

BEFORE THE ARBITRATOR

 :
 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 NORTH SHORE SUBURBAN EMPLOYES, :
 LOCAL NO. 1486, AFSCME, AFL-CIO : Case 28
 : No. 47536
 and : MA-7300
 :
 SCHOOL DISTRICT OF WHITEFISH BAY :
 :

Appearances:

Ms. Nola J. Hitchcock Cross, Podell, Ugent and Cross, S.C., 611 North
 Broadway, Suite 200, Milwaukee, WI 53202, and Ms. Malou Noth,
 AFSCME Council 48 Staff Representative, 3427 West St. Paul Avenue,
 Milwaukee, WI 53208, appearing on behalf of the Union.
Mr. Mark F. Vetter and Mr. Victor A. Lazzaretti, Davis & Kuelthau, S.C.,
 111 East Kilbourn Avenue, Milwaukee, WI 53202-6613, appearing on
 behalf of the District.

ARBITRATION AWARD

The parties jointly requested that the Wisconsin Employment Relations Commission designate the undersigned Arbitrator to hear and determine a dispute concerning the above-noted grievances under the grievance arbitration provisions of their July 1, 1991 - June 30, 1994 collective bargaining agreement (herein Agreement).

The Arbitrator conducted hearings in this matter on October 1, 1992 and September 29, 1993. The proceedings were transcribed. Briefing and reply briefing was completed on November 19, 1993, marking the close of the record.

ISSUES

At the hearing, the parties authorized the Arbitrator to frame the issue(s) for determination.

The Union proposed that the issues be, "Whether the District violated the collective bargaining agreement when it failed to select the grievant for the Maintenance VI (Plumbing/Heating) and did not allow the 60-day trial period? If so, what is the appropriate remedy." Tr. I,6.

The District proposed that the issues be, "Whether the Employer violated Article VI, Section 3, Filling Vacancies, when it failed to give the grievant a 60-calendar day trial period in the posted Maintenance VI (Plumbing/Heating) position. If so, what is the appropriate remedy?" Tr. II,6.

The Arbitrator frames the issues as follows:

1. Did the District violate the Agreement when it failed to give the Grievant a 60 calendar day trial in the posted position of Maintenance Worker VI (Plumbing/Hearing) and/or the subsequent permanent position in the same classification?

2. If so, what is the appropriate remedy?

The Arbitrator's formulation of ISSUE 1 takes account of the various Agreement provisions cited in grievance and is patterned after the formulation of a similar issue to which the parties stipulated in a previous grievance arbitration decided by Arbitrator William Houlihan on May 12, 1986.

PORTIONS OF THE AGREEMENT

ARTICLE VI - SENIORITY

. . .

Section 3 - Filling Vacancies. When it becomes necessary to fill a vacancy or a new position in the bargaining unit, the Board will bulletin such vacancy or new position, asking for applications, and the qualified employee within the bargaining unit with the longest period of service applying for the job or position will be assigned to it. This bulletin will cover a period of seven (7) calendar days. The Superintendent of Buildings and Grounds shall determine whether such services are satisfactory.

1. An employee being promoted or going to a new position shall be granted sixty (60) calendar days time to prove their qualification.

2. Any employee failing, for any reason, to qualify for any job or new position may return to the position formerly held.

3. In the event that there is no qualified employee within the bargaining unit to fill a vacancy or new position, the School Board may fill it at their discretion.

ARTICLE VII - GRIEVANCE AND
ARBITRATION PROCEDURE

. . .

Section 7 - Decision of Arbitrator. The decision of the arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to interpretation of the contract in the area where the alleged breach occurred. The arbitrator shall not modify, add to or delete from the express terms of this Agreement.

. . .

BACKGROUND

The District operates a K-12 public school system with multiple school and related buildings located in Whitefish Bay, Wisconsin. The Union represents the District's non-supervisory employees in its Maintenance and Custodial Departments.

The Grievant, Peter Rafalski, has been employed by the District since October 28, 1982. He initially held a position of Maintenance Worker

General/Electrical. Since approximately February 25, 1987, Grievant's employment has been in Custodian positions except during the summer of 1987 when he substituted during the absence of the incumbent of the Maintenance (Grounds) position. Grievant presently works as a bargaining unit custodial supervisor on the second (evening) shift at the High School.

Approximately one year after Grievant was initially hired, the current Superintendent of Buildings and Grounds, Dennis Anich, was hired. The working relationship between them has been a poor and stormy one generating numerous disputes of various kinds including several grievance arbitration awards.

On October 8, 1991, the District posted a Maintenance Worker VI (Plumbing/Heating) vacancy that arose due to the retirement of the previous holder of that position, Richard Bertram.

The posting read as follows:

JOB POSTING

POSITION: Maintenance Worker VI (Plumbing/Heating)

LOCATION: All District Facilities

HOURS: 7:30 a.m. - 4:00 p.m.

