

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
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 ANTIGO EDUCATIONAL SUPPORT PERSONNEL : Case 42
 ASSOCIATION : No. 50318
 : MA-8213
 and :
 :
 UNIFIED SCHOOL DISTRICT OF ANTIGO :
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Appearances:

Mr. Thomas J. Coffey, Executive Director, Central Wisconsin UniServ Council-North, appearing on behalf of the Association.
 Ruder, Ware & Michler, S.C., Attorneys at Law, by Mr. Jeffrey T. Jones, appearing on behalf of the Antigo School District.

ARBITRATION AWARD

On January 10, 1994, the Antigo Educational Support Personnel Association, hereinafter referred to as the Association, requested the Wisconsin Employment Relations Commission to appoint a member of its staff to act as arbitrator in a dispute concerning the filling of a newly created position of Head Custodian at the Antigo High School. The Antigo School District, hereinafter District, concurred in the request, and a hearing in the matter was held on March 3, 1994, at which time the parties were afforded an opportunity to present documentary evidence and testimony relative to the dispute. At the time of scheduling the matter for hearing the parties requested that the arbitrator issue either a bench or expedited decision due to the urgency of having the matter resolved as soon as possible. Consistent with that request, the parties filed pre-hearing briefs which were received by the arbitrator by March 1, 1994. At the close of the hearing, each party made a brief statement.

PERTINENT CONTRACT LANGUAGE:

Article XI - Seniority and Job Posting

. . .

D) Posting Procedure: When the District decides to fill a vacancy or a new position in the School District, the position shall be posted in all buildings. The posting notice shall include a description of the minimum qualifications for the position which is available. The notice shall be posted for a minimum of five (5) consecutive days excluding Saturdays and Sundays. Any employee interested in applying for the vacancy or new position shall notify the designated supervisor, in writing, within the posting period. The District shall have the right to select the most qualified applicant (bargaining unit or nonbargaining unit) for the position. However, if qualifications are substantially equal, the bargaining unit applicant with the most seniority shall be awarded the position.

. . .

Article XXII - Management Rights

The Board possesses the sole right to operate the district and all management rights repose in it subject to the express terms of this Agreement. These rights include, but are not limited to, the following:

A) To direct all operations of the district;

. . .

C) To hire, promote, transfer, schedule and assign employees in positions within the district;

. . .

F) To maintain efficiency of district operations;

. . .

K) To determine the methods, means and personnel by which district operations are to be conducted;

. . .

ISSUE:

Was the District's determination that Crapitto was more qualified than either Curran or Walrath to fill the Head Custodian position unreasonable, arbitrary, capricious or made in bad faith? If so, what is the appropriate remedy?

BACKGROUND:

For twenty years the District had been trying to construct a new high school and had unsuccessfully submitted the issue to voters in a referendum on several different occasions. However, they were successful in constructing the building under a lease purchase arrangement and the building is scheduled to be open at the commencement of the 1994-1995 school year. The cost of construction was approximately \$12,000,0000.

This grievance arises over the District's decision to create a new position entitled Head Custodian for the new high school. In the existing high school building there is not such a position, and the current Building and Grounds Supervisor is responsible for the high school building as well as eleven other school buildings. The District's intention in creating the Head Custodian position was to provide a lead worker in the building who would be responsible for overseeing the cleaning and maintenance of the building, functioning as a lead worker for the other eight custodians assigned to the building, and, as required, perform some cleaning functions. The District posted the position as required by the contract, as well as advertised in the newspaper. The posting listed the following "qualifications":

Qualifications

1. A minimum of 3 years experience in the cleaning and/or maintenance trade area.
2. Knowledge of mechanical systems including HVAC equipment, computerized control system and electrical systems, etc.
3. Supervisory skills.
4. Desirable background in the operation of special lighting and sound systems.

