasks. The Employer's intent in changing the job description is not to change the job duties, but to ensure that all new custodians are qualified to perform expected duties. The District does not have the duty to bargain the impact of the changes made in the job description or the qualifications required for the position. The Management Rights clause, Article 3, reserves to management the very rights exercised in developing the custodial job description.

The procedure established in Article 7, Section 1, does not preclude the District from seeking outside applicants. The Management Rights language, particularly the reservation of the right to hire, to promote and to judge employes' skills, ability, efficiency and qualifications, read in conjunction with Article 7, Section 1, gives the District the right to hire from outside the unit or promote from within the unit, dependent upon the qualifications of the candidates. Further, the phrase "making promotions and filling vacancies" implies that outsiders can be considered and that, therefore, the District has the right to hire from outside or promote from within, dependent upon the qualifications of the applicants. The phrase "and filling vacancies" would have no meaning, no reason to exist, if the Union's interpretation is correct and the District was required to promote from within.

The Union's bargaining proposals for the negotiations which lead to the 1985-86 agreement and its preliminary final offer for the 1986-88 agreement demonstrate that the Union desired to change the contract language to require no consideration of outsiders if there was an in-house candidate who met minimum qualifications, and, further, to differentiate among in-house minimally qualified candidates on the basis of seniority. The language in Article 6(1) and Article 7(1) and (2) is identical to that contained in the 1983-85 agreement. The fact that the Union proposed the above changes clearly demonstrates that it interpreted the current language to mean the District was not required to limit its search to in-house candidates or to promote on a seniority basis.

Section 7(2) is applicable only in promotion situations. If an employe is promoted, Section 7(2) (Trial Period) is operative. However, its existence and location in the contract does not preclude the District from filling a vacancy with an outsider rather than making a promotion.

Section 7(1) gives the District the authority to determine qualifications and to base hiring decisions on qualifications. The language refers to all applicants, not only employes. Seniority becomes a factor when the qualifications of the applicants are "relatively equal." While the District questions whether candidates Engebritsen or Proffit meet the minimum qualifications, the standard is whether the candidates are relatively equal, not whether they are minimally qualified.

The Union's reliance on Article 7(1) is misplaced. The use of the word employe in the last sentence of Article 7(1) does not preclude the District from considering outside applicants in its recruitment efforts. Outside applicants do not have the luxury of Union representation and, thus, the District's judgement regarding their qualifications is not subject to the grievance procedure. Had the word employe, not applicant, been used in the prior sentence, the Union might have an argument, but it was not.

Most arbitrators agree that, unless restricted by contractual language, the determination as to an employe's ability to fill a job is a management decision and that determination can only be challenged on the basis that it was arbitrary, capricious, discriminatory, clearly wrong or made in bad faith. The interview committee relied on prior work experience, a prepared list of interview questions, personal reference checks and, in the case of the Grievant, his performance as a District employe. The successful applicant's application reflected previous work experience in a custodial/maintenance position for the past six years and self employment as a painter/handyman for the five years previous to that. The grievant's only custodial experience indicated on his application was as custodial assistant at Webster High School while he was in high school.

The grievant is currently a bus driver for the District and has worked as a truck driver at Proffit Lumber for the past five years. Prior to that he served as a radio operator in the U.S. Army. Included with his application is a list of course work he took while in the military, which included two courses in plumbing and two in carpentry. There was no indication on his application that he performed any carpentry, electrical, painting or plumbing jobs in a self-employed capacity. All members of the interview team had knowledge of his painting work for the District while in high school and the fact that the painting he had done on the gym floor had to be redone by someone else because of the sloppy job performed by the grievant. While the grievant's application fell short of qualifications sought by the District, he was interviewed in an attempt to give him every opportunity to demonstrate his relative qualifications.

The seven candidates selected for a personal interview, including the grievant, were asked identical questions based on an interview worksheet developed by Superintendent Anderson. The questions were designed to give the candidates several opportunities to state why they should be hired. The grievant failed to make any mention of his self-employment in the construction area and the grievant offered no information during the interview that he was also currently self-employed in the construction business. The interviewers had no knowledge that the grievant had built two home additions, had built decks, or had done any wiring or plumbing work. The grievant failed to provide the interview team with relevant prior experience and knowledge beyond what was on his application and answered only specific questions during the interview. His answers simply were not satisfactory.