SALARY: Starting salary \$11.60 Per hour

DATE: October 8, 1991

REQUIREMENTS: Under the direction of the Superintendent of buildings and Grounds to perform reasonably skilled maintenance in specific fields as follows: general Outside, Heating, All Outside Equipment, including tractors and motor vehicles, Carpentry, Doors, Door Hardware, Electricity, Clocks, Thermostats, Air Conditioning, Ventilating, Plumbing, Electric Motors, Pumps, Valves and Painting, Plastering, and Drywall Repair. In addition, semi-skilled maintenance, repair and grounds work normally associated with Buildings and Grounds work in a district.

TRAINING & EXPERIENCE:

- a. High School and/or Technical School Graduation.
- b. Five or more years of advanced training in one or more of the skilled trades.
- c. Three years of work experience involving general repairs and maintenance associated with the trades to buildings and grounds.

SPECIFIC REQUIREMENTS OF THE JOB ARE:

Examples of specific knowledge and skills:

- Ability to weld and braze
- Ability to repair toilet flush valves and other related plumbing devices
- Ability to adjust, calibrate and repair pneumatic controls and valves
- Ability to repair and or rebuild mechanical equipment such as pumps, fans, compressors

-Ability to use and understand the tools required to do the above listed skills.

APPLY: Letter of application are to be submitted to Francie Shea, Director of Personnel/Pupil Services, . . . no later than October 14, 1991 at 3:00 p.m.

Four employes applied in response to that posting, including Grievant and a less senior employe, John Koster, who has been employed by the District in the instant bargaining unit since 1987 or 1988.

On October 16, 1991, Shea sent the following memorandum to each of the employes who responded to the posting:

Please submit to my office in written form your experience that exemplifies your knowledge and skill in the areas of:

1. Plumbing
2. Heating
3. Ability to weld and braze
4. Ability to repair toilet flush valves and other related plumbing devices
5. Ability to adjust, calibrate and repair pneumatic controls and valves
6. Ability to repair and/or rebuild mechanical equipment such as pumps, fans, compressors
7. Ability to use and understand the tools required to do the above list of skills

I would like the resume no later than Tuesday, October 22, 1991.

Thank you.

Only Grievant and Koster responded in writing to that memorandum. The other two applicants withdrew.

Grievant's response read as follows:

DATE: Oct 20, 1991

FROM: PETER RAFALSKI

TO: FRANCIE SHEA DIRECTOR OF PERSONNEL

RE: QUALIFICATIONS FOR MAINTENANCE
VI/PLUMBER

Ms. Shea,

In response to your letter requesting a listing of my qualifications for the Maintenance Worker VI/Plumber position, as a brief listing of my experiences:

From Oct, 1982 - Feb, 1987. I held the position of Maintenance Worker VI/Electrician. My qualifications for this position included licensed state master certification (007), National Board Certification as

a residential, commercial electrical inspector, and a special state VTAE certification as an electrical instructor. In addition to my electrical duties other assigned tasks included (1) grounds maintenance, (2) Pipe Insulation, (3) Isolating pneumatic problems, (4) repair, replace or calibrating of thermostats, (5) and working with Dick Bertram repairing or replacing pumps, water lines and bearing assemblies.

A number of electrical trade skills are common with those of the plumbing trade such as the mechanics of running pipe, the use of threaders, reamers, etc., the ability to solder and wipe joints. Pneumatic controls are often pneumatic/electrical in nature.

As the night supervisor, I have done a variety of minor plumbing repairs, such as unclogging drains, replacing faucet washers and minor repairs to flush valves.

The only qualification that I feel I am lacking in would be welding/brazing. Although I have welded and used cutting torches in the past, it has been about 15-20 years. and it was primarily tack welding.

Shea reviewed Grievant's and Koster's responses to her October 16 memorandum along with their initial applications for employment with the District when she received them. Grievant's response was dated October 20 and Koster's October 21, 1991.

Grievant's July, 1982 application listed an educational background of Boys' Technical High School graduation in 1967, attendance at Milwaukee Area Technical College, and work experience with the City of Milwaukee from 1972-77, with Marquette University from 1977-79 and self-employment with P&M Electric since 1979.

Shea next met with Anich on October 21 to develop the questions to be asked of the two candidates in the semi-structured interview method she utilizes in interviewing applicants for positions in all bargaining units of District employes. They developed the initial draft of questions based on the Maintenance Worker VI General job description. That description has read, in pertinent part, as follows since it was revised August of 1984:

JOB DESCRIPTION

MAINTENANCE WORKER VI GENERAL

Job Goals:

To maintain the school district's physical property in such a state of operating excellence that they present no problems or interruptions to the educational programs.