The District received twenty applicants. Those applications were reviewed, and ten individuals were selected to be interviewed by an interview committee composed of the Business Manager Filbrandt, Supervisor of Building and Grounds Schroeder, Assistant District Administrator VanLanen, High School Principal Ogi, and School Board Personnel Committee Member Ostrowski. All ten applicants were interviewed on the same evening and were all asked the same series of twenty questions. That evening, subsequent to the conclusion of the interviews, the interviewers talked among themselves about the ten applicants. Following that discussion they each wrote down on a piece of paper their top three choices.

Candidate Joseph Crapitto received five votes. He was not then an employe of the District, but was employed at Amron Corporation. The other candidates receiving votes were Arrowood (5), also a non-District employe; Frank Jalowiec, the current School District maintenance man, received three votes; and Mark Zingler, another District employe, received two votes. The two grievants in this case, Walrath and Curran, both custodians in the District, did not receive any votes. Subsequent to this exercise, the committee further discussed the top two candidates, Crapitto and Arrowood, and decided that Crapitto was the most qualified. After concluding this process, references were checked and Crapitto received "glowing" references. He was then offered and accepted the position. Of the internal candidates who were in the top ten and interviewed by the committee, Filbrandt testified that Jalowiec, the District maintenance employe was the most qualified and most senior.

Subsequent to being advised they were not selected for the position, both Curran and Walrath filed the subject grievances.

At the time Crapitto interviewed for the Head Custodian position he was employed by Amron Corporation as a Manufacturing Supervisor in the Manufacturing Department. 1/ His immediate supervisor was Mr. Ostrowski, who was also employed at Amron and was Maintenance Supervisor.

Curran, one of the grievant's in this case, has been employed by the District for eleven years as a custodian. Currently, he is the custodian at the West Elementary School. Prior to coming to the District, he was a plant foreman for Styrene Products Company from 1979 to 1981, and before that was in plant operations-maintenance from 1978 to 1979. The other grievant, Walrath, is employed in the District as a Custodian I at the North Elementary School at

1/ District Exhibit #2.

the time he bid for the Head Custodian position. In addition to his responsibilities at the high school, Walrath is also the Assistant Fire Chief for the Town of Park. Before coming with the District, he worked for Heppe Implement Company overhauling equipment, and also worked as labor foreman for the Mid-State Construction Company that was involved with paper mill maintenance contracts. Additionally, he has been involved with residential construction projects, including carpentry, plumbing and concrete work. Finally, he also has a vending machine business which he runs concurrently with his responsibilities as a custodian in the school district.

The District argues that the Association bears the burden of establishing that the District's determination that Mr. Crapitto was better qualified for the Head Custodian position was arbitrary, capricious or discriminatory. It argues that under arbitral precedent and the collective bargaining agreement itself the District is vested with the exclusive authority to determine the applicants' qualifications for the Head Custodian position and its determination is only subject to challenge as being arbitrary, capricious or discriminatory.

In reviewing the qualifications of the grievants, vis a vis Crapitto, the District notes this was a new building and it wanted someone with supervisory and maintenance experience in the Head Custodian position. Crapitto had the most supervisory and maintenance experience--12 to 13 years. While the grievants had some experience, theirs was limited in comparison to Mr. Crapitto's.

The Union, on the other hand, disagrees with the District's assessment that Mr. Crapitto was the most qualified applicant for the position. The Union believes that Curran's experience in the District on different work locations as a custodian established that he understands all of the requirements to function as the Head Custodian. The Union believes that Curran established he had solid experience with the District and in his prior position as plant foreman at Styrene Corporation. Thus, the Union concludes that Curran was substantially equal to Crapitto, and therefore the contract requires that he should have been awarded the job. Alternatively, the Union argues that if Curran is not awarded the position, Walrath has sufficient outside experience to demonstrate his ability to perform the functions of the Head Custodian position, and that, coupled with his experience as a janitor in the District, he should be deemed to be substantially equivalent in experience to Crapitto. Thus, the Union believes either candidate should be selected prior to hiring someone from outside of the District.

