

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

LOCAL 150, SERVICE EMPLOYEES  
INTERNATIONAL UNION

and

SCHOOL DISTRICT OF PEWAUKEE

Case 115  
No. 51631  
MA-8679

Appearances:

Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin 53212, by Ms. Marianne Goldstein Robbins, Attorney at Law, appearing at the hearing, and Local 150, SEIU, 6427 West Capitol Drive, Milwaukee, Wisconsin 53216 by Mr. Steve Cupery, Assistant to the President, on the brief, appearing on behalf of the Union and the grievant.

Davis & Kuelthau, S.C. 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202, by Mr. Mark Olson, Attorney at Law, and Ms. Nancy Pirke, on the brief, appearing on behalf of the Pewaukee School District.

ARBITRATION AWARD

Local 150, Service Employees International Union (hereinafter referred to as the Union) and the Pewaukee School District (hereinafter referred to as the District) jointly requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen of its staff to serve as arbitrator of a dispute concerning the denial of a promotion to Joe DiTorrice. The Commission designated Arbitrator Nielsen. A hearing was held at the District offices in Pewaukee on December 9, 1994, January 18, 1995 and February 10, 1995, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. Transcripts were made of the hearing, and the last was received by the arbitrator on March 10, 1995. The parties submitted briefs and reply briefs, which were exchanged through the arbitrator. The record was closed on January 5, 1996.

Now, having considered the evidence, the arguments of the parties and the record as a whole, the Arbitrator makes the following Award.

**I. Issue**

The parties were unable to stipulate to an issue, and agreed that the arbitrator should frame the issue in his award. The issue may be fairly stated as follows:

Did the District violate the collective bargaining agreement when, in the summer of 1992, it denied a promotion to the position of head custodian to the grievant, Joe DiTorrice? If so, what is the appropriate remedy?

**II. Relevant Contract Provisions**

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V - WORKING CONDITIONS

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5.2 Assignments

5.2.1 The School Board reserves the right to place the individual in the building that will use the employee's ability to the best interests of the School District.

5.2.1.1 In instances where training may be a necessary qualification, this factor will be taken into consideration as a prerequisite for employment.

5.2.1.2 Previous experience of a candidate for employment in the operation and maintenance positions of the school will be weighed carefully.

5.2.2 The building principal in each school serves as the administrative officer responsible for the total educational program in the school. Therefore, while school is in session, the building custodians work under immediate direction of the principal of the school.

5.2.3 The Building Head Custodian is in charge of maintaining and repairing the physical plants and training, scheduling and supervising custodians and maintenance personnel under the direction of the Principal/Business Manager. (Refer to

Organization Chart, page 28.)

5.2.4 All assignments are on a probationary basis during the first six (6) months of employment, During this period the employee is expected to show adequate evidence of ability to do the job and readiness to the necessary adjustments involved in working in the School District of Pewaukee.

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5.11 Vacancies

5.11.1 Any vacancy in the custodial or maintenance department shall be filled on the basis of seniority if all other qualifications are equal. A ninety (90) day trial period will be given.

5.11.2 In the event of any vacancy in the custodial or maintenance department, the School Board shall notify the other employees and the Union of such vacancy and any employee may make application for such vacancy within five (5) days after notice of such vacancy is given, The School Board shall fill such vacancy from the applications made, provided the School Board determines that the applicant is qualified for such vacancy.

5.11.3 In the event that any employee is dissatisfied with the action taken by the School Board in regard to filling such vacancy, the grievance procedure as provided in this Agreement shall apply. .

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ARTICLE X - GRIEVANCE PROCEDURE

10.1 Definition

10.1.1 A grievance shall mean an issue by a member of the bargaining unit that there has been a violation, misinterpretation or inequitable application of any of the provisions of the Agreement. The term "grievance" shall not apply to any matter for which (1) a method of review is prescribed by law or by an rule or regulation of the State Department of Public Instruction having the force of effect of law; (2) the school board is without authority to act.

## 10.2 Procedure

10.2.1 Any custodian or group of custodians who feel they have a grievable issue shall attempt to resolve that issue with the building principal. If the issue cannot be resolved, the matter should be presented to the union representative, in writing, citing the specific section violated.

10.2.2 The union representative, building principal, aggrieved and parties involved shall meet within three (3) working days of the filing of the written grievance with the building principal to attempt to solve the problem at its source.

10.2.3 If the grievance cannot be resolved at this level, the aggrieved shall file copies of the grievance with the business manager and the school superintendent.

10.2.4 The business manager, upon receipt of the written grievance, shall meet within three (3) days with the aggrieved and any others involved to attempt to solve the issue. If the grievance cannot be resolved at this level within five (5) working days, the aggrieved may submit the grievance, in writing, within five (5) working days to the school board for a hearing.

10.2.5 The school board, within ten (10) working days after receipt of the written grievance shall meet with the aggrieved and any others involved to attempt to solve the issue.

10.2.6 If a mutually satisfactory agreement is not reached at this level within ten (10) working days after the first meeting with the school board, the aggrieved may, within five (5) working days thereafter, notify the school board, in writing, of the decision to appeal the issue of arbitration.

## 10.3

### 10.3.1 Arbitration Procedure

The arbitrator will be agreed upon by the business manager

and the union representative. If agreement cannot be reached within ten (10) working days, a list of five (5) names of arbitrators serving on their staff shall be requested from the Wisconsin

Employment Relations Commission. If agreement cannot be reached on one name on the list, each party shall strike a name alternately, beginning with the union, until one name remains. In subsequent selections, the parties shall alternate the first striking of a name.

10.3.2 The arbitrator selected or appointed shall meet with the parties at a mutually agreeable date to review the evidence and hear testimony relating to the grievance. Upon completion of this review and hearing the arbitrator shall render a written decision to both the Board and the Union which shall be final and binding upon both parties.

10.3.3 The arbitrator shall not modify, add to or delete from the express terms of the Agreement. Any decision which exceeds the limits set forth herein shall be considered a per se violation of Section 298.10, Wis. Stats.

10.3.4 Any expenses of the arbitrator, including the arbitrator's fee, shall be divided equally between the Board and the Union.

#### 10.4 Statement of Grievance

10.4.1 In the event of a grievance, the employee shall perform the assigned work task and grieve the complaint later.

10.4.2 Any grievance shall be considered settled at the completion of any step in the procedure. If the grieving party concerned fails to appeal to the next step in a timely fashion, the grievance will be deemed resolved. Dissatisfaction is implied in recourse from one step to the next.

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### ADDENDUM "A"

#### CLASSIFICATIONS

**POSITION:** Custodian I - (General Building Cleaning)

**HOURS:** The building custodian will work 40 hours per week. Assignment will be through the Head Building Custodian and the

Business Manager.

**DUTIES:**

1. Scrub, mop, wax and polish floors
2. Dust and polish furniture
3. Wash windows, woodwork, washrooms, fixtures
4. Replace light bulbs
5. Keep premises in orderly condition by sweeping walks, shoveling snow
6. Empty waste baskets
7. Make simple repairs, paint (vacation periods) or equivalent assignment.

**QUALIFICATIONS:**

Essential Knowledge and Abilities

1. A working knowledge of materials, methods and equipment used in custodial work
2. Ability to understand and follow oral or written instructions
3. Ability to make minor maintenance repairs
4. Ability to perform manual tasks requiring average physical strength
5. Ability to get along with teachers, pupils and fellow employees

Desirable Training and Experience

1. Graduation from high school or its equivalent
2. Previous experience in performing routine cleaning work or manual labor

**POSITION:** Custodian II - (Head of Elementary and Middle)

**HOURS:** The Head Elementary Custodian will work 40 hours per week.

**NATURE:**

Under direction to be responsible for all custodial work in the elementary school or middle school and to be in charge of the

custodial staff of the school to perform related work as required.  
To be responsible for the heating program during the winter season;  
building check on weekends.

**DUTIES:**

1. Supervise the work of custodial assistants
2. Make minor repairs of building and equipment
3. Operate the heating and ventilating plant
4. Keep records and make reports
5. Operate vehicles and other equipment
6. Cleaning responsibilities: such as scrub, wax, mop and polish floors
7. Keep premises in orderly condition by sweeping and cleaning walks, raking leaves and shoveling snow
8. Perform duties such as painting (during vacations) and making minor repairs

**QUALIFICATIONS**

Essential Knowledge and Abilities

1. Ability to plan, assign and supervise the work of subordinates
2. Ability to operate vehicles and equipment
3. Ability to create and maintain effective public relationships
4. Considerable knowledge of the operations of heating and ventilating plants
5. Ability to get along with teachers, pupils and fellow workers

Desirable Training and Experience

1. Graduation from high school and some experience of a supervisory nature
2. High school equivalency

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**III. Background Facts**

The District provides general educational services to the citizens of Pewaukee in southeastern Wisconsin through the operation of an elementary school, a middle school and a high



school. The Union is the exclusive bargaining representative for the District's 17 regular maintenance and custodial personnel. The grievant, Joe DiTorrice, has been a custodian for the District since 1989, beginning as a substitute custodian and becoming a regular full-time employee on January 8, 1990.

Shortly after starting, the grievant complained about workloads among custodial employees and the fact that he was receiving a lower hourly rate of pay than other custodians under a negotiated two-tier wage schedule. In response to these complaints, District Business Manager Michael Barry sent him a letter on January 26th:

Each of the incidents detailed above suggests that you are not content with your current position with the District. You continue to voice your discontent both within the organization and in the community. I feel that your negative attitude does not serve you or the district well. I expect to see an immediate and dramatic change in your behavior if you are to continue employment with the District. If adequate improvement is not made your employment will be terminated.

The grievant was still in his probationary period at this time. After a meeting with Barry and Union officials, during which he had asked Barry if he didn't like him and wanted him to quit, and Barry indicated that he did not, in fact, like the grievant and would be happy if he quit, the grievant called in a resignation to Barry's secretary. However, since Barry was not there to take the message directly, the grievant reported for work, and the matter of a resignation was dropped.

