

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

SUN PRAIRIE SCHOOL DISTRICT

and

DANE COUNTY, WISCONSIN MUNICIPAL
EMPLOYEES, LOCAL 60, AFSCME, AFL-CIO

Case 89
No. 51346
MA-8578

Appearances:

Godfrey & Kahn, S.C., by Mr. Jon E. Anderson, on behalf of the District.
Mr. Laurence S. Rodenstein, Staff Representative, on behalf of the Union.

ARBITRATION AWARD

The above-entitled parties, herein "District" and "Union", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held on March 9 and 31, 1995, in Sun Prairie, Wisconsin. The hearing was transcribed and the parties thereafter filed briefs and reply briefs which were received by June 28, 1995.

Based upon the entire record, I issue the following Award.

ISSUE

Since the parties were unable to jointly agree on the issue, I have framed it as follows:

Did the District violate Article 7, Section 7.03, of the contract when it appointed Harvey Hayes to the position of Day Custodian at West Side Elementary School and, if so, what is the appropriate remedy?

DISCUSSION

In February, 1994, 1/ the District posted for a vacant Day Custodian position at West Side Elementary School. The posting (Joint Exhibit 6), for that lead worker position stated, inter alia:

1/ Unless otherwise stated, all dates hereinafter refer to 1994.

**OPENING: BUILDING CUSTODIAN -
SUPERVISOR (DAYS)
WESTSIDE ELEMENTARY**

SUPERVISOR: Manager - Building and Grounds

SALARY: \$8.90 per hour.

Qualifications:

1. High school education or equivalent experience.
2. Ability to work with elementary children.
3. Ability to work with elementary staff.
4. Effective in leadership, training and planning work.
5. Good manual dexterity and in good health.
6. Able to follow schedules and reliable enough to be left to work alone.
7. Familiar with cleaning equipment, both manual and automated.
8. Experienced in minor maintenance of tools which will be used and facilities which will be serviced.

Performance Responsibilities:

1. Cleaning of classrooms, halls, locker rooms and any other portions of the buildings and grounds.
2. Replenish supplies in paper and soap dispensers.
3. Dusting furniture, cleaning and polishing of fixtures on a daily schedule.
4. Attendant in the lunch room and kitchen areas.
5. Remove all trash and used items and place in collection barrels.
6. Make minor repairs and perform preventative maintenance functions on tools, equipment and facilities.
7. Possible security patrol of school system.
8. Be able to lift up to 50 lbs. without assistance.
9. Must have a current physical on file with the District Office certifying applicant is able to meet all job qualifications.
10. Responsible for scheduling and coordinating the work of subordinate staff.
11. Perform other duties assigned by the working supervisor or the Manager - Buildings and Grounds.

TERMS OF EMPLOYMENT: Salary and work year as established

by School Board

...

A number of employees bid for that position: Custodian Darlene Sturm; Driver/Messenger Penny Scherf; Groundskeeper John Severson; Custodian Michael Manley; Custodian George Bortner, and Custodian Harvey Hayes, the least senior applicant. The seniority dates for those applicants is as follows: Bortner, March 15, 1971; Sturm, January 28, 1980; Scherf, September 10, 1984; Severson, September 12, 1989; Manley, September 15, 1989; and Hayes, August 26, 1991.

The applicants thereafter were interviewed by a five-member committee which consisted of Supervisor of Buildings and Grounds Ludwig Jazdzewski; two Local 60 bargaining unit members, David McKay and Deb Harbort; West Side Elementary School Principal Shirley Welch; and West Side Elementary School teacher Eileen Petersen^{2/} who is a member of the Wisconsin Education Association. McKay, Harbort and Peterson were selected by their unions to be on the committee after Welch asked the unions to pick representatives. Each committee member individually graded each applicant by giving them scores of 1 to 10. The scores for all the applicants were as follows:

	<u>Jazdzewski</u>	<u>McKay</u>	<u>Welch</u>	<u>Peterson</u>	<u>Harbort</u>	<u>Total</u>
Hayes	71	81	78	78	86	394
Severson	68	68	85	84	68	373
...						
Bortner	66	62	51	83	73	335
Sturm	76	66	61	74	57	334
Scherf	57	47	72	85	62	323
Manley	65	61	47	66	53	292

Jazdzewski thus awarded Hayes fewer points than any other members of the Committee and he rated Sturm the most qualified applicant.

Since Hayes received the highest scores from the committee, the committee unanimously recommended that he be awarded the position. Hayes thereafter was awarded the vacant position

2/ A sixth member of the Committee left early and did not vote.

even though he was the least senior applicant and he began working as the Day Custodian on March 21.

The Union responded by filing the instant "group grievance" on April 6 wherein it claimed that the District violated Article 7, Section 7.03, of the contract by not awarding the position "to the right person". The Union at that time did not identify the person it believed should have been selected.