Nature:

Under the direction of the Superintendent of buildings and

Grounds to perform reasonably skilled maintenance in specific fields as follows: General outside, heating, grounds equipment including tractors and motor vehicles, carpentry, doors, door hardware, electrical, clocks, thermostats, air conditioning, ventilating, plumbing, electrical motors, pumps, valves and painting. In addition, semi-skilled maintenance repair and grounds work normally associated with building and grounds work in a district.

Examples: (Including but not limited to)

- 1) Performs work which involves minor repair requiring a general variety of ability in most of the trades, i.e., carpentry, electrical, plumbing, masonry, painting and grounds maintenance.
- 2) Performs work requiring considerable skill and ability involving semi-major and major repair, replacement and new installation, in a specific trade speciality.
- 3) Assists in establishing and maintaining an inventory of supplies and equipment required in his specific trade speciality.
- 4) Assists in establishing and maintaining an efficient and effective system of preventative maintenance in the field of his specific trade speciality.
- 5) Periodically inspects buildings and repairs malfunctioning equipment, notifies immediate supervisor of needed major repair beyond his capacity to accomplish.
- 6) Performs related maintenance work as assigned.

Minimum Qualifications: (Knowledge, skills and abilities)

- 1) Certification of good health signed by a licensed physician.
- 2) Considerable knowledge of the methods, tools, mechanical equipment and techniques used in the various trades, particularly in his specific trade speciality.
- 3) Knowledge of occupational hazards, safety precautions and building fire and sanitation codes.
- 4) Ability to operate various types of power and hand machinery and tools.
- 5) Ability to make minor repairs on mechanical equipment and to analyze and diagnose trouble from malfunctions in the more complex areas of his specific trade field.
- 6) Ability to understand and effectively carry out oral and written instructions.
- 7) Ability to perform assigned daily duties with a minimum of direction.
- 8) Ability to establish and maintain effective public and co-worker relationships.
- 9) The employee must possess a valid commercial driver's license.

Training and Experience:

- 1) High school and/or technical school graduation
- 2) Five or more years of advanced training in one or more of the skilled trades.
- 3) Three or more years experience involving general repairs and maintenance associated with the trades to buildings and grounds.

General:

This job description is an attempt to define in general terms the normal job duties and responsibilities of the Maintenance Worker VI position. It is not intended to cover all of the employee's job duties and responsibilities or to preclude the employee from performing the duties of other job classifications in emergency situations. It is also recognized that there is some overlap in the duties and responsibilities of the different custodial positions. Such overlap and flexibility in job assignments, as identified in these job descriptions, is necessary since all classifications of custodians are not assigned to each of the buildings in the District.

. . . .

On October 28, before finalizing the interview questions, Shea phoned Bertram at his home and asked him for information about his position, the duties he performed on a daily, weekly and monthly basis during the course of a year, and how much of his time he spent on his various duties. Shea did not read Bertram the questions, but rather gave him examples and asked whether they seemed appropriate and why or why not. Shea then incorporated certain clarifications and expansions of the draft questions based on her call to Bertram and finalized them after reviewing them again with Anich on November 6.

The resultant questions list read as follows:

1. Why did you apply for this job?
2. What qualifications do you bring to this job?
 - educational experience
 - prior job experience
 - specific duties and responsibilities
3. What steps would you take in repairing the following:
 - toilets, flush valves, urinals, drinking fountains, sink drains, garbage disposals?
4. Do you know how to weld/braze/solder copper piping?
5. What is the function of an airtrol separator on a heating system and what type of hearing system will it be used on?
6. When you have 15 lbs. of air pressure on a pneumatic valve, what position is the valve in?
7. What knowledge do you have of boilers, both hot water and steam and what are the advantages and disadvantages of each? Please be specific.

8. What is your knowledge of the filtering system for the pools? Please be specific.

9. Do you know how to rebuild a compressor head? Explain.

10. Please explain how you would determine whether the following needed to be replaced:

- Thermostats
- Pneumatic valves
- Steam traps

Do you know how to replace the above?

11. Within a hot water circulating pump, what is cavitation?

12. What is the function of a 3-way valve in a heating system?

13. What is the function of water treatment in a hot water heating system?

14. If a sloan valve continually drips water thru it, what is the problem?

15. Explain the difference between a globe valve, gate valve, ball valve, and a butterfly valve?

16. Are there any questions you have?

The interviews of both applicants were conducted on November 6. Shea asked each of the listed questions of each applicant. Anich made notes of the applicants' responses and provided clarifications about the meaning of the questions when Shea was unable to explain due to her unfamiliarity with plumbing and heating. After each interview, Shea reviewed Anich's notes to make certain that they accurately reflected the applicants' responses to each of the questions.