The grievant became active in the Union, and later in 1990 was disciplined by Barry for carrying on Union-related discussions during work time. He also served as a member of the bargaining committee over the successor to the 1989-90 agreement. Also on the team were Leo Zedrow and John Tall. One of the Union's primary issues was the elimination of the two-tiered wage schedule. The grievant was the primary mover behind the Union's efforts to eliminate the two-tiered wage, which was finally accomplished as part of an overall three year voluntary settlement reached during a WERC mediation session on August 12, 1991. 1/

In May of 1991, the grievant was elected Union steward. In December of 1991, he was assigned to work a third shift position at the Elementary school, where he would be the only employee working at that time. Union Business Agent Steve Cupery contacted Business Manager Michael Barry and Building and Grounds Manager Patrick Acker to discuss this reassignment, taking the position that shift changes should be done according to seniority. Barry told him that the third shift was necessary for security and monitoring boilers, and Acker attributed the selection of the grievant to the fact that he had more initiative than the other custodians. A prohibited practice complaint was filed over the reassignment in late January of 1992, and the complaint was

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1/ The arbitrator disclosed to both parties that he had served as the mediator at this session, and might have independent recollections of events at that session. The parties acknowledged that they were aware of the arbitrator's participation and had no objection to his service as arbitrator in this dispute.

settled on a voluntary basis in April of 1992, with the District agreeing to assign the grievant to second shift and the parties agreeing to a procedure for assigning employees to a third shift. After this settlement, the District did not replace the grievant on the third shift.

In June of 1991, two new custodians, Cheryl Christian and Lawrence O'Hern, were hired. A substitute custodian, Gordon Morey, was interested in the jobs, and filed a complaint with the Equal Rights Division of DILHR, alleging age discrimination. Part of his claim was that Acker had told Leo Zedrow that he wanted to hire "younger people, full of piss and vinegar". Zedrow repeated this statement to an investigator for the Division, and the grievant and custodian Dick Noble both gave statements to the investigator to the effect that the usual posting procedure had not been followed in filling the two jobs.

Each of the District's three buildings has a head custodian assigned to it. In 1992, there were also four custodians at the Elementary School, five at the High School and four at the Middle School. One person held the maintenance position. The grievant was a second shift custodian at the Elementary School. In May of 1992, the District posted two vacancies for head custodian, one at Asa Clark Middle School and one at Pewaukee High School. The grievant sent Acker a letter of application for the job:

Dear Patrick:

I'd like to be evaluated for both of these vacancies as well as head custodian as well as head custodian of the elementary school should that position become vacant.

I believe my abilities would enable me to do well in any of the three schools. However, a mutual preference for one over the other could result from an exchange of information with you. I'm looking forward to having it.

The posting did not require anything more than a letter of application, and the grievant did not include a resume or any other material with his letter. In all, six current employees applied, including John Tall, the head custodian at the Elementary School, who was interested in switching schools.

<u>Applicant Name and Classification</u>	<u>Seniority Date</u>
Leo Zedrow, Custodian	08/15/88
John Tall, Head Custodian	01/03/89
Joe DiTorrice, Custodian	01/08/90
Rick Lane, Custodian	05/21/90
Dick Noble, Custodian	11/12/90

Cheryl Christian sent a longer letter of application, accompanied by a resume. Her letter cited many years of supervisory experience, familiarity with record keeping and the various pieces of equipment used in the schools. Lane's letter was also accompanied by a resume, and cited his experience as the custodian primarily responsible for floor care, his introduction of a successful floor care program, and some experience with boiler problems. His resume reflected a high pressure boiler license, a correspondence electrician's course, supervision of student employees at Moody Bible Institute in Chicago, and boiler experience in Cicero, Chicago and Milwaukee.

The District scheduled interviews with the applicants before a panel consisting of High School Assistant Principal Hollis Herrell, High School Principal Jim Sprester, Elementary School Principal Norm Bruce and Building and Grounds Director Patrick Acker. In preparation for the interviews, a standardized set of questions was prepared:

**HEAD CUSTODIAN QUALIFICATION SUMMARY SHEET**

**GENERAL ITEMS:**

- A. Interview time approximately 30 minutes.
- B. Request for documentation will be made, if necessary.
- C. Interviews scheduled for Wednesday, July 1, 1992.
- D. Do you have any physical limitations which would prevent you from performing all the duties of a head custodian?

**QUALIFICATION A:**

Considerable knowledge of the operations of heating and ventilation plants.

- A. Do you have considerable knowledge of heating and ventilating systems?

If yes:

- 1. Do you have a current license to operate low pressure boilers?
- 2. Please describe both your training and experience in the operation and maintenance of heating and ventilating plants as follows:

- a. When did you get your training and experience?
- b. Where did your training and experience take place?
- c. What kind of systems are you able to operate?

If no:

1. Please describe your present knowledge of heating and ventilating systems.

B. Please describe your training and experience in the following areas of plant operation:

1. Electrical systems (i.e. ballasts; switches; receptacles; breakers).
2. Plumbing systems (i.e. sinks; toilets; urinals; plumbing repairs).
3. Minor repairs (i.e. painting; carpentry; other).

### **QUALIFICATION B**

Ability to plan, assign and supervise the work of subordinates.

A. Have you any experience as a supervisor of custodial/housekeeping operations?

1. When and where did you gain your experience? What was your job title?
2. What kind of housekeeping/custodial operation have you supervised?
3. What were your specific duties and responsibilities?
4. How many employees were you responsible for? To whom did you report?

1. Please describe any other supervisory experience you may have and how that experience would relate to the head custodian job.

### **QUALIFICATION C**

Ability to get along with teachers, pupils and fellow workers.

A. How would you describe your ability to get along with teachers and fellow workers?

B. Please describe any times when you've had a confrontation with a teacher or fellow worker and how you handled that situation.

C. Please describe any times when you've had a positive work experience with a teacher or fellow worker.

#### **QUALIFICATION D**

Ability to create and maintain effective public relations.

A. As head custodian, what specific things will you do to create and maintain positive public relations for your school?

B. In the building you work in now, what changes would you suggest to improve public relations?

#### **QUALIFICATION E**

Ability to operate vehicles and equipment

A. Do you have a valid driver's license? Do you have a commercial driver's license?

B. Can you operate and instruct subordinates in the use of the following equipment?:

-Automatic floor scrubber

-Ultra high speed buffer

-Carpet extractor

-Please identify other custodial equipment that you are qualified to operate.

Interviews for the candidates were scheduled for July 1st. Tall was not available for an interview that day, and his interview was set for two weeks later, on the 15th. The interviews lasted approximately 30 minutes and followed the general format outlined by Barry and Acker, although panel members had the chance to ask follow-up questions. Acker conducted the questioning of each applicant. Herrell, Sprester, Bruce and Acker were present for the July 1st interviews. Bruce was not present for the July 15th interview with Tall, but the other three panel members were present. During the July 1st interviews, custodian Richard Noble removed himself from consideration for the jobs.

On July 2nd, the grievant sent a letter to the committee to correct information he had given them about his boiler training during the interview:

Gentlemen:

I think I erred (sic) on a thing yesterday. I don't believe I studied boilers in Industrial Engineering at Marquette U. (1955) but at the Institute of Dry Cleaning and/or the Institute of Laundering (both combined, now, and called "Fabricare Institute" in Joliet, Illinois) or both places (Both General Management courses) in 1960 and 1962-63, respectively.

If it's a major point, I might be able to get the records from  
Fabricare Institute or "up in my attic". ### 2/

We're talking 30 plus years ago on all of this.

/s/ Joe DiTorrice

On July 3rd, the grievant sent a letter to Acker, clarifying some of the comments made in  
his interview:

To: The Boss

From: The servant

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2/ "###" denotes the placement of happy face drawing in the letter.



(I think I'm getting "the picture", Patrick. ###) 3/

I gave my thoughts on why, if I was the Bldg & Grnds Director, I'd have John Tall be the High School Bldg Head (which boils down to his being obviously the most able to appease and even impress the Pewaukee public which only John knows, correct?) but I, fortunately, don't have to make that decision possibly against his current preference.

I only mention this (again) because you asked me if I was chosen to be a Bldg Head, if I had a preference for the elementary school or middle school which I didn't. Recall, I only joked about the air-conditioning.

I shouldn't have. The other janitors will attest to my sneezing episodes, watery eyes, endless nose blowing, etc. and/or all the fun things that go with having allergies. Being as air-conditioning is known (does) relieve these problems, I guess I would be better off at the middle school should you prefer to transfer John to the High School for the reason mentioned and any others you might have.

In not knowing the building, I expect the middle school to be harder to learn (but that's true for any of us that takes it) but that's a short term, one time, inconvenience. The allergy thing goes on.

I also think Ron Feuerstein (it's mutual) likes me some (but do check it out with him) which I don't feel Norm Bruce does.

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3/ "###" denotes the placement of happy face drawings in the letter.

That's probably even a more significant thing to you than the allergy thing, right?

It might interest you to know (just because I happen to be the union steward at this time, you think I'm your enemy, right?) I bawled Leo, Dick Noble and John tall (sic) out after discussing these moves, for only thinking about their personal interests and giving no thought what-so-ever (sic) as to what would be "best" for the schools. I won't like myself if I suddenly become a hypocrite and now do that myself. So....if you don't agree these thoughts are logical in benefitting (sic) the schools and will benefit your likliesses (sic) in succeeding as the Bldg & Grnds Director in so doing, ignore them.

How come I don't feel I have to suggest this to you?

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/s/Joe

After the July 15th interview, the committee met briefly and did a ranking of the candidates. Every member of the committee ranked Tall, Christian and Lane as qualified for the vacancies, and Zedrow, Noble and the grievant as unqualified. John Tall was moved from head custodian of the Elementary School to head custodian at the Middle School. Richard Lane was promoted to head custodian at the High School. Cheryl Christian was made the head custodian at the Elementary School. The bidders were notified of this on July 16th.

The instant grievance was filed on August 13th, alleging that the failure to select the grievant violated the contract, including Article V, subsection 5.11.1:

Mr. DiTorrice was denied the position of Building Head Custodian which pays \$13.25 per hour. Mr. DiTorrice applied for two Building Head Custodian positions one at Asa Clark and the other at Pewaukee High School. July 16, 1992 he was notified of his non-selection for both positions. The effective start date for these positions was 8-3-92. The union requests that DiTorrice be awarded a Building Head position and be made whole for all losses suffered.