In support of the grievance, the Union argues that the District's selection process was marred by "a plethora of arbitrary and capricious errors"; that Jazdzewski's testimony is contradictory and thus not credible; that "the District's reliance on the Knudson Award is inapposite to the facts in the instant case"; and that the District "improperly discounted its professed concern for the District's children in its selection process. . ." The Union also claims that the District's actions "violate arbitrable tradition regarding management's affirmative obligation to utilize a fair and unbiased testing procedure..." As a remedy, the Union requests that the selection process be declared "irretrievably flawed" and that Sturm be awarded the position because she was the most senior applicant and because her past evaluations "are consistently strong." Alternatively, the Union states that Severson should be awarded the position if the District's selection process is upheld because Principal Welch testified that in her opinion Severson's qualifications were relatively equal with Hayes'.

The District counters by asserting that it "fully complied" with the contract when it awarded the position to Hayes; that it properly determined the qualifications for that position; that it used a "systematic and well-considered procedure. . ." in selecting Hayes; that Hayes' skill and ability were superior to the other applicants; that its decision should not be disturbed; and that the grievance therefore should be denied.

The resolution of this issue turns on Article 7, Section 7.03, of the contract, which states:

7.03 Filling Vacancies

An employee interested in such position shall file a written request by 4:30 p.m. on the fifth day of the posting with the Director of Business Services. The selection of any applicant to fill the job vacancy shall be made on the basis of skill, ability, and seniority. If the skill and ability of two or more employees is relatively equal, the employee with the greatest district-wide seniority shall be chosen. The qualified senior employee shall be (health assistants are required to have a current active LPN or RN license) given the position within thirty (30) working days of the date of posting. The employee shall have a sixty (60) calendar day

probationary period in which to prove his/her qualifications for the job. If during such sixty day probationary period the selected employee fails to make satisfactory progress to qualify for the new position, he/she shall be returned to his/her former position and selection will be made from the remaining employees who signed the job posting according to the criteria set forth above. (Emphasis added)

The parties here have previously litigated this very language before Arbitrator Douglas V. Knudson in another case where the District did not select the most senior applicant who happened to be Sturm. 3/ In dismissing the grievance, Arbitrator Knudson ruled:

The undersigned does not find the selection process for the day custodian in this case was either flawed or resulted in gender discrimination. The employer developed a set of job related questions which were applied and scored in a reasonable and systematic manner. Although both interviewers were male, they certainly were the logical choices to conduct the interviews in view of their responsibilities and their familiarity with the duties of the day custodian. The undersigned is persuaded that there was a rational basis for the differences in scores given to Anderson and Sturm. Said difference established that Anderson and Sturm were not relatively equal in their skill and ability. Therefore, the Employer was not required by the contract to make seniority the deciding factor in the selection process. It is also noted that this was not a situation involving a substantial difference in seniority. Rather, Sturm has less than seven months more seniority than Anderson has. In fact, other male employees with more seniority than both Anderson and Sturm applied, but were not selected for the job. Such a fact supports a conclusion that gender discrimination was not involved in this case.

Arbitrator Knudson added:

The scores for nine of the ten factors were based on subjective decisions by the evaluators. In such a situation, one can always question the validity of a specific score for one individual relative to the corresponding score for another individual. A review of the explanations given by the evaluators for the scores they gave

3/ Case 81, No. 46649, MA-7036 (7/92).

to Anderson and Sturm demonstrates a reasonable basis for each of the scores as well as the differences between the scores given to the two applicants. The record does not support the Union's assertion that Sturm had more applicable hands on experience than did Anderson. It is true that Sturm had some limited experience (one and a half months) as a day custodian. Jazdzewski testified that because Sturm's experience was custodial, he gave her a higher score than she would have received otherwise for such limited experience and that because Anderson's supervisory experience was as a construction foreman, he gave him a score of nine rather than ten even though Anderson had supervised crews of five or more employees for sixteen years. Such testimony reveals a logical and careful evaluation and comparison of the experience and ability of the applicants and fails to support a claim of an arbitrary, capricious, or discriminatory process or result.

Here, there is no claim of gender inequality. To that extent, then, the facts in the Knudson Award differ from the facts herein.

There is, however, one important similarity in these two cases: the tests used during both interview processes were nearly the same. That being so, it must be concluded that the test used here is a valid one since the parties have already fully litigated this issue before Arbitrator Knudson and since the principle of stare decisis bars relitigation of this issue.

But, the Union raises several collateral issues here which were not addressed in the Knudson Award.

One relates to Jazdzewski's testimony that Hayes' deceased father was his best friend. That being so, Jazdzewski should have either recused himself or related that fact to others in the interview process least there be any questions involving favoritism and whether Hayes was selected only because of his father's relationship to Jazdzewski.