Anich's notes regarding Grievant's responses to the interview questions read as follows:

- 1) opp to give district a opportunity to correct a mistake they made in 1987.
- 2) Gen Maint Man
Master Elect license
Working w/ R. Bertram - pump replacement AH units
pipe wrapping, grounds maint
some heating repairs
JC thermostats replacements
troubleshoot JC panel - elect portion
- 3) Toilets -- what on a toilet if a flush valve if a
flush valve turn off water behind wall
replace diaphragm
Sink drains - simple snake
open clean out plug or remove trap
Disposal - jamb or motor
jamb can be freed
dismantle
if motor - replace

- 4) Solder -- clean pip w/ emery, add flux pipe solder
99% silver solder
welding - Basic welding in apprenticeship
Brazing haven't done
- 5) pneumatic valve to separate radiator on steam system
- 6) closed position
- 7) Advan
Steam Vs HW cheaper to heat w/ Steam
- 8) don't know a whole lot
filter bed to pool w/ clay substance -- filters
water
- 9) wouldn't say I know how
similar to car engine
- 10) thermostats - doesent calibration or air leaking
replace diaphram
pneumatic val - is electrical in nature - if elect
is ok air
pressure - if not correct - replace
what type of steam traps - inverted bucket traps
- 11) don't know
- 12) " "
- 13) avoid polunts from city water reduce calcification
- 14) valve not seating
nylon pin goes bad
- 15) buterfly - flappers within
globe - ceiling m
gate - stem inward - pulls valve open
Ball - on how it seals

Shea met with Anich on November 12 to assess the interview responses. At that time Shea told Anich she was unable to make a decision that she was very confident about regarding minimum qualifications and that she needed more information, perhaps in the form of an assessment from someone with expertise in the plumbing and heating areas. Anich offered to contact Bert Fredricksen, Vice President of Bert Fredricksen, Inc., Consulting Engineers, who was then serving as the District's consulting engineer on a renovation project. After contacting Fredricksen, Anich gave Shea the following written summary:

Nov. 19, 1991

Today I spoke to Bert Frederickson to obtain his opinion with response to questions given at the two interviews for the Maintenance plumber position.

Bert was asked if the questions were fair and reasonable. Bert stated he felt the questions were very reasonable and open ended. He further stated the questions asked would cover the applicants general knowledge.

Applicant #1 (Rafalski)

Bert stated he felt this applicant was not qualified based on his question responses to basic system questions. He showed lack of understanding.

Applicant #2 (Koster)

Bert felt this applicant was close to being qualified but felt he would have to personally interview him for Bert to give his personal opinion.

After reviewing Anich's handwritten report, Shea decided she needed to talk directly with individuals with plumbing and heating expertise for assessments of the interview questions and responses. She asked Anich to set up an appointment with someone who was performing contracting work on a District building for the purposes of analyzing the questions and the applicants' responses.

Anich arranged such meetings for December 18, 1991 with Kurt A. Tingwald, Senior Project Manager for United Mechanical, Inc., and for January 10, 1992 with Fredricksen. At those meetings, Shea asked whether the interview questions (and especially the plumbing and heating questions) were related directly to basic maintenance functions for any building, asked each to evaluate the applicants' responses to interview questions 3-15 (with Anich stating aloud what each response had been based on his notes), asked each for their comments about the general qualifications of the candidates, asked if interactions with Anich or Shea had prejudiced the evaluations given, and asked whether the contractor knew either of

the candidates. Shea made notes of the contractors' responses as they were given and prepared them in typed form the same day as the meetings occurred.

According to Shea, both contractors confirmed that the interview questions related directly to basic maintenance functions for any building, and both stated that they did not know the candidates and that their evaluations had not been prejudiced by Shea or Anich. As noted by Shea, the contractors' comments about the candidates' responses to the questions and then their general were as follows (Grievant was referred to as Number 1 and Koster as Number 2):

[Tingwald:]

- Question #3 "Number two has the better answer."
- Question #4 "Number two has the better answer."
- Question #5 "Neither answers are good."
- Question #6 "Okay answers from both."
- Question #7 "Neither answers are good; however, the hot water response was better." (#2)
- Question #8 "Number one doesn't know, number two does."
- Question #9 "Neither answers are good."
- Question #10 "Number two is better than number one. They have a very simple understanding."
- Question #11 "Number two is better than number one."
- Question #12 "Neither are good. Number two at least had an idea."
- Question #13 "Both okay, number two is better."
- Question #14 "Both are not real terrific."

. . .

"Based on the job description, candidate number one is not qualified. Electrician skills are not transferrable to this position. For example, I would not hire a sheet metal guy to work as a plumber."