A companion grievance was filed on behalf of Leo Zedrow. A grievance meeting was held on August 19th, and the Union demanded certain information relating to the grievances. The District responded in writing on August 31st. Additional information was requested in a September 11th letter from Cupery to Acker. A September 18th response was not acceptable to the Union, and a prohibited practice charge was filed on October 5th. The complaint was settled in December of 1993, without any admissions by either party, and with the District agreeing to provide requested

information to the Union. There were additional disputes after this, and the grievance remained in limbo until the Spring of 1994.

On May 13, 1994, the grievance was amended to read:

Mr. DiTorrice was denied the position of Building Head Custodian which pays \$13.25 per hour. Mr. DiTorrice applied for three Building Head Custodian positions one each at Asa Clark, the Elementary and Pewaukee High School. July 16, 1992 he was notified of his non-selection for all positions. The effective start date for these positions was 8-3-92. The union requests that DiTorrice be awarded a Building Head position and be made whole for all losses suffered.

The amended grievance was processed through the steps of the grievance procedure and was denied by the District. Both it and the Zedrow grievance were referred to arbitration.

Arbitration hearings were held on December 9, 1994, January 18, 1995 and February 10, 1995. At the hearings, in addition to the facts set forth above, the following testimony was taken:  
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#### **Leo Zedrow**

Leo Zedrow testified that he had served informally as a head custodian at the High School in 1990 while the incumbent, Wade Johnson, was ill. He did this at Johnson's request. After two or three months, Michael Barry contacted him and told him Warren Bub had exercised his seniority to claim the head custodian's job. During the time he acted as the head custodian, he received his normal rate of pay.

In 1991, Acker was hired. Acker commented to him at one point that he could not understand why the employees felt they needed a union, since he would take care of them. Acker also expressed the opinion that \$8.00 per hour, the pay under the two-tiered wage system, was a fair wage. Acker also told him at one point that he wanted to hire "younger people, full of piss and vinegar". Zedrow

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4/ The summary of testimony includes relevant portions, but is not exhaustive. the order of the answers is varied somewhat in order to consolidate information by subject matter.

repeated this comment to the Equal Rights Division investigator, but there was never a hearing on the age discrimination case, and thus he did not testify before the ERD on this point.

### **Joe DiTorrice**

Joe DiTorrice testified that he held a bachelor of science in business administration from Marquette University, with additional management education from various seminars and clinics. After school, he went to work in a family dry-cleaning business, supervising 75 to 80 people. He thereafter worked for Adelman Dry Cleaning in Milwaukee, supervising approximately 60 people. During his time in the dry cleaning industry, he had experience with high pressure boilers, including adding chemicals, blowing them down and cleaning out the boilers.

The grievant subsequently went the Leadership Division of the Success Motivational Institute ("SMI") in Waco, Texas, and purchased a franchise and distributorship. He became the area director for Wisconsin and upper Michigan, training other franchisees and distributors. He then took a job with Ortho-Kinetics of Waukesha as national sales manager, supervising 50 to 75 people. He was laid off from that position and took a job as general manager of West Allis Marble Company, supervising 12-14 people.

In 1979, the grievant was awarded custody of his children and he quit his job to be with them. After they grew, he went back out into the job market. For a period of time in 1989, he worked as a spotter at a dry cleaner in Butler. As part of the job he went out distributing promotional material of the cleaner, drumming up business, and he also worked with their boilers. He took a job as a horticulturist at a Pewaukee area bank, and then worked for an area nursery. He decided to go into business for himself, and in 1989 he contacted the Pewaukee School district to see if he could get their business. He spoke with Michael Barry, who said he could offer him a job as a substitute janitor. Barry did not ask for any work history, and offered him the job. He took it, and then went full-time in January of 1990.

When he was assigned to 3rd shift at the Elementary School, he was

told the assignment was partly due to his ability to work with boilers. Acker told him to check the boiler every two hours and do minor troubleshooting. He assumed that the assignment was intended to make him quit because of his activism on the Union bargaining team and as steward.

When he interviewed for the job of head custodian, the session lasted about 25 minutes. He took with him a three ring binder containing information on his past employment history, including letters of commendation from past employers, magazine advertisements for SMI, featuring him as an example of success, SMI seminar outlines, and a list of references he had prepared, with current phone numbers. He referred to the binder and told the committee members it contained background information, but Acker said they wouldn't be needing it, and none of them asked to see it.

During the interview, he was asked about his experience with heating and air conditioning, and he said he had quite a bit of knowledge although it was not current. He did not mention any work with boiler while on the 3rd shift at the Elementary School. He told the committee that he had no boiler license, and that his last training in boilers was in 1965. He also described his experience with other minor maintenance, including electrical work, lighting fixtures and plumbing.

In answer to questions about his supervisory experience, he told the committee he had extensive experience in supervising large numbers of employees, although his only experience supervising in Pewaukee was when he filled in for absent head custodians.

In response to the committee's question about getting along with other employees, the grievant said he got along well with all but one of his co-workers, and with that person, he simply walked away from arguments. He described his approach to public relations as not being timid or shy about talking with the public and discussing his work.

When the committee asked him if he had a preference among the available schools, he told them that the work was basically the same at all three, though the Elementary School had no air conditioning system, and the High School had more activities in it than the other two schools. He commented that he enjoyed the elementary children, because the older children were less open to adults.

He sent the letter of clarification to the committee on July 2nd because he feared he had made a mistake in reviewing his boiler training. He did not send along any of the information from his

binder, because the committee did not express any interest in reviewing that information.

The grievant testified that he did not make any objection to the fairness of the procedure at the time of the interview, nor was he denied any chance to make any point he wished to make.

The grievant recalled receiving a letter of reprimand from Barry while he was still on probation. The letter concerned his complaints about the two tiered wage schedule, and the distribution of work among the custodial staff. During a meeting over this with Barry, Sprester and some Union officials, he asked Barry if he didn't like him and wanted him to quit, and Barry said that he didn't like the grievant and would be happy if he quit. The next day, the grievant left a message with Barry's secretary saying he would quit, but since he couldn't reach Barry, he would report for work that evening. Barry did not take him up on his offer, and he did not quit. The grievant also recalled receiving a letter of reprimand from Barry later in 1990 for discussing Union business on work time. Hollis Herrell attended a meeting between the grievant and Barry over that reprimand.

### **Michael Barry**

Michael Barry testified that he is the business manager of the Pewaukee Schools, and that he supervises the Director of Buildings and Grounds. He was responsible for establishing the procedures for selecting the new head custodians in 1992, and employed the same criteria as he had used in 1990 to promote Warren Bub to the position. John Tall had also been promoted to head custodian, largely on the basis of his public relations ability flowing from 20 years as a music teacher and music director in the District.

Barry testified that the job of head custodian is a more responsible job than that of custodian, since the head custodian supervises the custodians, keeps the maintenance and general work records of the custodial function, and has more contact with the principals, teaching staff, students and public.

Barry prepared the job qualification summary sheet used during the interviews in order to tie the interview process to the qualifications listed in the collective bargaining agreement. The summary was prepared after the jobs were posted. The interview panel procedure

was employed in part to allow input from the principals of the affected schools, in recognition both of the District's site-based management system and the fact that principals have a great deal of contact with the head custodian. Barry also believed

a panel system would insure fairness, given the large number of applicants. In addition to the written interview format, panel members were allowed to pursue follow-up questions if they wished, although they were not told of this in advance, and they also considered written materials submitted by the applicants.

On the afternoon of July 15th, he received the files from the committee, and reviewed the written materials submitted by the applicants and the panel's interview notes. In order to confirm the applicants' various claims as to experience and the like, Barry and Acker went through their personnel files. In reviewing Richard Lane's file, Barry looked at his initial employment record and resume. They reflected a high pressure boiler license, as well as experience with boilers at Cicero Bible Church, the Moody Bible Institute and One Hour Martinizing. Lane also had supervisory experience at Moody Bible Institute. Cheryl Christian's letter of application for the head custodian's job claimed supervisory experience at Olympia Resort, and this was confirmed by the resume in her personnel file from her original application for employment. Barry also noted that she had managerial experience at Olympia, which he viewed as being relevant to her public relations ability.

There was no resume or work history in the grievant's file. The grievant's letter of application for head custodian did not suggest any experience with boilers or supervision. Barry considered that the July 2nd letter clarifying the grievant's background confirmed his statement that his experience with boilers was not current. Barry also took into consideration the July 3rd letter from the grievant to Acker, since it was a submission about the vacancies by an applicant to a member of the committee. After reviewing all of the files and notes, Barry decided to confirm the committee's recommendation that Tall, Christian and Lane be selected for the head custodian jobs. He judged that Lane's boiler experience and recent supervisory experience, and Christian's substantial supervisory experience gave them an advantage over the grievant,



and that his reported dislike of high school students was inconsistent with the demands of the job. 5/ Since the qualifications of the applicants were not equal, he did not refer to seniority in making his decision. 6/

On cross-examination, Barry conceded that John Tall was initially promoted to head custodian without having considerable experience with boilers, and that he had weighed both qualifications and seniority when he promoted Warren Bub to head custodian. Although the qualification summary prepared for these interviews asked employees if they had a current low pressure boiler license, Barry did not know whether such a license existed, and agreed that no applicant had a low pressure license. Barry acknowledged that Lane's high pressure license was in the personnel file when the questions were drafted. In reviewing the phrasing of the supervisory questions, Barry denied that the question "Have you any experience as a supervisor of custodial/ housekeeping operations" was specifically drafted to highlight Christian's experience in the hotel industry, where the term "housekeeping" is commonly used, and pointed out that there was a follow-up question to all applicants asking about general supervisory experience.

Barry said that there were no guidelines of the committee on whether to request additional information from applicants, although he would expect the committee to make copies of additional information submitted by candidates. Barry did not feel that the notebook the grievant had with him would have been relevant, and that his personnel record provided sufficient information about his background. He agreed that materials in personnel files were not necessarily uniform, and that hiring procedures had become more formal in 1990 or 1991. Thus while later hires like Lane and Christian would have resumes in their files, someone like the grievant, who was initially hired as a temporary employee, would not. Barry said his impression from speaking with committee

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- 5/ Three of the four panelists -- Sprester, Acker and Herrell -- had noted in their interview notes that the grievant said either that he did not like or did not care much for high school students.
- 6/ The parties stipulated that the selection of John Tall for the middle school head custodian was not at issue in this case.

members was that the grievant brought his notebook with him for personal reference, and that it had not been offered to the committee.