While the grievant believes that he answered the light switch and florescent fixture questions clearly and appropriately, the testimony of the interview team does not bear this out. At hearing, the grievant testified that he had done some plumbing work with respect to unfreezing pipes. The grievant,

however, did not offer that information during the interview process. Mr. Spafford, who was familiar with other projects painted by the grievant while he was in high school, described his work as "very poor." The grievant acknowledged that he explained at the interview that he "has trouble with fine work." In fact, on a scale of one to five, the grievant rated himself as a two with regard to painting skills.

Among the qualifications sought by the District was adaptability to work around students. Additionally, extra curricular events bring the public to the school nearly nightly and custodians need to be able to deal with people. During the interview process, the grievant stated that he is not an outgoing person and indicated that he would rather work out in the woods, away from people.

The personal references of the candidates also verified that Daggy was better qualified than the grievant. One of the grievant's references stated that he had no knowledge regarding the grievant's custodial skills. The other reference, District Bus Maintenance Supervisor McLain, did not recommend the grievant for the custodial position and stated that the grievant had a problem staying with the task at hand. McLain indicated that the grievant often required a repetition of directions and was not self motivated or competent. McLain's reference was based on his experience with the grievant at Proffit Lumber, as well as with the District.

The interview team analyzed job applications, results of personal interviews and references. The conclusion was unanimous. Tim Daggy was by far the best candidate for the position. There was simply no evidence that the grievant's qualifications for the custodial position were relatively equal to those of Tim Daggy.

Contrary to argument of the Union, the time needed to teach an employe how to wire a switch is not relevant. The inference that the District should be required to teach the grievant how to wire a light switch simply demonstrates that the grievant does not qualify for the custodial position.

Since the grievant was not selected for the custodial vacancy, he is not entitled to the two-week trial period. The trial period is not designed for an employe to prove that he or she can't do the job. Rather, it is designed to see if the employe selected likes the new position and whether he/she demonstrates that they can perform the tasks of the new position. The District has no obligation to offer an employe who is not selected for a position an opportunity to prove that he/she can or cannot do the job. There has been no contract violation and the grievance must be dismissed as being without merit.

DISCUSSION

Duty to Bargain

In a letter dated April 18, 1991, Union Representative Barry Delaney requested the District to bargain over the changes in the Custodian job description and the impact of such changes. At hearing, District Administrator Anderson confirmed that the District had not been willing to bargain either the changes or the impact of the changes.

The Union, relying upon the language of Article 3 stating that "The exercise of the aforementioned management rights shall be subject to the grievance procedure. It is agreed that in the exercise of such rights, the District will be in conformance with Wisconsin Statute 111.70.", argues that

the District had a contractual duty to bargain the change in the Custodian job description duties and qualifications, as well as the impact of these changes. The District denies that it has any such duty to bargain. 1/

At the time that the District implemented the new Custodian job description, the parties' 1990-92 collective bargaining agreement was in effect. The Wisconsin Employment Relations Commission, which administers Sec. 111.70 of the Wisconsin Statutes, has held that an employer has a statutory duty to bargain collectively with the representative of its employees with respect to mandatory subjects of bargaining during the term of an existing collective bargaining agreement, except as to those matters which are embodied in the provisions of said agreement, or bargaining on said matter has been clearly and unmistakably waived. 2/ Where a collective bargaining agreement expressly addresses a mandatory subject, the language of the agreement determines the rights of the parties. 3/ The determination of whether the language constitutes a waiver must be determined on a case by case basis. 4/

In Milwaukee Sewerage Commission, the Commission stated: 5/

. . . if a particular duty is fairly within the scope of responsibilities applicable to the kind of work performed by the employees involved, the decision to assign such work to such employees is a permissive subject of bargaining. (cites omitted)
Only when the duties involved are not fairly within that scope does the matter of whether the employees may be assigned such work become a mandatory subject of bargaining. (cites omitted)

The new job description, like the old job description, contains three categories of job duties i.e., Cleaning and Operations, Maintenance, and Other. Perhaps recognizing that there was little, if any, material change in the duties contained in the two categories of Cleaning and Operations and Other, the Union does not take issue with the duties assigned to these categories in the new job description. Rather, the Union disputes the right of the District to include the duty to "perform minor electrical, plumbing, painting, and carpentry repair as necessary" in the Maintenance category.

1/ At hearing, the District raised an issue as to arbitrability. Specifically, the District argued that the issue of whether or not the District violated the collective bargaining agreement when it changed the job description and qualifications for custodians without bargaining the changes or the impact of the changes was not substantively arbitrable. Since the District did not address the issue of arbitrability in post-hearing written argument, the undersigned concludes that the District has abandoned its arbitrability claim.