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[Fredricksen:]

- Question #3 "Candidate #2 clearly shows a better understanding of what he needs to do."
Question #4 "Can't say one is better than the other unless you actually see their work."
Question #5 "Neither know what an air trol separator is."
Question #6 "Okay for both but not thorough enough."
Question #7 "Clearly candidate #2. Candidate #1 is flat wrong."
Question #8 "I can't say. I'm not an expert."
Question #9 "Candidate #2 was straight forward in not knowing. Candidate #1 seemed to take a wild guess that was partially right."
Question #10 "Candidate #2 has a good understanding; Candidate #1 is flat wrong on pneumatic valves."
Question #11 "Candidate #2 shows an understanding, Candidate #1 does not."
Question #12 "Candidate #2 shows an understanding, Candidate #1 was absolutely wrong."
Question #13 "Candidate #1 has a very slight edge."
Question #14 "I can't evaluate."
Question #15 "Candidate #2 knew three of the four valves, Candidate #1 knew one out of the four valves."

. . .

"I assigned up to ten points for each question. Candidate #1 received 35 points, Candidate #2 received 74 points." [After stating that he would not hire Candidate #1, Fredrickson added:] "A guy with eight years of experience running a building has a broader knowledge base than an electrician."

. . .

Shea testified that, following those meetings, she reviewed the candidates' initial job applications, their written responses to the seven questions in Shea's October 16 memorandum, their responses given during the job interviews, and the comments made by the two contractors, and decided on those bases that Grievant did not possess the minimum qualifications for the position and that Koster did. Shea then informed Anich of her decision and wrote the applicants. She thereby informed Grievant by letter dated January 15, 1992, as follows:

Thank you for your patience regarding the matter of hiring for the Maintenance VI (Plumbing and Heating) position. The position has been offered to Mr. John Koster. Again I apologize for the delay.

The grievance giving rise to this proceeding was filed on February 25, 1992. In it, Grievant alleged that on January 15, 1992, the District violated Arts. I (Recognition), VI (Seniority), VII (Grievance and Arbitration Procedure),

IX (Employment Status) "and all other applicable articles." The grievance further states,

Statement of Grievance - The District persists in its continuation of the unjust discipline, harassment and discriminatory practices in its awarding of the Plumbing position to an employee of less seniority and qualification.

Relief sought - (1) be awarded the Plumbers position (2) made whole (3) cease and desist with all forms of harrassment unjust discipline and discriminatory practices.

Anich waived the grievance to Step II where it was heard and denied by District Director of Business Services James Paschen. Paschen concluded,

It is my determination that Ms. Shea has clearly shown that Mr. Rafalski does not possess the minimum qualifications for the job. This is substantiated by persons who are knowledgeable in the skills required for the position. The final decision was made in a reasoned, rational, and objective atmosphere and therefore, this grievance is denied.

The grievance was then appealed to and heard at Step 3 and denied on April 14, 1992 by Interim Superintendent of Schools Milton Bleeke. The matter then proceeded to arbitration as noted above.

When the arbitration hearing was first convened on September 17, 1992, the Union objected to the District's introduction of certain exhibits which it had earlier failed to provide in response to a Union request. The Arbitrator discontinued the hearing, directed the District to provide the documents, and remanded the matter to the grievance procedure to permit the parties to discuss the grievance with benefit of the additional documents. The grievance denial was reaffirmed following additional pre-arbitral processing, and the hearing was reconvened on October 1, 1992.

At the reconvened hearing, in addition to the Grievant's testimony, the Union presented subpoenaed testimony of Gary Hamilton, a journeyman (and former master) plumber and Business Representative of Plumber's Local 75. Hamilton testified that many of the contractors' evaluations were necessarily subjective and in some cases wrong; that Koster's definition of "cavitation" was totally wrong; and that in some cases (at least questions 3, 4 and 15) the questions related to work which may legally be performed only by a master plumber.

Grievant testified that Anich's notes did not record Grievant's interview question responses verbatim or completely. With regard to his interview responses as to the general questions concerning his interest in and qualifications for the position, Grievant testified as follows:

- Q. Mr. Rafalski, what did you tell Mr. Anich and Miss Shea in the interview during the five minutes of your answer to question number 1 which is why did you apply for this job? What did you say in regards to your qualifications for the position at that time?
- A. In addition to having held a maintenance position, I pointed out the fact that I have held or do hold license as an electrical inspector. I do hold

license as a master electrician. Having gone through that, I pointed out as far as from the mechanics of the trades of plumbing, electrical, there are certainly others, use of the various hand tools, running of pipe and such and threaders, things of this caliber, understanding of the building designs and construction. You do have -- Being associated with the trades for 20 years, you do end up picking up an overlapping understanding not claiming that you are a plumber or anything of that nature, but you do get an understanding of how the other trades people work. Use of fasteners, things of this nature. There is also the fact that I have had a boilers license and other items of this nature so this was all brought out during the course of this interview.

Q. Did you say anything else in response to question number 1 with regards to the qualifications that you had for the position?

A. There were several qualifications that at the time such as my asbestos certification, I had formerly received from the state the certification, parts I had not included, but I had indicated that there were other certifications that I had, but I wasn't stressing the need at the moment.