Barry testified that he was aware that the grievant had some boiler experience in the dry cleaning industry. He also was aware that Lane's boiler experience was primarily between 1970 and 1980. When the grievant had been assigned to the third shift at the Elementary School, one of his duties had been to monitor the boilers. Barry agreed that the grievant had been assigned to the third shift in part because he was considered a responsible employee, with the initiative required to work unsupervised.

Barry denied any animosity towards the grievant. While he was aware that the grievant led the opposition to the two tiered wage system, he did not consider this to be inappropriate advocacy. Barry acknowledged sending the grievant the January 26, 1990, letter detailing complaints the grievant had made about salary and workloads among custodial employees. Barry also recalled that he had disciplined the grievant in 1990 for discussions he had with other employees during work time about Union business. However, he denied ever saying that he did not like the grievant, or that he wanted him to quit, or, in comparing the grievant to former head custodian Warren Bub, who had been forced out, that he might have fired the wrong person.

On re-direct examination, Barry noted that the grievant was still on probation when he sent his January 26, 1990 letter and could have been fired without recourse to the grievance procedure. On re-cross examination, he conceded that even a probationary employee could not be discharged for protected concerted activity.

**Norman Bruce**

Norman Bruce testified that he is the principal of the Pewaukee Elementary School, and has responsibility for the building and grounds associated with the school. He opined that the head custodian functions as the "right hand man" for the principal, because he makes all of the physical arrangements for school activities. Bruce was a member of the interview panel for the July 1st interviews, but was not present for the July 15th interview with John Tall. Each applicant was asked the same questions by Acker during the interviews, and panel members contributed follow-up

questions where appropriate. At the end of each interview, the applicant was asked whether there was anything more he or she wished to add.

Bruce took notes during all of the interviews, and later relied on these notes to rank the candidates. He ranked Lane first and Christian second. He later added Tall as the third ranked candidate, even though he had not participated in the interview with him, because Tall had been the head custodian at his school for three years and he was familiar with his work. Bruce stated that Christian was very strong in the area of supervision, but not strong in the area of heating and cooling. In the area of getting along with people, he judged Christian's cooperation with the athletics program at her school to be in her favor. She said that public relations were very important and he believed this indicated initiative. He also gave her credit for initiative for providing a resume and a good application letter. Overall, Bruce felt that Christian was very well prepared for the interview, and presented herself well in the interview process.

Lane demonstrated great experience with boilers in the dry cleaning industry and had a high pressure boiler license. He had supervised three employees at the Milwaukee Psychiatric Hospital while a floorman from 1971-73, and had assigned work to 10 part-time student employees at the Moody Bible Institute. Bruce gave Lane credit for showing initiative in establishing a floor care program at his school, and for providing a resume and a good application letter to the committee. Lane said that he placed a high priority on public relations, and thought it was important to improve the status of custodians as an important part of the school staff. Bruce regarded Lane as a good applicant, who showed a positive attitude and offered information to the panel.

Bruce testified that the grievant indicated that he did not have current knowledge of HVAC, although he had a background with boilers from eight years with his father's dry cleaning firm and year and a half with Adelman cleaners, as well as some classroom work in the 1950's. He said he had experience with electrical systems from his work as general manager for West Allis marble, and was capable of doing simply electrical, carpentry and plumbing work. He had very little experience supervising employees, although he had been a manager in most of his prior positions. The grievant told the committee that he had no difficulty getting along with other

people, and said that a good looking building was the key to public relations. He had no suggestions for improving public relations in the schools. At some point in the interview, the grievant told the committee that he did not care for high school or middle school children.

The grievant had come to the interview from a painting job, and Bruce noted on the interview form "General not well dressed or shower for interview, even though he had been painting." Overall, the grievant did not make as good an impression on Bruce as did Christian and Lane. While he referred to a notebook during the interview, he did not offer it to the committee or aggressively make his own case. Bruce considered Lane to be well qualified in every respect, and the strongest overall candidate. He saw Christian and the grievant as very similar in their knowledge of HVAC, but Christian much stronger on supervision, inter-personal relations and public relations.

On cross-examination, Bruce said that the committee's general agreement was that Lane was the best candidate, and the only one with substantial boiler experience. In deciding among the remaining candidates, the committee looked to the other qualifications, and was favorably impressed with Christian's supervisory experience. Bruce's impression was that the grievant and Christian were similar in their boiler knowledge, but that she was clearly superior in the area of supervision, and preferable to the grievant in public relations and interpersonal relations. On these latter points, Bruce felt that the grievant's responses were quite vague and sketchy, though he received credit for being familiar with the Elementary School and having the ability to speak to the public.

Bruce said that he was involved in the decision to assign him to that shift at the Elementary School and that he was aware that the grievant had monitored boilers while on third shift.

### **Hollis Herrell**

Hollis Herrell testified that he was the High School assistant principal in 1992 and participated in the interviews. The same format was used for each interviews, with a flexible goal of 30 minutes for the sessions, Acker doing the questioning and each candidate being allowed to make a closing statement, covering any

points they wished to make. He was very favorably impressed with Lane and Christian's manner of presentation, while he felt that the grievant did not put his best foot forward. In particular, he noted that the grievant was poorly dressed, "uptight", unable to focus on the specifics of questions, rambling and incoherent in his answers. Herrell was concerned that the grievant said he wasn't current on HVAC because he assumed there must be some changes in these systems since the 1950's. Herrell recalled the grievant saying that he did not like kids above the 7th and 8th grades, and he felt that this disqualified him from further consideration.

Herrell's opinion was that Lane, Tall and Christian were qualified for the job, and that the grievant was not. Lane's boiler experience was clearly superior to the other applicants, and Christian was superior in the area of supervision. The grievant cited no experience as a head custodian, and made it clear that his knowledge of boilers was long before joining the school system.

On cross-examination, Herrell said that he believed the candidates were told they could submit additional information, but he was not completely sure on this point. He noted that other candidates did submit such information. He did not regard the grievant's notebook as being helpful, since he had seen it before and knew it mostly consisted of material from the Success Motivation Institute. Herrell expressed the opinion that being able to sell motivational materials had nothing to do with being a head custodian. While a positive attitude was important to the job, Herrell pointed out that the grievant's demeanor in the interview was a better indicator of this than his past experience in selling materials related to positive attitude.

Herrell drew a line on his ranking sheet separating the qualified from the unqualified after the July 1st interviews, leaving open the possibility of slotting Tall in the appropriate grouping after the July 15th interview. As he understood the process, it would have been possible for all of the applicants to be qualified, or all of them to be unqualified. He was not attempting to indicate the most qualified. Herrell was aware that Lane's boiler experience came from the dry cleaning industry, and that the grievant also had experience in that industry. The grievant said during his interview that his entire work background was in supervision except for a job at a local nursery.

He also discussed his understanding of HVAC systems, saying that they were essentially tea kettle systems for moving air, and that he had taken a course in air movement at Marquette University in 1955.

On re-direct examination, Herrell said that the grievant asked for some additional time at the end of the interview to make comments and was given more time. Herrell knew he had been doing painting work before the interview, but the grievant did not ask for time to go home and clean up. Herrell acknowledged that the grievant's answers to specific questions were on point, but offered little detail.

### **James Sprester**

James Sprester testified that he was the High School principal in 1992, and that he participated in the 1992 interviews. He found Lane very impressive in his experience on boilers, and noted that Lane had once rebuilt a steam system. Lane also had a good deal of supervisory experience, and made a good presentation to the committee. Cheryl Christian was not as strong on HVAC, but was very strong in the area of supervision. The grievant made a poor presentation, appearing unshaven and not displaying the same energy and enthusiasm as the other candidates. He said he had no current experience with HVAC and no supervisory experience over custodial employees. Sprester was struck by the grievant's statement that he did not care much for high school students, since one of the open positions was at the High School.

On cross-examination, Sprester said he was told to use his judgment on whether candidates were qualified or unqualified, without using any objective standard for dividing them into the two categories. He had been involved in the original hiring of Christian as a custodian and was familiar with her background. According to his notes from this set of interviews, she had 12 years of supervisory experience before joining the District. Sprester acknowledged that the grievant may have expressed a fondness for younger children, but denied that the comment about high school students was a comparison such as "I don't care for them as much." He was sure that the statement was a negative statement about high school students. On re-direct examination, he said this alone would have disqualified the grievant in his view, though the grievant did meet the other qualifications for the job.

Sprester was not involved in the negotiations over the two-tiered wage system among custodians, and did not recall being involved in any discipline of the grievant. He knew he had been in on a meeting with Barry, Cupery and the grievant, but could not recall the content of the meeting.

### **Patrick Acker**

Patrick Acker testified that he is the Director of Buildings and Grounds. He was involved in setting the format for the interviews, and conducted the questioning. The qualifications used in the interview and evaluation of the candidates were drawn from the labor contract, and if all of the candidates had proved to be equal, seniority would have governed the selection.

Acker found Lane to be very positive, well-prepared and interested in the job. He held a high pressure boiler license, which would also encompass the operation of low pressure systems, and was experienced in boiler operations. He credited Lane for developing a very good floor care plan for the third shift at the District. Christian also made a good impression on the committee. She did not have considerable knowledge of boilers, but was head and shoulders above the other applicants in supervisory experience. The grievant showed up for the interview unshaven and made a poor impression on the committee. His boiler experience was thirty years old, and the technology has changed since then, with new control systems and maintenance regimes in place. During the interview, the grievant acknowledged having no experience supervising custodial employees or working as a head custodian. His remark that he did not like high school kids was a red light to Acker, since it was inconsistent with the whole function of the schools. Acker also did not care for the grievant's comment that he would not change anything in his current building, because Acker felt the Elementary School was not in good shape, was not clean, and needed changes. Overall, Acker felt the grievant had some of the basic qualifications, but did not stand out in the same way that Christian and Lane did. Acker denied that he had failed to give the grievant an opportunity to submit additional materials, and pointed out that he had received and accepted two letters from the grievant after the interviews were over.