DISCUSSION:

The undersigned agrees with the District's assessment that it is vested with the authority to make the initial determination regarding an individual's qualifications and that such determination, while subject to challenge by the Union, can only be overturned upon a showing that the decision was unreasonable, arbitrary, capricious, discriminatory, or made in bad faith. Arbitrator Klein so stated in Shenango Furnace Company, 46 LA 203 (1966):

It is a well-established principal of Arbitration Law that the determination of whether or not an employe is qualified to perform the duties of a particular job is initially a judgment of management . . . and Management's decision in this regard will not be upset unless found to be unreasonable, arbitrary, capricious, discriminatory or made in bad faith.

Arbitrator Harry Platt in discussing the meaning of "arbitrary action" in South Central Bell Telephone Company, 52 LA 1104 (1969) said:

'Arbitrary Action' has acquired a fairly clear meaning . . . The term has been defined as a 'failure of the Company's supervisory personnel to follow the Company's various instructions and procedures pertaining to any phase of the selection process. It is the failure to properly weigh the various factors which are considered in the selection determination. (This of course, includes the error of allowing one factor being evaluated to become controlling.) It is the failure to properly and fairly investigate all factors. It is the failure to afford each candidate a full, fair and impartial opportunity to have his qualifications considered. And, in regard to testing, it is the failure to be reasonable and fair in light of that which is known or prudently ascertainable at the time of crucial decisions.' In general, it may be added, action

is arbitrary when it is without consideration and in disregard of facts and circumstances of a case, without rationale basis, justification, or excuse.

As a basic proposition, the Union does not dispute the District had the right to create a new position of Head Custodian and determine the job duties of the position. In this case the Business Manager Filbrandt and Supervisor of Building and Grounds Schroeder testified that it was management's intention that the Head Custodian would spend 20% of the work day cleaning, 40% of the work day overseeing the cleaning duties of the eight other custodians assigned to the building (lead worker), and 40% of the work day overseeing the maintenance needs of the 213,000 square foot building and operating the equipment.

Clearly, it would be inappropriate for the Union or the undersigned to second guess management's decision as to the determination as to the amount of the Head Custodian's work day that should be devoted to carrying out these responsibilities, and that is not the focus of this grievance. Rather, the issue presented by the grievance is whether the District acted in an unreasonable, arbitrary, capricious or discriminatory manner or in bad faith toward the grievants in the selection process it followed and/or the decision that Crapitto was more qualified than them.

Following a process of requiring internal applicants to compete against individuals not employed by the District did not violate that standard. The contract at Article XI, Section D states:

. . . The District shall have the right to select the most qualified applicant (bargaining unit or nonbargaining unit) for the position. . . .

The Union argues, however, that the District has always looked to inside candidates in the past to fill custodial vacancies. The District counters that, in the past, internal applicants were selected in most cases involving existing jobs or transfers within the same job categories. This case involves a newly created position, and the District was looking to find someone with maintenance experience in a large commercial building and supervisory experience.

The mere fact that, in the past, internal candidates were usually or customarily selected to fill custodian vacancies does not establish the District was contractually or otherwise obligated to do so in this instance. There has been no showing that in those instances the Union speaks of that the vacancies were even posted externally or, if they were, that the selection of an internal candidate was anything more than the District following the contract and selecting the "most qualified applicant." Thus, there is no basis in this record for concluding that the District was not free to select an outside candidate if he/she was the "most qualified" applicant.