Q. Did the district ask any questions regarding your qualifications at this so-called interview?

A. Would you repeat the question?

Q. Did the district other than asking you these questions about how to repair a toilet even though you didn't know what was the matter with it, did the district ask you anything about what your qualifications were?

A. In question 2 they asked a similar but virtually the same question of what I covered initially in question number 1.

Q. Did you make any additional response to question number 2 besides what you told them in your response to question number 1?

A. Further elaborated such as, for example, working with Dick Bertram. I was basically again I'll repeat what I just said, you know, where I have the master's license, I have this, I have that. I have worked with doing these various types of jobs. That was pretty much it. Question number 2 was actually no more than just a repeat of what was said in question number 1.

Q. Is there -- You see the notes that are written here by Mr. Anich in number 2 that are attributed to you as a response to question number 2?

A. Yes.

Q. Did you give a response to question number 2 that included anything that is not set forth in Mr. Anich's notes?

A. I know the answer was more involved and I'm trying to remember because I know question number 1 I stated a lot and question number 2 I indicated basically that I had already covered a lot of that answer in question number 1 and to recap I just hit on the same main topics again, but I can't honestly say today about two years later. As far as I would say, this is just a note of what was said not a declaration of the statement.

. . .

Tr. 41-43.

Shea was the District's only witness.

POSITION OF THE UNION

The sole issue in this case is whether the District has proven by clear and convincing evidence that Grievant does not possess the minimum qualifications for the position. The District's selection process must be set aside because it utilized a comparison of applicants and/or because it never specified the minimum qualifications that were required or that Grievant lacked.

The District set forth the necessary "training and experience" for the position on the posting, and it is undisputed that the Grievant met those requirements. The posting also set forth "examples of specific knowledge and skills," but it is not clear from the posting or from any subsequent District statement or action whether possession of some or all of those constituted the minimum qualifications for the position. Indeed, the only measures of minimum qualifications identified in the District's brief were those that Koster happened to possess and an assertion that a skilled trade cannot be learned in 60 days (approximately 40-45 working days).

The application process began with each interested candidate signing the posting and submitting a written description of his qualifications. The Agreement required the District to then determine whether Grievant was minimally qualified and, if so, to award him the promotion so that he could begin the 60-day trial period. After reviewing Grievant's initial written statement of qualifications, the District found Grievant sufficiently qualified to participate further in the selection process and thereby in effect acknowledged that Grievant was entitled to a 60-day trial period as the most senior qualified candidate.

The District, however, proceeded to formulate its interview questions after learning that Koster and Rafalski had applied and what their respective backgrounds were. This is significant given the District's well-documented prior efforts to rid itself of Grievant and given the well-documented fact that Grievant and his supervisor, Anich, do not get along. The District then put its carefully crafted questions to Koster in a friendly atmosphere and to Grievant in a hostile atmosphere and had Anich summarize Grievant's answers in his own words.

When, even after that process, neither Shea nor Anich determined that Grievant lacked the minimum qualifications for the job, the District clearly was obligated to appoint Grievant and give him the 60-day trial period. The District cannot now be heard to argue that Grievant did not list sufficient qualifications on his written statement of qualifications because Shea admitted in her testimony

that she was unable to conclude that Grievant was unqualified after reviewing that statement and the results of the interview.

At Anich's suggestion, the District next asked two contractors for their opinions of the candidates and their interview responses, with Anich making the arrangements with each contractor and reading the questions and his version of each candidate's answers. The contractors' firms are doing business with the District and they hence were dependent on the District and Anich. However, their backgrounds and qualifications were not made a part of the record. Their responses clearly show that they were comparing the answers and qualifications of the two candidates, rather than focusing on whether each candidate was or was not minimally qualified for the position. Their responses resulted in part from the way Anich chose to phrase his summary of the candidates' interview answers, from the contractors' lack of knowledge on subjects the District had asked about, and from the fact that the contractors had no opportunity to observe the candidates performing the work of the position. Mr. Fredricksen ultimately concluded only by finding Koster better qualified than Grievant and Mr. Tingwald's conclusion that Grievant was not qualified was not based on any rating system or articulated minimum standard.

For those reasons, the District's failure to select Grievant and give him the 60-day trial period violated the Agreement.

By way of remedy for its Agreement violation described above, the Arbitrator should order the District to award Grievant the promotion and retroactive back pay differential and benefits.

POSITION OF THE DISTRICT

Under controlling interpretations of the Agreement rendered in two prior grievance awards and one prohibited practice decision under Art. VI, Sec. 3, the sole issue in this case is whether the District has shown by a preponderance of the evidence that the Grievant was not minimally qualified for the position. The District has unquestionably met that burden. There is no basis in the record to conclude that Grievant was even remotely qualified for the position. Because there is also no basis in the record on which to conclude that the District made its determination as to his qualifications in a subjective or unfair manner, the District's judgment as to Grievant's qualifications is entitled to weight in this proceeding.