Acker said that the boiler systems had changed over the years, and

that the grievant's experience was not relevant to current systems. The elementary school boilers required an understanding of the chemical currently used and the chemical tests routinely conducted, including how to correct chemical imbalances in the system. The boiler system at the High School and Middle School had a central control system that was different from the control systems on older boilers.

Acker denied ever saying that a union was not needed by the custodial staff, or that he had ever said he wanted to hire younger people for custodial jobs. He was the one who decided, in conjunction with John Tall, to assign the grievant to the third shift in 1991. This was part of an overall reorganization of the custodial assignments. When the grievant was placed on third shift, he attempted to explain the boiler system to him, but the grievant could not understand the system and Acker ended up telling him to call if there were any problems. At the time, the

grievant did not claim any ability to handle boiler problems. Acker explained his failure to assign anyone to third shift after the settlement of the prohibited practice 1992 as simply being a case of not getting around to it.

On cross-examination, Acker acknowledged that he may have discussed unions in general terms with employees, but did not recall any specific discussion in which he said unions were not needed or that a pay increase was not called for. The grievant was the union steward either at the time Acker was hired or shortly thereafter.

The decision to move the grievant to the third shift was taken after a general conversation with John Tall, during which they discussed the fact that the grievant was the longest serving custodian at the Elementary School, and thus the one most familiar with the building. Acker also thought, at the time, that the grievant was a self-starter who could work alone, although he had changed his opinion somewhat by the time of the head custodian interviews. He knew that the grievant did not understand the boiler system, and that he suffered sleep problems because of the schedule change, but neither of these changed his decision to make the third shift assignment.

Acker said he was not specifically aware of Lane's boiler license



before he got Lane's resume with his application, although he knew Lane had worked with the boilers at the schools, doing nighttime checks. He acknowledged that a boiler license was not required for the head custodian's job, though it indicated expertise. He knew of Christian's supervisory experience because he had hired her, but said he had never met her before she was hired.

Acker testified that Barry drafted the actual qualifications summary and that he acted as a consultant to him. The reference to a low pressure boiler license was included because Barry had asked him if there was a boiler operator's license. The City of Milwaukee did at one time issue such licenses. The reference to experience with supervising housekeeping personnel was included by Barry, and Acker did not know why he phrased it that way. Christian was the only applicant experienced in supervising housekeeping personnel, but actual housekeeping duties, such as linens and laundry, are not relevant to the work of school custodians.

After the interviews, he advised the panelists that if all of the candidates were equally qualified, they would assign by seniority. Otherwise, the panelists were told to rank the candidates in order, and draw a line between those who were qualified and those who were unqualified. He did not expand on the criteria for determining qualified and unqualified, and there was no objective basis for this judgment. In his view, it was possible for someone to lack boiler experience but still be qualified for the job, or to lack supervisory experience and still be qualified for the job, depending upon their overall background. Acker agreed that anyone assigned to the Middle School or High School would need to be trained on the operation of the control board for the boiler system, and that Christian required training on the Elementary School boilers after she was promoted to head custodian.

After the rankings were done, he and Barry reviewed the personnel files to confirm the applicant's claims. While Lane claimed supervisory experience at Milwaukee Psychiatric Hospital from 1971 to 1973, Acker acknowledged that this was not listed on Lane's resume. He said he must have missed this discrepancy in comparing the files with the interview notes.

Acker testified that the grievant's comment about liking kids up to the 7th or 8th grade but not caring for older children might have been in response to a question about work location preferences, and that he might have posed the question.

**Cheryl Christian**

Cheryl Christian testified that she had been the head custodian at the Elementary School since July of 1992. Prior to working for the District, she was in charge of the trade show area and kitchen at Olympia Resort. This job involved a good deal of public contact and dealing with hundreds of vendors, as well as directing the work force, ordering chemicals, doing payrolls and maintaining the floors, all duties that were similar to her head custodian work. She said that the primary differences between her duties as a custodian and as a head custodian were boiler maintenance, payroll, preparation of work orders and work schedules, training custodians and monitoring and inspecting custodial work performance.

On cross-examination, Christian said that she got her job with the District through a blind advertisement in the paper, and did not know Acker before she was hired. Acker did not encourage her to apply for the head custodian's job. She submitted a copy of her resume with her original application for employment as a custodian, and another copy with her application for head custodian. The copy of the resume in the record of the arbitration, which was used by the committee, was not the one accompanying her application for head custodian. Handwritten notes on the resume indicated that it was the one used for her original hire.

### **Richard Lane**

Richard Lane testified that he had been the head custodian at the High School since July of 1992, and prior to that was a third shift custodian at the High School. He interviewed with the panel on July 1st, and walked them through his resume, explaining his background and experience. He explained his familiarity with boilers through the dry cleaning industry and at Cicero Bible Church and Moody Bible Institute, and the importance of understanding HVAC systems in the schools. He explained to the committee that he had upgraded the old boiler systems at Cicero by installing new control systems and making other changes. In the area of supervision, Lane cited his background as a manager at One Hour Martinizing supervising general employees, managing the maintenance and student employees at Moody Bible Institute, and supervising floor care workers at Milwaukee Psychiatric Hospital. He also told the committee that he had designed a floor care plan for the schools, coordinating with various suppliers to address an area of weakness in the School District's custodial operation.

Lane said that the primary differences between his work as a custodian and a head custodian were that he was now scheduling work to prepare for activities at the school, dealing with the public to arrange for activities, supervising the work of custodians and sitting in on the interviews for hiring custodians.

Lane said that no one discussed the interviews with him beforehand, and that no one encouraged him to apply. On cross-examination, he said that he had encouraged other custodians to apply, so that someone outside of the bargaining unit was not hired as head custodian. While some of the custodians expressed concerns about

doing the maintenance aspects of the head custodian jobs, Lane tried to assure them that they could do the jobs. He knew that Christian was interested in applying, but did not know that the grievant was applying. He did not advise management in advance that he was going to apply for the promotion.

Lane said that he had to get a high pressure license when he became the manager of One Hour Martinizing in the early 1970's and that he had renewed it every two years by paying a renewal fee. The low pressure boilers in the schools did not require a license. Lane did not recall ever training Christian in the operation of the boilers, although he might have walked her around the units and explained them in that way.

Additional facts, as necessary, will be set forth below.

#### **IV. Arguments of the Parties**

##### **A. The Union's Brief**

The Union takes the position that the grievant was qualified for the job of head custodian and should have been awarded the position based on his experience and seniority. The Union points to a series of decisions in which arbitrators recognized the practical impossibility of employees having precisely equal qualifications across the board, and determined that rough overall equality was the only reasonable standard to be applied. In those cases, the arbitrators noted that junior applicants can only be preferred if they are significantly more well qualified than the senior applicants, and then only if there is a fair and objective basis for measuring the qualifications. In this case, there is no fair measurement of qualifications that would place Christian and Lane "head and shoulders above" the grievant with respect to the head custodian position.

The Union argues that the District improperly relied on factors which are not reasonably job related in order to disqualify the grievant. The heavy emphasis placed on "attitude and potential" taints the process, in that these are completely subjective factors. "Attitude" was never even listed on the qualifications for the job, and not every interviewer ranked the candidates for this or made notes regarding their subjective impressions of the applicants' attitude. The grievant was downgraded for his appearance, even though he was called to the interview directly from a painting job and would naturally be dressed and groomed more casually than he would if he had been given some advance warning. There are no standards for "acceptable" appearance, and disqualifying the grievant on these grounds is purely arbitrary.

The District's claim that the grievant was disqualified because he lacked sufficient training

and experience in boilers is clearly just an after the fact justification for their decision. Christian had even less experience with boilers than did the grievant. The boiler duties of the

head custodian amount to simple monitoring and testing, with occasional light maintenance. The system is automated, and the relatively simple tasks required of the head custodian can be learned quickly. Christian admitted that she taught herself the boiler system. Attempting to use this minor aspect of the job as a disqualification for a senior employee raises questions about the true intent of the selection committee, as does the decision to inquire about boiler licenses. Michael Barry, who suggested adding this question, did so knowing that Lane possessed such a license. Yet there is no requirement of licensure in this municipality, and no job related reason to require a license. The inclusion of this question strongly suggests that the committee process was slanted to favor Lane.

The Union also points to the submission of resumes for Lane and Christian. There was no request for a resume, and it appears that these are the only two candidates whose applications included resumes. In both cases, the resumes were the same ones submitted when they originally hired on with the District. In the case of Christian, the resume in her file contained handwritten notes indicating that she did not actually submit a resume, but that someone on the committee saw fit to copy her old resume and distribute it to the members.

The Union rejects the District's claims that the grievant was not equally qualified to Lane and Christian in the area of supervision. Although the contract speaks to "ability to supervise", the District unilaterally changed this to experience supervising custodians. This narrowing of the qualifications is plainly intended to push aside the grievant's own supervisory ability and give additional weight to Christian and Lane's claimed experience. The Union notes that there was no effort by the committee to actually verify any claims about prior experience, and suggests that this is inconsistent with prior experience being an important factor. The claim on Christian's resume to six years of supervisory experience were contradicted by her own statements to the committee that she had supervised for only four years. Lane's alleged supervisory experience at Milwaukee Psychiatric Hospital was twenty years ago as a crew leader, when he was 19 year old. This claim conflicts with his resume, which shows him holding a different position at that time. Lane himself contradicts the committee's claim that he supervised custodians at the Moody Bible Institute. Again, the committee's failure to follow up on these obvious conflicts raises a question about how seriously supervisory experience was weighed in the selection process.

The District's entire approach to measuring experience leaves the selection process open to challenge. It discounted the grievant's boiler experience as being too old, but credited Lane with supervising employees 20 years before the interviews. The grievant's own substantial experience in supervising was discounted because it did not involve custodians, yet John Tall was credited with supervisory experience for having been a music teacher. No weight was apparently given for experience in the Pewaukee Schools themselves, where the grievant has performed well, has served as a substitute for a head custodian, and has monitored heating and cooling equipment.

Lane's experience is largely in floor cleaning and Christian had been with the District for only one year at the time of the interviews.