2/ City of Richland Center, Dec. No. 22912-A (Schiavoni, 1/86), affirmed Dec. No. 22912-B (WERC, 8/86); Racine Unified School District, Dec. No. 18848-A (WERC, 6/82).

3/ Racine Unified School District, supra; Janesville School District, Dec. No. 15590-A (Davis, 1/78), aff'd by operation of law, Dec. No. 15590-B (WERC, 2/78).

4/ Racine Unified School District, Dec. No. 19357-D (WERC, 1/83).

5/ Dec. No. 17025 (WERC, 5/79).

The Maintenance category in the old job description, contained the following:

- a. Report all damage or wear of school facilities each day to Head Custodian.
- b. Make any repairs as necessary

Eli Fuller has been a Custodian for five and one-half years. According to Fuller, during his tenure as Custodian, he has occasionally changed washers in plumbing fixtures, has changed two or three ballasts in florescent light fixtures and, on one occasion, has painted in the small gym. Leslie Mackyol, has been a Custodian for two and one-half years. According to Mackyol, during his tenure as Custodian, he has changed goosenecks on sinks, changed water lines, fixed gaskets, and repaired toilets. Additionally, Mackyol, has painted a wall in a classroom; changed switches, ballasts, and the ends of florescent lights; and has built shelves.

As discussed supra, the old job description recognized that Custodians have a maintenance function. The testimony of Custodians Fuller and Mackyol demonstrates that this maintenance function has included the performance of "minor electrical, plumbing, painting, and carpentry repair as necessary". The undersigned is satisfied that the duty to "Perform minor electrical, plumbing, painting, and carpentry repair as necessary", assigns duties which are fairly within the scope of responsibilities applicable to the kind of work performed by the District's Custodians. Accordingly, the District had the right to include these duties in the Custodian job description without bargaining the same with the Union.

The prior job description did not include any qualifications. The new job description included the following qualifications:

1. Custodial work experience.
2. Must have basic plumbing, painting, electrical and carpentry skills.
3. Should have valid Wisconsin driver's license.
4. Adaptable to working around students.
5. Demonstrated aptitude or competence for assigned responsibilities.

The Commission has held that a municipal employer, such as the District, does not have a statutory duty to bargain over the minimum qualifications of a position. 6/ Applying this holding herein, the undersigned concludes that the District had the right to establish the qualifications contained in the new job description without bargaining the same with the Union.

For the reasons discussed above, the undersigned has concluded that the District did not have a Sec. 111.70 duty to bargain the changes in the duties and the qualifications of the Custodian position. The undersigned is persuaded, however, that the District does have a statutory duty to bargain the impact of the changes on the wages, hours and conditions of employment of employes in the bargaining unit represented by the Union. 7/ Inasmuch as the District did not agree to the Union's request to bargain the impact of the change in the duties and qualifications of the Custodian job description, the District did not exercise its management rights in conformity with Sec. 111.70

6/ City of Waukesha (Fire Department), Dec. No. 17830 (WERC, 5/80)

7/ Brown County (Department of Social Services), Dec. No. 19042 (WERC, 11/81)

of the Wisconsin Statutes. Accordingly, the undersigned has concluded that the District has violated Article 3 of the parties' collective bargaining agreement.

The Union requests that the District be ordered to return to the status quo which existed prior to the implementation of the new Custodian job description. The Commission, however, has established the general rule of allowing implementation of a decision which is a permissive subject of bargaining prior to resolving any impact issues. 8/ Applying this general rule herein, the undersigned is persuaded that the District had the right to change the Custodian job description prior to bargaining the impact of any change on the wages, hours and working conditions of the Union's bargaining unit employees. The appropriate remedy for the District's failure to respond to the Union's request to bargain the impact of the changes in the duties and qualifications of the Custodian job description is to order the District to bargain the impact of such changes as required by Sec. 111.70, Wis. Stats.

Failure to Award the Custodian Position to the Grievant

As expressly stated in Article 3, the exercise of the District's management rights are subject to the other provisions of the labor contract. It follows, therefore, that the Article 3 rights relied upon by the District, i.e., to hire, promote, etc., are subject to limitation by the language of Article 6 and Article 7.