Among the "minimum qualifications," which are set forth in the longstanding job description for the Maintenance Worker position, is, "considerable knowledge of the methods, tools, mechanical equipment and techniques used in various trades, particularly in his specific trade speciality." The District has a right to expect its Maintenance personnel to come to the position with considerable knowledge of their specialty. In this case the specialties involved are plumbing and heating.

Grievant was given ample opportunity to present anything upon which the District could find that he was minimally qualified. The only qualifications related to plumbing or heating that Grievant possesses involve some experience with minor routine maintenance projects.

Grievant was denied the position because Shea properly concluded that he lacked the minimum qualifications. She reached that decision upon consideration of Grievant's original job application, his written responses to the seven questions contained in her memo to both applicants on October 16, 1991, the responses of each applicant to the questions posed at the November 6, 1991 interviews, and the evaluations provided by two outside consultants who were knowledgeable in the relevant skills necessary for the job. Shea ultimately decided that Grievant lacked minimum qualifications for the position independent

from her determination that Koster possessed those minimum qualifications.

Shea took great care at each step of that hiring process to insure that Grievant was treated fairly and that she had an objective basis on which to judge the qualifications of the applicants for the position. Prior to the interviews, both applicants had the opportunity to submit, in writing, their qualifications for the position. When both candidates were interviewed, they were asked identical questions relating to the skills necessary to perform the job. Shea developed the questions with the assistance of the former incumbent of the position. Shea promptly checked Anich's written record of each applicant's interview answers and found them accurate in all respects. Shea sought and obtained first-hand the opinions of two outside consultants regarding each applicant's qualifications based on their answers to the interview questions. Both consultants concluded that Grievant was not qualified for the position, without knowing whose answers they were assessing. Both consultants also attested that neither Shea nor Anich had influenced their judgment in that regard. The evidence showing that Koster's qualifications were superior to Grievant's is irrelevant except insofar as it provides an example of the type of qualifications that met the "minimum qualifications" requirement in the Maintenance Worker job description.

For those reasons, the Arbitrator should deny the grievance in all respects.

DISCUSSION

The answer to ISSUE 1 turns on whether Grievant was "qualified" for the posted position within the meaning of the first sentence of Art. VI, Sec. 3.

Under the controlling interpretations of the Agreement rendered in prior grievance awards and a prohibited practice decision between the instant parties under the instant language of Art. VI, Sec. 3, that provision requires an applicant for a posted vacancy to be minimally qualified for the position at the time he or she applies for it, such that the employe's background suggests a reasonable probability of success in the 60-day trial period. Thus, Arbitrator William Houlihan stated at page 12 of his May 12, 1989 award denying Grievant's claim that the District improperly failed to grant him the 60-day trial period with regard to a posted Maintenance (Painter) position,

[T]he promotional right to a 60 day trial period . . . is contractually available to an employe who is being promoted or going to a new position. In order to secure the promotion, a senior employe must be qualified. While I understand the purpose of the trial period is to allow an aspirant an opportunity to "prove their qualification", I also believe that by contractually restricting promotions to "qualified" applicants the section was intended to provide the trial period only to those applicants whose background suggests a reasonable probability of success. I do not believe that Mr. Rafalski is so qualified.

Accordingly, Grievant's right, as the senior applicant, to be selected for the posted position depends only on whether Grievant possessed the minimum qualifications to meet that standard, not on how he compares with the less senior employe whom the District selected for the position. Koster's qualifications for the position are relevant only to the question of whether the District applied a different standard to Koster than it did to Grievant in determining whether each possessed the minimum qualifications for the position. The District must establish that the senior applicant lacks the "minimum qualifications" for the

position. The appropriate standard of proof in that regard is the conventional preponderance of the evidence standard, not the higher clear and convincing standard urged by the Union. See, e.g., Kroger Co., 25 LA 906, 908 (Russell A. Smith, 1955) ("In general, arbitrators probably have used the 'preponderance of the evidence' rule or some similar standard in deciding fact issues before them, . . .").

While management judgments regarding employe qualifications are ordinarily entitled to weight in arbitrations of this kind, at least where supported by specific and understandable evidence, the Arbitrator gives Shea's judgment in this case no weight for the following reasons. The history of conflict and mutual antagonism between Anich and Grievant makes any role played by Anich subject to careful scrutiny. Here, Anich served as Shea's in-house technical resource person in formulating the initial draft of interview questions after it was known that Grievant was among the applicants for the position. Anich also played a pivotal role in recording the applicants' answers, in selecting and initially contacting the contractors, and in interpreting the applicants' interview answers for the contractors. Shea's discussion with Bertram and her efforts to assure that Anich wrote down what the applicants said do not sufficiently alleviate the significant influence on the outcome that Anich's various roles permitted him to exercise. In addition, the fact that Shea and Anich seemed to be designing the selection process as it went along rather than applying a pre-established process further undercuts the notion that the results of that process ought to be accorded weight by the Arbitrator. Finally, the contractors' assessments of the interview question responses and of the applicants general qualifications seem to involve far too much

of a comparison of the applicants and far too little of a separate determination as to whether each was or was not minimally qualified without regard to the qualifications of the other.