The District's claim that the grievant said he disliked students above the eighth grade is simply a distortion. The grievant expressed a preference for working at the Elementary School because he enjoyed the younger children. The use of this to disqualify him is wholly improper, particularly when John Tall's conflicts with co-workers and criticism of teachers were not given any weight.

The Union argues that the District's unusual weighting of factors in order to pass over the grievant for promotion may have been caused by a predisposition against the grievant. The grievant was the leader of the Union's successful drive to rid itself of a two tiered wage system. He has since had to process several claims against the District for its retaliatory actions, including one attempt to unilaterally reassign him to the third shift. He also gave statements against the District in an age discrimination action. These actions establish a motive for the District to have retaliated against the grievant when he sought the head custodian's position, and the arbitrator should weigh this information in judging the validity of the entire selection process.

The interviews tried to measure ability, but they did so without any way of verifying their assessments. As such, they are at best an estimate of potential. The contract provides a means of testing this potential, through a 90 day trial period. If the committee had doubts about the grievant's abilities, he should have been given a chance during this trial period to allay these concerns. Past applicants had been given this opportunity, and there was no basis for denying the grievant this chance.

Since a review of the record demonstrates that the grievant's qualifications were relatively equal to those of Lane and Christian, and since his seniority was greater than that of both of the successful applicants, the District clearly violated the contract by denying him the promotion to head custodian. Whether this was by mistake or by deliberate design, the appropriate remedy is to award him the position and to make him whole for his losses.

#### B. The District's Brief

The District takes the position that it acted properly and that the grievance should be denied. An employer's judgment of qualifications cannot be disregarded by an arbitrator unless it is found to have been unreasonable, arbitrary, capricious, discriminatory or made in bad faith. The process used in this case was fair and objective. Decision making was spread across a committee comprised of administrators who work directly with head custodians and are experienced in group interviewing. Every interview used the same format, and each applicant was asked the same set of job related questions. All applicants had the same opportunity to make a case for themselves. The result of this process -- a finding that the grievant was not qualified -- is necessarily subjective, but it is supported by the objective evidence in the record.

While the Union argues that the grievant's seniority should have given him an edge in this process, the contract calls for consideration of seniority only where the candidate's qualifications are equal. Thus the employer must make an initial determination of qualifications, and seniority only becomes a factor if the employer concludes that the candidates are equally qualified. The job of head custodian has five essential skills, and the grievant was lacking in four of them:

1. Ability to plan, assign and supervise the work of subordinates
2. Ability to operate vehicles and equipment
3. Ability to create and maintain effective public relationships
4. Considerable knowledge of the operations of heating and ventilating plants
5. Ability to get along with teachers, pupils and fellow workers

The grievant had no experience in supervising the work of custodial employees. His experience in supervising other types of employees is not a sufficient substitute. By contrast, Lane and Christian both had extensive experience in supervising custodial employees. Thus the interview committee properly determined that the grievant's qualifications were not equal to those of the successful candidates in the area of supervision.

In the technical area of knowing heating and cooling systems, the grievant indicated that his knowledge "was not current". Indeed, the evidence shows that any experience he had in this area was over 30 years ago. He had not kept up with the changing technology, and had been unable to pick up boiler operations when Acker tried to acquaint him with them on prior occasions. Lane is a licensed operator for high pressure and low pressure boiler systems, with ten years of experience. Christian did not have any significant experience in this area. Thus the grievant is obviously not equal to Lane in this area of qualifications, although he is arguably equal to Christian.

In the area of getting along with students, teachers and co-workers, the grievant admitted to the interview committee that he did not like working with middle school and high school students. An unwillingness to work with students at two of the three schools is an obvious disqualification in a position that requires at least some interaction with the student body. Neither Lane nor Christian had any such disqualification.

The grievant also failed to demonstrate any ability to create or maintain effective public relations. Head custodians have regular contact with the public and must project a positive public image. His appearance before the committee was unshaven and unkempt. His presentation was rambling, disorganized and difficult to follow. Granting that he was called in for the interview from a painting job outdoors, he made no effort to straighten himself up before seeing the committee. The committee reasonably concluded that he did not meet this criterion. Lane and Christian made very positive impressions during their interviews, both in terms of appearance and

in their manner of presentation.

The members of the committee individually rated the applicants before discussing the interviews. All of them rated the grievant unqualified, and Lane, Christian and Tall qualified. These ratings were confirmed after they discussed the interviews, and the District's business manager concurred after reviewing the personnel files of the applicants. The entire process was fair and above-board, and information available to the committee supported their conclusion that the grievant was unqualified for the head custodian's job. Since he did not have "equal" qualifications, his seniority did not come into play, and the District properly awarded the jobs to the other applicants.

The District denies that it had any obligation to allow the grievant a ninety day trial period to become qualified for the head custodian's job. While the contract does allow a ninety day trial period, that applies only to candidates who are already determined to be qualified. It is an opportunity to confirm rather than to gain qualifications. Any other reading would render the language requiring that applicants be qualified in order to be selected meaningless.

Finally, the District rejects the suggestion that it somehow engaged in retaliation or discrimination against the grievant. Although the grievant had been active in the Union, the same is true of John Tall and Richard Lane. The Union's assertion that the grievant was rejected because he was too old is simply that, an assertion, without any support in the record. The arbitrator's task is to rule on the question of qualifications, not to engage in a broad ranging review of the many smoke screens raised by the Union in this case. Since the evidence establishes that his qualifications were not equal to those of Lane, Tall and Christian, the grievance must be denied.

### C. The Union's Reply Brief

The Union rejects the District's claim that Ms. Christian's duties at the Olympia Resort are in any way comparable to the supervisory duties of the head custodian. Head custodians perform little of what is customarily thought of as supervisory work, and play no role in hiring or discipline. Again, the Union notes that supervisory experience is not a requirement for the job, merely the ability to supervise employees. The grievant has extensive supervisory experience, demonstrating his ability to supervise employees.

The Union also disputes the repeated assertions in the District's brief to individual rankings of the applicants on each of the listed criteria. There is no evidence that the interviewers ranked applicants on a criteria by criteria basis, and indeed there is evidence that this was not done.

The District makes the claim that the grievant had no qualifications to work with the boilers in the schools, but the record does not show that. Granting that the grievant's experience was some time ago, there is nothing to show the age of the boilers at the schools or the difference



between the boiler technology of twenty years ago and that of today. Acker had no idea what changes had been made in this technology, or even what tests were run on the water. Moreover, the Middle School does not have an independent boiler system, since its heating and cooling is provided by the High School. The District's assertion that the grievant was not trainable on boilers is just an assertion, without any facts to back it up. Acker made this claim, but could not remember exactly what it was he tried to teach the grievant, and there was never any training deficiency noted in the grievant's personnel files. Furthermore, there is no evidence that this information was shared with the committee or was ever expressed prior to the arbitration hearing. Thus it is irrelevant to the question of the committee's decision.

The Union disputes the District's claim that Union animus played no part in the decision. The District claims that John Tall was a steward, but there is no evidence of that in the record. Granting that Tall was a member of the Union bargaining committee, it was the grievant who was the leader of the fight against the two tiered wage system. While Lane was a steward at the time of the arbitration hearing, there is no evidence of Union activity by him before the promotions were made, and that is the relevant time period.

Throughout its brief, the District confuses the contractual requirement of "ability" with actual experience. The grievant clearly had a history of accomplishment as a supervisor in other jobs and as a successful custodial employee in the District, and this history shows that he did in fact have the ability to perform the job of head custodian. At a minimum, he should have been given a trial period, as was Christian, even though she lacked any qualifications whatsoever vis-a-vis the boilers.

Again the Union objects to the arbitrary weighting of factors in the decision making process, including the different standards applied to Lane's supervisory experience and the grievant's boiler experience, the granting of credit to Christian and Lane for having resumes available when none were requested, and in treating the supervision of unskilled, minimum wage student workers at Olympia Resort and Moody Bible Institute as somehow comparable to supervising trained custodial employees at the Pewaukee schools. The entire selection process smacks of an effort to arrive at a predetermined outcome.

#### D. The District's Reply Brief

The District dismisses the Union's claim of bias and discrimination as smoke screens, intended to obscure the fact that the grievant lacked the qualifications for the head custodian's job. There is no evidence of any agency having found contract violations, prohibited practices or discrimination at any time. These are claims and innuendo without any factual basis. If the Union actually believed that there was evidence of Union animus or age discrimination, it should have raised those issues in a separate forum, or at least have raised those issues in this or another grievance. The sole issue before the arbitrator is whether the District violated the contract in deciding to promote Lane and Christian. The answer to that is plainly "no".

The Union's claim that the District somehow changed the job description by requiring that the applicants have the ability to supervise "custodians" instead of simply "subordinates" ignores the fact that the only employees the head custodian supervises are custodians. The District did not disregard other supervisory experience, but it certainly had the right to place greater weight on prior experience supervising exactly the same type of workers as would be supervised in this job.

The District dismisses the Union's suggestion that Lane and Christian were somehow warned to submit resumes, since both of them denied it as did every members of the interview team. The applicants were deliberately not given any direction as to the form of their application, so that the District could gauge their initiative and enthusiasm. As for the Union's argument that demeanor and appearance cannot be considered, this ignores the importance of public relations and professionalism in the head custodian's job. The fact that the grievant was unkempt, unshaven, and nearly incoherent in the interview indicates that he was not suited for this relatively high profile position.

The Union tries to turn the grievant's comment that he "liked kids up to 7th or 8th grade, but did not care for high school kids" into some sort of positive comment on younger children. The members of the committee agreed that he said he did not like high school kids, and this was the statement that made the biggest impression on them. The Union's explanation that he was expressing a preference as to work site ignores the fact that his application had already stated his first preference as either the High School or the Middle School. Thus there was no reason for him to state a preference at the interview, and the Union's explanation should be disregarded.

The Union distorts and misstates the record in claiming that Christian and Lane gave conflicting information about their backgrounds. Christian said she supervised employees for six years at Olympia, and the evidence shows that she did so -- two years as assistant sanitation supervisor and four years as sanitation manager. Among the classification she supervised was that of "janitor", an obvious parallel to the "custodian" classification in the schools. Contrary to the Union's claim, Lane never said he supervised employees at Moody Bible Institute and the District did not credit him with supervisory experience from Moody. Instead, the District recognized his supervisory work at Milwaukee Psychiatric Hospital. The District also gave Lane credit for his boiler license, not because such a license is required but because it indicates ability in that important area, an area in which the grievant conceded he was not current and had not worked for 30 years.