Having said that, the next step is to review the process that was used to ultimately select Crapitto over the grievants and other applicants. Did the District, for example, allow one of the several factors being evaluated to become controlling or did it so structure the process that each of the grievants and other candidates failed to receive a "full, fair and impartial opportunity to have his qualifications considered." The Business Manager and the Supervisor of Building and Grounds testified that the work day of Head Custodian would be broken down into three major categories: cleaning (20%), lead worker (40%) and overseeing equipment operation and maintenance (40%). However, the interview questions developed by the interview committee were not similarly broken down. The questionnaire contained 20 questions. Question 1 was a general inquiry as to prior work experience. Question 2 asked what educational experiences beyond high school the candidate had that were directly related to the maintenance area. Question 3 inquired about prior experience as a "foreman, lead person or supervisor." Questions 4 and 5 asked candidates to detail their experience in cleaning and cleaning equipment operation. Questions 6 through 15 dealt with operation and maintenance of heating and ventilating equipment and electrical systems. Unlike the questions pertaining to cleaning and supervision/lead worker experience, these questions were very specific in evaluating the candidates' knowledge of terminology and system operation, e.g. "what is the difference between frequency drives and vains?" and "what does D.D.C. mean when referring to a heating system?" Question 16 was related to having to report poor work performance of a custodian to the Supervisor of Building and Grounds. Question 17 asked about experience or knowledge in operation of computerized auditorium lighting and sound systems. Question 18 asked if the candidate was willing to obtain training in computers and sound and light systems. Question 19 asked if the candidate would feel comfortable working with students on light and sound crews. Question 20 asked the candidate to tell why he/she wanted to be the Head Custodian.

Thus, 65% of the specific knowledge questions were related to maintenance, whereas only 40% of the day-to-day job responsibilities are involved with maintenance. Also, the maintenance questions were much more knowledge specific than was the case with the cleaning and lead worker questions. While the District's intent is to have the Head Custodian spend 40% of the work day as a lead worker, only Questions 3 and 16 pertain to that aspect of the job, and only Question 3 sought to elicit any specific information on the applicant's knowledge or experience. 2/ Furthermore, all the lead worker responsibilities relate to the eight other custodians assigned to the building who will be engaged in general cleaning, and the remaining 20% of the work day will be spent on cleaning an assigned area. However, only Questions 4 and 5 dealt with cleaning and other custodial duties.

2/ The District, throughout the hearing, and the exhibits refers to supervisory experience, yet the Head Custodian position is a lead worker position. This is generally a less responsible position than supervisor and does not involve discipline, evaluations, approving leave requests, etc. Consequently, experience as supervisor would not be required or necessary, although it could be beneficial.

Clearly, the oral interview questionnaire was disproportionately dominated by questions relating to the maintenance area. Also, the maintenance questions were designed to test a candidates' specific knowledge and terminology, whereas the other questions allowed for very general responses and didn't allow for the same comparative analysis of responses as the maintenance questions. Thus, a candidate with a strong maintenance background was advantaged over candidates with strong custodial/cleaning background. This emphasis meant that maintenance experience became the controlling factor in the oral interview selection process, while it only comprised 40% of the position's daily responsibilities. Candidates with extensive cleaning and school setting work experience would be disadvantaged in a comparative analysis of interview responses by the committee because there were no opportunities to show their job knowledge in that area like those candidates with strong maintenance background. For example, no specific questions were asked about cleaning, e.g. "what, if any, special care or treatment is required for lavatory and kitchen floors?", or "what is the difference between high and low acid toilet bowl cleaners and in what situations is each used?", or "what are the steps in refinishing wood gym or concrete floors, and what finishes are used?" The absence of such questions allowed candidates like Crapitto with strong maintenance background, but limited custodial experience, to look more qualified because their shortcomings would not be highlighted by lack of knowledge in the custodial area. Also, when the lead worker and cleaning responsibilities are taken together they comprise 60% of the position's responsibilities, yet only two very general questions were asked that dealt with these areas of responsibility.

Also troubling to the undersigned was the participation of Board member Ostrowski on the interview committee. He was not the Chair of the Board's Negotiation and Personnel Committee and had never before participated in any hiring interviews other than for administrative positions. However, he chose to participate in this screening process even though he was the immediate supervisor of Crapitto at Amron Corporation. As a committee member he also participated in the formulation of the oral interview questions and the discussion of each of the applicant's interview performance that preceded each interviewer listing his/her top three choices.