Article 6, Section 1, states, in relevant part, that "It shall be the policy of the Employer to recognize seniority in filling vacancies . . . provided, however, that the application of seniority shall not materially affect the efficient operation of the School District of Webster". This provision, standing alone, would require the District to fill the disputed vacancy with the senior applicant unless the District could establish that such an action would "materially affect the efficient operation of the School District of Webster". While the District may believe that the efficient operation of the School District would be materially affected if the District were not permitted to fill the vacancy with the most qualified candidate, the undersigned disagrees. The undersigned is persuaded that the application of seniority would materially affect the efficient operation of the School District only if the senior candidate were unqualified. Accordingly, the undersigned construes the language of Article 6, Section 1, as requiring the District to fill vacancies with the most senior qualified candidate.

Article 6, Section 1, however, does not stand alone and must be construed in a manner which is consistent with the other provisions of the collective bargaining agreement. Article 7 provides a procedure for filling vacancies and new positions. The third sentence, which is relied upon by the District, provides that "Seniority shall be given preference in making promotions and filling job vacancies provided the qualifications of the applicants are relatively equal." As the District argues, this sentence references "applicants" and not "employees". Thus, one may reasonably argue, as the District does, that the parties' intended to recognize the District's right to hire outside applicants if the qualifications of such applicants were not relatively equal to, but were better than, the qualifications of the employee applicants. However, given that the preceding sentence provides a procedure by which employees of the District may apply for vacancies and new positions, the undersigned is persuaded that the more reasonable construction of the third

8/ City of Madison, Dec. No. 17300-C (WERC, 7/83)

sentence is that the term "applicants" refers to employe applicants.

Contrary to the argument of the District, the language of Article 7, Section 1, which provides that "Seniority shall be given preference in making promotions and filling job vacancies provided the qualifications of the applicants are relatively equal" does not provide the District with the right to choose an outside applicant on the basis that the outside applicant is more qualified than an employe applicant. Rather, this language is only applicable when the District is choosing among employe applicants.

In summary, the undersigned is persuaded that the language of Article 6, Section 1, requires the District to fill vacancies with the most senior qualified candidate. Under the provisions of Article 6, Section 1, the District may hire an outside applicant only when there is no qualified employe applicant. The seniority requirements of Article 6, Section 1, however, are modified by the language of Article 7, Section 1. Specifically, the District is not required to hire the most senior employe applicant if the qualifications of the junior employe applicant are not relatively equal to, but are better than, the qualifications of the senior employe applicant.

For the reasons discussed above, the undersigned is persuaded that the District is contractually required to award the disputed Custodian position to the Grievant if the Grievant is qualified for the position. 9/ For the reasons discussed below, neither the evidence of past practice, nor the evidence of bargaining history, demonstrates that the parties intended otherwise.

At hearing, District Administrator Anderson recalled that in the Fall of 1982, the District did not award the position of Head Cook, a bargaining unit position, to the employe applicant, but rather, hired an outside applicant. District Administrator Anderson could not recall that a grievance was filed in this matter. Given the lack of evidence on the issue of whether or not the employe applicant was qualified for the Head Cook position, the undersigned does not consider the evidence relating to the Head Cook incident to be persuasive evidence that the parties intended the District to have the right to hire an outside applicant in situations in which the outside applicant is more qualified than an employe applicant.

As the District argues, during the negotiation of the parties' 1985-86 and 1986-88 collective bargaining agreements, the Union, without success, proposed changes to the language of Article 6 and Article 7. In each instance, the Union proposed the deletion of Article 6, Section 1, and the deletion of that portion of Article 7, Section 1, which states: "Seniority shall be given preference in making promotions and filling job vacancies provided the qualifications of the applicants are relatively equal". In each instance, the Union proposed the inclusion of language which states: "Employees who are current employees of the District, who apply for a bargaining unit vacant position, shall be transferred to said position if they are qualified for the position. When two or more current employees who are qualified for said position, apply for the vacant position; the employee with the greatest in-district seniority shall be transferred to the vacant position".

9/ At hearing, District Administrator Anderson indicated that the Grievant was more qualified than Evelyn Engebritsen, an employe applicant who was senior to the Grievant. Engebritsen did not file a grievance and the Union does not claim that Engebritsen is entitled to the disputed custodial position.