Those flaws in the District's selection process are not fatal to the District's case, however.

The District has shown that it asked in its October 16, 1991 memorandum for Grievant's written responses to questions which the Arbitrator finds were fairly and reasonably developed on the basis of the "minimum qualifications" for the position as stated in the applicable job description since 1984. Grievant's responses to those questions establish that he lacks the "considerable knowledge of the methods, tools, mechanical equipment and techniques used . . . particularly in [the] specific trade specialty" (plumbing and heating) associated with the instant posted position. That requirement is among the "Minimum Qualifications (Knowledge, skills and abilities)" listed for the position in the job description in effect since 1984. While the language of the description calls for the applicant to have such knowledge "particularly in his specific trade specialty", the Arbitrator has previously concluded at the top of page 14 of his Award dated May 14, 1988 involving the instant parties, that the specific trade specialty thereby referred to is the one involved with the particular posted position, rather than some other trade specialty in which the applicant is particularly knowledgeable. The "considerable knowledge . . ." requirement quoted above is reasonably related to the performance of the job as described in the posting and in the job description, even though a list of "Examples of specific knowledge and skills" rather than the above-quoted phrase itself appeared in the posting.

The Grievant's October 20 response, with or without the other record evidence bearing on Grievant's background knowledge, skills and abilities satisfies the Arbitrator that Grievant cannot on any reasonable basis be deemed to meet the above-quoted "considerable knowledge . . ." requirement. Grievant's background does not reasonably prepare him for the second of the "Examples" set forth in the job description which would require him to perform ". . . work requiring considerable skill and ability involving semi-major and major repair,

replacement and new installation in a specific trade specialty" where, as in the case of the instant posted position, that specific trade specialty is plumbing or heating. The record evidence establishes that Grievant has not performed work of that kind on his own in the plumbing and heating trade specialties. At most, he has some experience in assisting when Bertram was performing such work. Grievant acknowledged in his October 20 response that he was lacking with regard to welding/brazing.

As interpreted and applied by Arbitrator Houlihan, above, the Agreement gives the District a right to require applicants for the instant position to have a background that "suggests a reasonable probability of success" in a trial period as Maintenance Worker VI (Plumbing/Heating). By at least the necessary preponderance of the evidence, the District has persuasively shown that Grievant did not have such a background.

The Arbitrator finds unpersuasive the Union's reliance on Shea's inability to confidently determine whether the candidates were minimally qualified at various points in the process she followed. The Arbitrator gives Shea's judgment in that regard no weight just as he gives no weight to her ultimate judgment that Grievant lacked the minimum qualifications for the job. While Shea's efforts to provide a process sufficiently free of Anich's influence to warrant giving arbitral weight to her judgment about Grievant's qualifications were unsuccessful for reasons noted above, it was appropriate for Shea to want to conduct the sort of semi-structured interview used in filling vacancies in all District bargaining units. It was also appropriate for Shea to want to obtain information from Bertram about the job. Her desire to involve outside plumbing and heating experts in the selection process is also commendable as a general proposition, as is her preference to deal with such experts directly rather than through Anich. Shea's inclinations in those regards are especially understandable given the history of job-related grievances and litigation concerning the Grievant. Shea's reluctance to reach what might have been criticized as a pre-mature conclusion based on what might have been characterized as an insufficient or otherwise unfair selection process does not amount to evidence (let alone a tacit District acknowledgement) that Grievant possessed the minimum qualifications for the position.

A review of Koster's responses to the October 16, 1991 memorandum with, or without consideration of any of other record evidence concerning Koster's qualifications fully satisfies the Arbitrator that Koster possessed "considerable knowledge of the methods, tools, mechanical equipment and techniques used . . . particularly" in the plumbing and heating trades specialties and was otherwise "qualified" for the position within the meaning of Art. VI Sec. 3. The District's determination that Koster was minimally qualified for the position does not provide any support for the instant grievance.

Upon review of the other provisions of the Agreement referenced in the grievance and a consideration of the record as a whole, the Arbitrator concludes, for the foregoing reasons, that the grievance should be denied in all respects.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole it is the DECISION AND AWARD of the undersigned Arbitrator on the ISSUES noted above that:

1. The District did not violate the Agreement when it failed to give the Grievant a 60 calendar day trial in the posted position of Maintenance Worker VI (Plumbing/Hearing) and/or the subsequent permanent position in the same classification?

2. The subject grievance is denied. No consideration of a remedy is necessary or

appropriate.

Dated at Shorewood, Wisconsin
this 17th day of February, 1994 by

Marshall L. Gratz, Arbitrator