Crapitto had listed on his application that Ostrowski was his immediate supervisor. As the only School Board member on the interview panel and Crapitto's immediate supervisor, the potential for undue influence was clearly present. However, no evidence was adduced as to why, in light of these circumstances, he participated, other than the Negotiations and Personnel Committee Chair was unavailable on December 8, 1993. The previously enunciated standard for reviewing the District's actions in this case demands the process not be tainted. Because the possibility existed in light of all the facts in this case that undue influence was exercised by Ostrowski in the panel's selection of Crapitto, it was incumbent on the District to clearly establish what measures were taken to preclude that from occurring. The District has not met its burden in this case in that regard.

Additionally, Questions 17, 18 and 19 dealt with the applicant's experience and/or knowledge of the operation of computerized auditorium lighting and sound systems. There is no evidence Crapitto had any experience in that area. Also, Question 19 did not inquire as to what experience the candidates had in working with students in an auditorium setting, but rather only inquired as to if they would be comfortable working with students. This, to an outsider, seems to arbitrarily discount the value of an internal custodian applicant who already possess the experience while advantaging outside candidates without school work experience. Question 18 also reinforces this impression. Obviously, anyone desiring the position without that experience would be willing to be trained. Thus, a reasonable inference that

can be drawn from this series of questions is that the interview questions were really structured to allow a candidate without a prior public school work experience to slide by, thereby arbitrarily favoring outside over inside candidates.

Finally, the testimony of District witnesses stressed the need for prior supervisory experience even though the Head Custodian is only a lead worker position. There was no testimony offered as to why District officials believed prior supervisory experience was necessary to function as a lead worker. The absence of such explanation can lead one only to conclude that this was an arbitrary decision. Also, in this regard, while the District was willing to give full credit to Crapitto for his experience as a part-time instructor at Blackwell Job Corps at least 13 years ago, when he occasionally, although it is not clear to what extent, was involved in floor cleaning and carpet shampooing, it was not so inclined to credit Curran's experience, duly noted on his application, in plant operations, maintenance and plant foreman at Styrene Products, Inc. during the same time frame (late 1970s, early 1980s) as Crapitto was part-time at Blackwell. This was also an arbitrary decision.

The undersigned is satisfied, for the reasons noted above, that the interview process and some of the decisions of the District representatives regarding their evaluation of some candidates' qualifications were arbitrary. That conclusion thus puts in question how these arbitrary actions should be remedied. The Union requests that one of the two grievants be awarded the position. The undersigned does not believe that is the appropriate remedy because it requires me to conclude, based upon the results of a flawed process, that one of the grievants is at least as qualified as Crapitto. It also results in the arbitrator substituting his judgment as to the applicants' qualifications for that of the District. Under some circumstances that might be appropriate, but it is not in this case.

Admittedly, the committee's actions were arbitrary, and Ostrowski's participation raises the specter that he exerted undue influence on the panel to select Crapitto. Nonetheless, I believe the appropriate relief is to direct the District to modify the questionnaire and the procedures followed in the selection process starting, at the point after the ten finalists had been selected, and repeat the process so as to eliminate the arbitrariness noted in the earlier discussion. This then will preserve the District's right to determine who the next Head Custodian will be, hopefully, while adhering to a process and reaching a decision that cannot subsequently be attacked as unreasonable, arbitrary, capricious, discriminatory or made in bad faith.

Therefore, based upon the foregoing and the record as a whole, the undersigned enters the following

AWARD

The District's determination that Crapitto was more qualified than either Curran or Walrath to fill the Head Custodian position was arbitrary. Therefore, the District is ordered to remove Crapitto from the Head Custodian position, redesign the interview questionnaire and procedures it used in screening the ten finalists, and re-interview those candidates as a prerequisite to selecting one of them to fill the Head Custodian position.

Dated at Madison, Wisconsin, this 18th day of March, 1994.

By Thomas L. Yaeger /s/
Thomas L. Yaeger, Arbitrator