Given that relationship, it is necessary to closely examine Jazdzewski's actions to determine what role, if any, that friendship had in the selection process. As to that, the record shows that Jazdzewski actually gave Hayes the lowest grade (71) of any of the other interviewers and that, moreover, he gave his highest grade (76) to applicant Sturm. There certainly was no favoritism in any of that. 4/

4/ Jazdzewski's lack of favoritism is also reflected by the fact that Hayes was not his first choice to fill a vacant position when Hayes first applied for a job at the District in 1991. Jazdzewski subsequently showed that lack of favoritism when he passed over Hayes for a subsequent transfer.

Jazdzewski and West Side Elementary School Principal Welch subsequently met a day after the interview committee met, at which time they reviewed the yearly evaluations given to the candidates -- which is something which was not done by the full interview committee. Again, there is no basis for finding that Jazdzewski exhibited any favoritism in doing so.

The question of favoritism, however is a separate question of whether such evaluations should have been considered by the full committee since they measure an employe's actual job performance and since such evaluations constitute a very reliable job tool. They therefore should have been used in the committee's selection process since both Jazdzewski and Welch referred to them and since the District's May 10 response to the Union's grievance stated, *inter alia*, that it relied on "(4) supervisory observations and past work history, (5) review of personnel files. . .". Had that been done, the committee should have given Severson more credit than Hayes since Severson received an "outstanding" evaluation versus Hayes' "above average".

Yet another problem stems from Welch's admission that she was influenced by the fact that Severson - who had worked on a part-time basis at the West Side Elementary School for three years - told her privately before the committee met that, in her words, "his first love" lay in building and grounds and that, if awarded, he therefore might leave the Day Custodian position at West Side Elementary School if a full-time building and grounds position subsequently opened up. Severson was then spending about 30 percent of his time on custodial duties; the remaining 70 percent was spent on building and grounds. Welch testified that she specifically asked Severson this question and that "I didn't need someone who was going to be gone in two weeks or even in a year in my building. My staff, kids and parents needed someone who was going to become part of our team and be there."

While Welch's reaction may have been understandable, it nevertheless was wrong because she relied on information which was not made available to other members of the committee and because she in effect unilaterally amended the qualifications of the job posting by insisting that the successful applicant remain at the West Side Elementary School for a minimum number of years. This added factor should not have played any role whatsoever because the only issue before her and the rest of the committee was whether Severson was fit to fill the vacant Day Custodian position without regard to what, if anything, Severson might do after he was awarded that position.

The selection process therefore was seriously flawed because the applicants' evaluations and past job performances were not considered by the full committee and because Welch was soured on Severson because of his honesty in detailing his future plans.

That, in turn, raises the question of whether a new posting must be ordered to fill the Day Custodian position at West Side Elementary School or whether, instead, one of the other candidates should be selected on the basis of the present record.

Welch admitted on cross-examination that in her mind Severson and Hayes' qualifications "are relatively equal" based on the scores she gave them; i.e., 85 for Severson and 78 for Hayes. Jazdzewski reached much the same conclusion since he gave Severson 68 points versus 71 points for Hayes. These relatively equal scores are backed up by the District's own 1992-1993 evaluations which show that Severson was rated "outstanding", whereas Hayes was rated a lower "above standard".

In such circumstances it is clear that Severson's skill and ability were relatively equal to Hayes'. Hence, he should have been awarded the position pursuant to Article 7, Section 7.03, of the contract since he had about 4 1/2 years of seniority versus Hayes' 2 1/2 years.

To rectify this contractual violation, the District is required to immediately offer that position to Severson and to make him whole for any loss of pay he suffered as a result of not being awarded the Day Custodian position. 5/ If he declines that offer, the District will be required to repost this vacancy and to fill it according to Article 7, Section 7.03, of the contract.

In order to resolve any questions which may arise over application of this Award, I shall retain my jurisdiction for at least sixty (60) days.

In light of the above, it is my

AWARD

1. That the District violated Article 7, Section 7.03, of the contract when it appointed Harvey Hayes to the position of Day Custodian at West Side Elementary School.
2. That to rectify that contractual breach, the District shall immediately offer that position to John Severson and make him whole for any loss of pay he suffered.
3. If Severson declines that offer, the District shall immediately repost that position.
4. That I shall retain my jurisdiction for at least sixty (60) days.

Dated at Madison, Wisconsin, this 9th day of October, 1995.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator

5/ This position need not be offered to Sturm because she received a total of 334 points, 60 points less than the 394 points awarded to Hayes. Sturm's much lower score may have been attributed to the fact that she broke down and cried during the interview process - a situation over which the District did have any responsibility or culpability.