While it is reasonable to assume that the parties discussed the Union's proposals at the time that the parties negotiated their 1985-86 and 1986-88 collective bargaining agreements, the record does not contain any evidence of such discussions. The only record evidence of the Union's intent with respect to its proposals is that which can be determined from the language of the proposals. The proposals, on their face, do not establish that the Union understood that the District had the right to hire an outside applicant who was more qualified than an employe applicant, nor do they establish any mutual intent with respect to the existing language of Article 6, Section 1, or Article 7. Rather, on their face, the Union proposals address the process for selecting among employe applicants. Specifically, the proposals seek to eliminate the District's right to select a more qualified junior employe applicant. Despite the District's arguments to the contrary, the evidence of bargaining history does not establish that the parties intended the provisions of Article 3, Article 6 and/or Article 7 to be given any construction other than that reached by the undersigned herein.

As discussed above, the undersigned is satisfied that the District had the contractual right to change the duties and the qualifications of the Custodian job description. The issue to be decided, therefore, is whether the Grievant met those qualifications.

The Union, contrary to the District, asserts that when the parties met on April 18, 1991, the District Administrator advised the Union that the Grievant was denied the Custodian position because the Grievant did not wire a single pole light switch and because the Head Custodian had said that the Grievant was a lousy painter. Assuming arguendo, that the Union is correct, the failure of the District Administrator to enumerate other reasons for the decision not to award the Custodian position to the Grievant does not preclude the District from relying on such other reasons. Such a failure, however, would give rise to the inference that the District did not have any other basis for its decision.

At hearing, District Administrator Anderson, Principal Seitzberg, and Head Custodian Spafford were in agreement that, in determining qualifications of the applicants, the District considered the application materials, the personal interview and the references. The undersigned considers this testimony to be persuasive. Contrary to the argument of the Union, the record does not demonstrate that the Grievant was denied the Custodian position solely on the basis that he did not correctly wire a single pole light switch and because the Head Custodian had said that the Grievant was a lousy painter.

The revised job Custodian job description contains the following qualifications: 10/

1. Custodial work experience.
2. Must have basic plumbing, painting, electrical and carpentry skills.
3. Should have valid Wisconsin driver's license.
4. Adaptable to working around students.
5. Demonstrated aptitude or competence for assigned responsibilities.

10/ The notice which was sent to support staff employes, including the Grievant, indicated that the "Qualifications include: some experience in custodial work and the ability to do minor maintenance repair."

The Grievant's application for the Custodian position indicated that, in 1983, while the Grievant was stationed at Fort Campbell, Kentucky, the Grievant attended Austin Peay State University . The Grievant's transcript (Employer Exhibit #5), which was also submitted to the District, indicates that the Grievant completed courses in Intro Plumbing, Radio TT Op C O5C, Masonry Const, Adv Plumbing, MEOC, Const Survey, Adv Masonry Const, and Adv Carp and also indicates that the Grievant, attended but did not complete, courses in Intro Carpentry and Basic Arc Weld. 11/

District Administrator Anderson recalled that, during the interview for the disputed Custodian position, the Grievant indicated that he had extensive schooling in the areas of plumbing, electrical and carpentry. While the Grievant did not recall being asked about carpentry, he recalled that he indicated that carpentry was one of his strong points.

The undersigned is persuaded that the Grievant, like the other interviewees, was asked Question 14, *i.e.*, Describe your carpentry, electrical, plumbing and painting skills. District Administrator Anderson recalls that the Grievant indicated that his only experience with carpentry was in the military. Seitzberg and Spafford did not offer any testimony concerning the Grievant's response to questions about his carpentry experience.

At hearing, the Grievant stated that he does part-time carpentry work and that he has done roofing and built two additions, a garage, and a deck. The Grievant, however, did not provide the District with this information when he was asked to describe his carpentry skills, nor at any other time during the application process. Accordingly, this part-time carpentry work can not be considered when determining the Grievant's qualifications for the Custodian position.

While it is evident that the Grievant has had some carpentry work experience, it is not evident that the Grievant described this work experience to the District during the application process. To be sure, the transcript indicates that the Grievant has had coursework in carpentry. However, the transcript, *per se*, does not provide sufficient information upon which to conclude that the Grievant's coursework provided the Grievant with basic carpentry skills.

At hearing, District Administrator Anderson stated that, at the time that the District was determining which applicant would be awarded the disputed Custodian position, the District concluded that the Grievant did not meet the carpentry qualification. Given the record presented herein, the undersigned is persuaded that the District had a reasonable basis to reach such a conclusion.