The record demonstrates that the District fully complied with the contract. However, should the arbitrator find some violation, the District urges that any remedy be limited by excluding backpay for the two years that the Union failed to process this grievance. While the original grievance was filed on August 13, 1992, the final amended grievance was not submitted

until May 13, 1994. The Union certainly has the right to amend its pleadings, but its initial sloppiness should not be held against the District.

## **V. Discussion**

The issue in this case is whether the District had a legitimate basis for its conclusion that the grievant was not equal to the successful applicants in qualifications for the head custodian openings. If that judgment was valid, the fact that some District administrators may have been

pleased to pass him over is irrelevant. Thus the Union's allegations of antipathy to the grievant by Acker and Barry do not bear on the merits of the case. To the extent that they are relevant, they go to whether the normal presumption of regularity and good faith in management decision-making may be extended to the District's choices in this case.

Article 5 of the contract speaks to the basis on which vacancies will be filled:

5.11.1 Any vacancy in the custodial or maintenance department shall be filled on the basis of seniority if all other qualifications are equal. A ninety (90) day trial period will be given.

The parties make arguments about both sections of this clause. In connection with the second sentence, providing for a trial period, the Union suggests that this should allow for the appointment of a senior employee if there are questions about his qualifications. This argument is not consistent with the first sentence. Equality of qualifications is the precondition to weighing seniority, and thus an employee cannot claim a job on the basis of his or her seniority without first passing that hurdle.

Where a job calls for multiple qualifications and there are multiple applicants, absolute equality of qualifications among the applicants is not a practical possibility. Each of the applicants may have strengths in one area and weaknesses in another. If the language of the contract is to have any meaning, there must necessarily be a comparison of the overall package offered by each applicant. In making this comparison, the employer and, on review, the arbitrator must take into account the fact that certain of the qualifications demanded will be more important to the performance of the job than others, and relative qualifications in those area are entitled to greater weight than are the relative strengths and weaknesses in lesser areas. The contract calls for the following qualifications for a head custodian:

1. Ability to plan, assign and supervise the work of subordinates
2. Ability to operate vehicles and equipment
3. Ability to create and maintain effective public relationships
4. Considerable knowledge of the operations of heating and ventilating plants
5. Ability to get along with teachers, pupils and fellow workers

The ability to operate vehicles and equipment is not relevant to this dispute. The other four qualifications are at issue.

## A. Review of the Criteria

### 1. Ability to Plan, Assign And Supervise The Work Of Subordinates

The Union objects that criterion #1, ability to supervise subordinates, was interpreted by the District as being the equivalent of actual experience in supervision of custodial and housekeeping personnel. From the record, it is apparent that the interview panel did focus on actual experience, and stressed experience in supervising custodial personnel over supervision of other types of employees. The Union is correct that actual experience in successfully performing a task is different than having the potential to successfully perform that task, but that distinction does not translate into a fatal flaw in the interview procedure. Actual experience is generally considered the best indicator of present and future ability. Experience is a fact, while potential is a guess. To invite the District to place equal or greater weight on its judgment of potential than it places on the objective fact of experience is to make an already subjective process completely subjective. No rational selection process would function in that manner.

The greater reliability of actual experience as a predictor also provides justification for the District's assignment of somewhat greater weight to experience supervising custodial employees than to general supervisory experience. While the contract itself speaks to supervising "subordinates", the fact is that the head custodian's only subordinates are custodians. Thus a person who has successfully supervised custodial work in the past might reasonably be said to have greater proven ability to supervise custodians than one who has supervised other types of employees. The degree of preference given to this actual experience will vary, depending upon the difference in work settings and conditions for the employees supervised. A college dean, to take an extreme example, supervises professors, but the nature of the work, the nature of the workers, and the manner of supervision are so completely different than that presented by custodial supervision that an interview panel could legitimately give this experience relatively little weight.

The three applicants in this case all had at least some experience in supervising employees. 7/ Christian supervised janitorial and housekeeping employees at Olympia Resort for six years, from 1985 through January of 1991. Lane's resume shows supervision of student maintenance employees at Moody Bible College from 1980 to 1983, and experience as a Manager at One Hour Martinizing in Milwaukee from 1971 to 1980. In his interview, he also cited experience

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7/ The comparison in this analysis is limited to the grievant, Lane and Christian. In some instances, the parties have made comparisons in their briefs between these three and John Tall. Tall was already a head custodian and was seeking a new work location, not a promotion. In addition, the parties have stipulated that there is no dispute over Tall's selection. Thus comparing Tall to the other three does not bear on the equality of qualifications for the disputed selections.

supervising custodial employees at Milwaukee Psychiatric Hospital from 1971 to 1973, although this was not indicated on his resume. The grievant's oral presentation cited extensive experience as a manager, overseeing the sales people across the country as national sales manager for Ortho-Kinetics from August of 1974 to May of 1975, and franchisees as a salesman and distributor for Success Motivation Institute from June of 1966 to August of 1974. He also cited experience directly supervising employees at his family's dry cleaning business from 1959 to 1965 and at Adelman Laundry from 1965 to 1966.

The interview panel members all testified that they judged Christian to be far and away the better choice in the area of supervision. The record shows that they could legitimately have arrived at this judgment. Her supervisory experience was more directly related to custodial supervision than that of either Lane or the grievant, and was far less dated, occurring immediately before she was hired by the schools, and only a year before the interviews. By contrast, Lane's ended in 1983 and the grievant's in either 1966 or 1975, depending upon how one views his managerial experience. Granting that the housekeeping work Christian supervised was not directly relevant to custodial work, the supervisory function itself does not appear to be so dissimilar as the Union suggests.

As between Lane and the grievant, the District asserts that Lane's qualifications are superior to the grievant's in the area of supervision. Lane had some experience in supervising custodial workers at Milwaukee Psychiatric Hospital in the early 1970's, and experience supervising low-skilled student maintenance workers at Moody Bible Institute in the early 1980's. He also had nine years managing a dry cleaning store from 1971 to 1980. For his part, the grievant had never supervised custodial workers, but he also had supervisory experience in dry cleaning, for seven years from the late 1950's through the mid-1960's. While he cited his experience as sales manager for Ortho-Kinetics and as a distributor for SMI as having been relevant to supervision, his own description of the work as overseeing sales people all over the country shows some rather clear distinctions between this and the day-to-day direct supervision of custodial employees. Both involve evaluating work performance, but the setting for the supervisor-subordinate relationship and the nature of the work monitored are radically different. This is in part the distinction between someone functioning as the supervisor of employees and someone functioning as the manager of an operation. An argument can be made that overseeing a large, widely dispersed and independently functioning group of sales people is more difficult than monitoring three or four employees regularly performing routine tasks in a single building, but as with the example of a college dean, the point is that the skills brought to bear on the one task are not directly transferable to the other, even though they may both loosely be termed "supervision". While his brief experience with Ortho-Kinetics and his longer experience with SMI indicate an ability to function in a responsible position, the District could reasonably view his employment from 1966 to 1975 as having little bearing on his ability to perform the supervisory duties of the head custodian.

Although the gap between the grievant and Lane is not so great as that between them and

Christian, the District had a sound basis for assessing Lane's supervisory qualifications as being somewhat superior to those of the grievant. Both had experience in the dry cleaning industry, but Lane had actually supervised custodial work, and had more current supervisory experience than did the grievant.

## 2. Considerable Knowledge Of The Operations Of Heating and Ventilating Plants

The interview panel concluded that Lane was substantially superior to Christian and the grievant in his knowledge of HVAC systems, while those two were roughly equal in this area. Lane recited his possession of a boiler operator's license, 8/ and experience with boilers in the dry cleaning industry from 1971 to 1980, as well as operating and maintaining boilers at Moody Bible Institute and Cicero Bible Church from 1980 through 1986. He told the committee that he had operated chillers and pumps at Moody, and had reconditioned and upgraded the entire heating system at Cicero. For her part, Christian said she understood the operation of the HVAC systems, but had little actual experience with boilers other than what she had observed and what had been explained to her on the job with the District. The grievant told the committee that he had learned about boilers on the job in the dry cleaning industry, and had taken coursework in the 1950's at Marquette University. He said his knowledge of boilers was not current, but claimed the ability to clean and maintain a system, and stated that he could learn what he needed from others on the job. His follow-up letter to the committee corrected his statement about his coursework, placing it in the early 1960's at the Fabricare Institute.

The committee's preference for Lane's HVAC knowledge over that of the grievant and Christian is clearly supported by the information they had available to them at the time of the interviews. Lane's resume shows 15 years of continuous experience with boiler systems from 1971 to 1986, including maintenance and upgrading of boilers. His three years at Moody also included work with cooling systems. Lane stressed his expertise in these areas to the interview panel. By contrast, while both he and Christian claimed to understand the operation of the HVAC systems, it appears that the grievant downplayed his knowledge of boilers, admitting that it all took place over 30 years earlier and was not current. Given that Lane objectively had much greater experience with HVAC systems and aggressively portrayed this as a strength in his presentation to

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8/ The Union suggests that the inclusion of a question concerning possession of a low pressure boiler operator's license indicates an effort to skew the process towards Lane, since he had a boiler license in his personnel file and listed this on his resume. This is not a persuasive argument. Lane's license is a high pressure license, and it appears that low pressure licenses are no longer issued by any licensing body. Presumably the District, if it were trying to tailor the job to Lane, would have listed the type of license he actually possessed.

the interview panel, the District had a valid basis for concluding that he was clearly superior to the other two candidates in this area of qualification.

The decision that Christian and the grievant were roughly equal to one another in HVAC qualifications is more arguable than the preference for Lane. The grievant's actual experience with boilers was substantially greater than Christian's, 9/ but his presentation to the committee and his follow-up letter both suggested that it was out of date. The Union questions whether there have been sufficient changes in boiler technology to actually make his experience from the later 1950's and early 1960's inapplicable in the 1990's. From the record, it appears that the basic technology has not changed substantially, although some of the testing and maintenance procedures have changed and the control systems are different. Having said that, it was the grievant, not the committee, that labeled his knowledge "not current". If an applicant tells an interview panel that he worked with a piece of equipment 30 years earlier but has not kept up-to-date with it, it is difficult after the fact to say that the panel should have disregarded his comments. The purpose of the interview procedure is to gather information. As a general rule, people play up their strengths and downplay their weaknesses in such interviews, and interviewers are likely to take a much harder look at claims of strength than admissions of weakness. An applicant who denigrates his own qualifications in a given area should expect the interviewers to take him at his word, particularly when the panel does not have a resume or work history to check his comments against.

Both Christian and the grievant claimed basic knowledge of HVAC. The grievant claimed prior experience with boilers 30 years earlier, but leavened that claim by saying his knowledge was no longer current. Both said they had, or could, learn from others. The grievant additionally claimed a current ability to clean and maintain a system. The interview panel could reasonably have judged them to be roughly equal in the sense that both admitted a need for some on the job training in the schools' systems, but could not reasonably have concluded that they were equal in basic knowledge of boilers. The grievant was at least somewhat better grounded in the operation of boilers than Christian, and this was demonstrated by his more complete answers to the committee. His advantage is not as substantial in this process as it might have been in reality, because he led the committee to believe that his knowledge was out of date.

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9/ Acker's testimony that the grievant could not grasp boiler operations when he worked the third shift at the Elementary School has not been given any weight in this analysis. There is no evidence that Acker shared this impression with the other members of the committee or with Michael Barry, and thus it could not have been weighed into anyone's comparison of the candidates.



### 3. Ability To Create And Maintain Effective Public Relationships

There is no great difference in the answers given to the committee by the various applicants in this area. The District's reasons for giving Lane and Christian credit in this area essentially turned on the interview panel's impressions of their interview styles, and the decision to downgrade the grievant was based upon his unkempt appearance in the interview. The grievant was called to the interview directly from working for two hours on an outdoor painting job. The District suggests that he should have asked for time to go clean up, and he may have been better served by taking a moment before the interview to attend to his appearance. However, the members of the committee were all familiar with the grievant from his two plus years of employment with the District. Disqualifying him from a promotion based on his appearance on the day of the interviews borders on being arbitrary. From the record, there is no substantial basis for judging any of the applicants markedly superior to the others under the "Public Relations" criterion.

### 4. Ability To Get Along With Teachers, Pupils and Fellow Workers

The only compelling evidence under this criterion is that the grievant is alleged to have said he did not like or did not care for middle and high school students. Several panel members said this weighed heavily against him as a candidate. The grievant says that he did not disparage older students, but simply expressed a preference for younger children in answer to a question about which school he would prefer to work in. With all due respect to the grievant, the contemporaneous interview notes and the recollections of the interview committee members indicate very strongly that his comment went beyond saying that he liked younger students more than older students. Instead I conclude that he in fact told the committee he liked the younger kids, but disliked high school students. This answer was apparently not given in response to the questions listed on the interview form under the heading of "ability to get along with pupils ...", since it is listed separately at the end of the interview notes, and the weight of the evidence persuades me that it was in response to a question about preferred work locations. Nonetheless, the information is relevant to this criterion, and the committee is entitled to consider it in assessing his overall ability to get along with pupils.

The grievant's candor with the committee may raise a question in their minds as to his suitability for the opening at the high school, and perhaps even the middle school. To suggest that it wholly disqualifies him from this job simply goes too far. The arbitrator recognizes that an employer is entitled to make reasonable judgments about whether a given candidate meets the qualifications for a job. The arbitrator also recognizes that the employer's judgment is entitled to deference. However, the grievant's statement cannot reasonably be interpreted as an admission that he could not get along with students outside of the elementary school, which is essentially the interpretation placed on it by the committee. Getting along with people necessarily involves working without conflict with those whom you do not like, and admitting that you do not like students in a particular age group does not mean that you cannot or will not make the effort needed

to get along with them. If the committee wished to further explore this point, in order to establish whether the grievant's dislike of older students would interfere with his ability to work with them or was indicative of a set of attitudes indicating that he probably could not work with them, it certainly could have posed additional questions. Unlike the grievant's relatively straightforward but misleading comment that his boiler knowledge was out of date, where the committee had no obligation to argue with him that he was more qualified than he said, the committee would have an obligation to follow-up on a comment like this if it wished to use it as an important basis for its decision. The comment is not directly on point, and the grievant explained at the hearing that he did not mean to convey some sort of hostility to older students. Relying solely on an ambiguous statement made in answer to an unrelated question to disqualify a candidate is inherently unfair. In this case, it also ignores the fact that, after Tall entered the picture, one of the openings was at the elementary school, where the grievant's views would presumably be a plus rather than a minus.

The grievant's comments that he did not care for older students could reasonably raise questions for the committee, but standing alone it could not reasonably yield a judgment that he was not qualified, or was materially less qualified in this respect than Christian or Lane.

#### B. Overall Comparisons

Reviewing the overall qualifications of the candidates, the interview committee could reasonably have concluded that Christian was head and shoulders above the grievant and Lane in supervisory experience, and that Lane was more qualified in this respect than the grievant. Lane was clearly superior in his knowledge of boilers, with the grievant having a slight advantage over Christian in this area. No reliable basis appears in the record for preferring one candidate over the others in the remaining areas of comparison.

The District's position that the grievant was unqualified is not supportable on this record. A review of his background as presented to the committee indicates that he does possess the minimum qualifications for the position of head custodian. However, the contract does not look to minimum qualifications. As noted at the outset of this discussion, the language of Article 5 calls for selection based upon seniority "if all other qualifications are equal", and this must be determined on the basis of overall qualifications, giving due consideration to the relative importance of one qualification vis-a-vis the others. The primary job of the head custodian is to supervise the work of other custodians. The most technical aspect of the job involves the monitoring and maintenance of the HVAC system. Lane held an advantage over the grievant in the area of supervision, and was far more qualified in HVAC. The grievant's qualifications are clearly not equal to those of Lane, and thus his four months greater seniority will not enable him to defeat Lane's bid for the job. With respect to Christian, the grievant's boiler knowledge was objectively greater than hers, but his presentation to the committee made their relative qualifications appear to be quite similar. Granting that the committee, based on the answers shown in the interview notes, should still have judged him somewhat more qualified in the area of HVAC, Christian's very substantial advantage over him in supervisory experience would have

allowed a reasonable committee to determine that she was superior to him overall.

### C. Hostility to the Grievant - Unfairness of Procedure

The Union has raised the possibility that the committee's judgment was influenced more by hostility to the grievant for his concerted activity than by an objective assessment of his qualifications. There is some basis in the record for believing that Barry and Acker may have had less than positive feelings towards the grievant. Particularly in Acker's case, the very sarcastic July 3rd letter from the grievant indicates a strained relationship at the time of the interviews, although this says more about the grievant's feelings towards Acker than Acker's towards the grievant. However, Acker's completely implausible explanation that the decision to assign the grievant to third shift was an operational necessity, but that he had not gotten around to replacing him there after nearly three years, strongly suggests a measure of antipathy to the grievant by Acker at about the time of these interviews. The conclusion that Acker, and perhaps Barry, did not like the grievant does not explain the judgments expressed by Herrell, Sprester and Bruce, all of whom found Christian and Lane better qualified than the grievant. Their connections to the various controversies involving the grievant and the District are more attenuated than Acker and Barry's, yet their views of the candidates were fairly uniform, and their rationales were supported by objective evidence in the record. As noted earlier, if the information available to the committee indicates that his qualifications were not equal to those of the successful candidates, the issue of possible hostility will not change the outcome.

In addition to the charge of hostility towards the grievant, the Union has argued that the procedure was inherently unfair because Christian and Lane were allowed to submit resumes, even though the posting did not require them, while the committee refused to accept the grievant's three ring binder of background material. Submitting a resume with a job application is a fairly common sense step, and the fact that Lane and Christian did so on their own initiative cannot be read as proof that they were somehow prompted to take this step or given some sort of unfair advantage. 10/ As for the grievant's three ring binder, most of the material in the binder consisted of essentially identical clippings of a print advertisement for SMI, featuring him as a success story for that business. It also contained a handwritten job history and an updated list of references. The job history information was reviewed verbally in the course of the interview, but the references were not.

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10/ The resume in the file for Christian appears to have been the one originally submitted when she was hired, and the Union suggests that this was retrieved from her personnel file by one of the committee members, which would indicate that the members were supplementing her materials in order to promote her candidacy. Christian's letter of application refers to an attached resume, and the evidence does not support the notion that there is any sinister implication to the mix-up in the files between the resumes themselves.

The members of the interview committee all said that the grievant referred to the binder during the interview, but did not submit it to the committee or ask that it be copied and distributed. The grievant testified that Acker told him the committee "wouldn't be needing" the binder. Assuming for the sake of argument that Acker did discourage a review of the binder, there remains a question of what effect this would have had on the selection. The advertisements in the binder merely restated his verbal recitation of experience with SMI, and the committee's failure to review them should not have had an impact on their decision-making. The job history information was recited during the interview, although it would have been to the grievant's advantage to have it presented in a more systematic way. Likewise, having the references before the committee may have been a benefit to the grievant. However, the grievant made additional written submissions twice after the interviews. While he may not have thought to prepare these materials at the time of his application, or to have copies available for the committee at the time of the interview, if he felt that he had been prevented from sharing this information during his session with the panel, he could easily have included it with his July 2nd letter to the committee members when he corrected his statements about his boiler training. On balance, I cannot conclude that the committee's failure to physically review the three ring binder prevented a fair evaluation of the grievant's qualifications or so tainted the process as to require that the promotions of Christian and Lane be set aside.

On the basis of the foregoing, and the record as a whole, I have made the following

#### **AWARD**

The grievant, Joe DiTorrice, possessed the minimum qualifications for the position of head custodian. His qualifications were not equal to those of Richard Lane or Cheryl Christian. The District did not violate the collective bargaining agreement when, in the summer of 1992, it denied him a promotion to the position of head custodian and instead selected Lane and Christian. The grievance is denied.

Dated at Racine, Wisconsin this 22nd day of April, 1996.

By Daniel Nielsen /s/  
Daniel Nielsen, Arbitrator