District Administrator Anderson recalls that, during the interview, the Grievant was asked about his experience in painting and if he was neat in painting. The District Administrator further recalls that the Grievant responded that he had experience in painting while he was a student custodian. According to the District Administrator, he had no personal knowledge of the painting done by the Grievant while the Grievant was a student, but that he had understood that the Grievant had done some painting on the gym floor which was unsatisfactory. The Grievant recalls that, during the interview, he explained that he had painted at one of the schools and at his own home. The Grievant further recalls that, during the interview, he stated that, on a scale of 1 to 5, he scored 2 on painting because he had trouble doing fine work.

At the hearing, the Grievant stated that he did not have much experience as a professional painter. According to the Grievant, he painted a classroom and playground equipment when he was a student custodian. The Grievant recalls

11/ Apparently, the Grievant was reassigned to a different base and, thus, could not complete this coursework.

that, at the grievance meeting of April 18, 1991, Head Custodian Spafford indicated that when the Grievant was a student, he painted a "W" on a gym floor which was sloppy and had to be redone. Neither Spafford, nor any other witness, made any specific complaint about any other painting by the Grievant.

The qualifications for the Custodian position include "Demonstrated aptitude or competence for assigned responsibilities". When determining which applicant to hire for the Custodian position, the District was aware that the Grievant had worked as a student Custodian. The Grievant does not claim, and the record does not establish, that the Grievant had any other custodial experience. The Head Custodian, who was familiar with the Grievant's work as a student custodian, stated that the Grievant had performed this work poorly.

The Grievant provided the District with two references who were District employes, i.e., Wayne McLain, the District's Bus Maintenance Supervisor, and Tom Rich, an Assistant Principal. When contacted by the District Administrator, Principal Rich stated that he knew the Grievant as a student and as an individual, but had no knowledge of the Grievant's custodial or maintenance skills.

Bus Maintenance Supervisor McLain, who is a member of the Union's bargaining unit, worked with the Grievant at Proffit Lumber. At hearing, the District Administrator, the Head Custodian and Principal Seitzberg each stated that he had talked to McLain about the Grievant's application for the Custodian position. The District Administrator recalls that McLain's comments were negative and that McLain questioned the Grievant's ability to stay on task. The Head Custodian recalled that McLain had stated that the Grievant "was not the sharpest employe". Principal Seitzberg recalled that McLain had stated that the Grievant lacked confidence, was not self-motivated, and required repetition of direction. Principal Seitzberg, who supervises the Grievant in his work as a District Bus Driver, stated that he had observed the same things.

At hearing, McLain stated that, based upon the Grievant's work as a student custodian, he was concerned about the Grievant's ability to perform custodial work, but that his evaluation of the Grievant was based upon the Grievant's work at Proffit, as well as a District Bus Driver. McLain confirmed that, in his conversations with Principal Seitzberg, he expressed concern for the Grievant's ability to keep on task and indicated that the Grievant needed periodic reminders to perform work tasks.

As discussed supra, the District may not hire an outside applicant if there is a qualified employe applicant. Article 7, Section 2, states that "Whether or not the Administrator has been reasonable in judging employee qualifications shall be subject to the grievance procedure." The undersigned is not persuaded that, during the application process, the Grievant established that he had basic carpentry or painting skills, or that he had demonstrated aptitude or competence for assigned responsibilities. The undersigned is satisfied, therefore, that the District's Administrator has been reasonable in judging that the Grievant was not qualified for the Custodian position. The District did not violate the collective bargaining agreement when it did not award the Custodian vacancy to the Grievant.

Article 7, Section 2, provides a trial period for employes selected for a vacancy or new position pursuant to the provisions of Article 7, Section 1. In the present case, the provisions of Article 7, Section 1 do not entitle the Grievant to be selected for the Custodian position. Accordingly, the District is not contractually required to provide the Grievant with the trial period provided in Article 7, Section 2.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The District did not violate Article 3, Management Rights, when it changed the duties and qualifications of the Custodian job description without bargaining the changes.

2. The District violated Article 3, Management Rights, when it did not bargain the impact of the changes in the duties and qualifications of the Custodian job description on the wages, hours, and conditions of employment of employes in the bargaining unit represented by the Union.

3. In remedy of this contract violation, upon request of the Union, the District is to immediately bargain the impact of the changes in the duties and qualifications of the Custodian job description on the wages, hours and conditions of employment of employes in the bargaining unit represented by the Union consistent with the requirements of Sec. 111.70, Wis. Stats.

4. The District did not violate Article 6, Section 1; Article 7, Section 1; or Article 7, Section 2, when it did not hire Dan Proffit as a Custodian.

Dated at Madison, Wisconsin this 27th day of November, 1991.

By _____
Coleen A. Burns, Arbitrator