

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LOCAL 60, AFSCME, WCCME, AFL-CIO

and

WAUNAKEE SCHOOL DISTRICT

Case 16
No. 54139
MA-9562

Appearances:

Mr. Laurence S. Rodenstein, Staff Representative, Wisconsin Council 40, on behalf of the Union.

Axley Brynson, by Mr. Michael J. Westcott, on behalf of the District.

ARBITRATION AWARD

The above-entitled parties, herein "Union" and "District", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held on August 8, 1996, in Waunakee, Wisconsin. The parties thereafter filed briefs which were received by October 7, 1996.

Based upon the entire record and arguments of the parties, I issue the following Award.

ISSUE

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

Did the District violate Article 11.5 of the contract when it selected Neil Reible to fill the Head Custodian vacancy at the Heritage Elementary School and, if so, what is the appropriate remedy?

BACKGROUND

The District operates a school system in Waunakee, Wisconsin. On January 4, 1996, 1/ it posted for a vacant Head Custodian position for the Heritage Elementary School.

1/ Unless otherwise stated, all dates hereinafter refer to 1996.

Eight applicants bid for that position, including Neil Reible, Jeff Unger, Peter Breunig, and Bob Pertzborn. 2/ Reible, with a seniority date of April 1, 1992, has less seniority than Unger, Breunig and Pertzborn who have seniority dates of July 1, 1988, August 15, 1990, and October 1, 1991, respectively. They were interviewed in half-hour intervals on January 25 by Business Manager Gary Nelson, Director of Human Services Connie Beth, and Director of Buildings and Grounds Ken Diericks. All three subsequently graded the applicants as:

Reible	170
Pertzborn	164 3/
Breunig	162.5 4/
Unger	151

The District then awarded the position to Reible because of his higher score.

In this connection, Union Vice-President and Head Custodian Dean Fredrick testified that the difference in duties between being a Custodian versus a Head Custodian is that with reference to the latter, "You're dealing more with kids and the basic operation of the school itself as far as making sure everything is ready for class." On cross-examination, Fredrick acknowledged that the Head Custodian also serves as a lead worker and that he/she is thus accountable for making sure that the work is done by the Custodians.

Business Manager Nelson testified that he gave Reible, Unger, Pertzborn and Breunig scores of 61, 57, 60 and 60, respectively. He explained that Reible was clearly superior to the others, "Because in answering the questions he had more point value, and there are other considerations beyond that." Nelson explained that weight also was given to job performance and evaluations, as well as communication skills involving "how they did during the interview as far as quick responses, eye contact." Nelson acknowledged that the three interviewers did not have the candidates' evaluations before them on January 25 and that they relied on Dierick's prior evaluations "to refresh our memory and then discuss them." Nelson also said that this kind of testing had been previously used for positions in the bargaining unit and that the Union never before grieved it.

Director of Buildings and Grounds Diericks, who supervised all four of the applicants, testified that he sat in on the January 25 interviews; that he gave Breunig, Pertzborn and Reible scores of 47, 48, and 50 respectively; and that Reible was "by far the better candidate" because "the way the questions were answered." He explained that higher points were given for "how

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- 2/ The parties agree that these four applicants are the only ones relevant to this proceeding.
- 3/ The District erred in initially giving Pertzborn a score of 161; it should have been 164.
- 4/ The District erred in initially giving Breunig a score of 158; it should have been 162.5.

long it took the candidate to come forth with the answer" and for answers that were "quicker and correct". He agreed that an applicant would get a lower score if "It took them some time to think about the necessary correct alignments" and if the person gave a longer, but correct, answer.

Diericks also said that the applicants' past evaluations were not looked at on January 25; that the evaluations in each applicants' file were not discussed; that they nevertheless "played a role in the decision"; and that the specific comments in Reible's last evaluation were not considered.

He also stated that Breunig in 1993, 1994, and 1995 received the highest number of points possible in his evaluations and that Reible in 1993, 1994, 1995 received fewer points in his evaluations. In addition, Reible was told in his June 20, 1995, evaluation: "Needs to improve patience with others." Diericks added that he and the different school principals completed all of the aforementioned evaluations and that he on January 25 told fellow interviewers Beth and Nelson about how well all the candidates had performed as workers.

Director of Human Services Beth testified that in addition to looking at the total points each applicant scored on January 25, she also looked at "Their presentation of themselves in the interview and their ability to communicate. . ." She explained that Reible "had good eye contact, his answers were flowing and he didn't pause and have to think something through. It seemed to be right there. He was relaxed." She also testified that some of the primary qualifications addressed were the ability to communicate effectively, maintaining a professional image and having excellent organizational skills. She also said that she gave Reible, Pertzborn, and Breunig 59, 53, and 51.5 points respectively and that she on January 25 was unaware that Reibel's 1995 evaluation stated, "Needs to improve patience with others."

Beth also said that the District in the past had used the same type of interview process it used here when it awarded a maintenance position to a junior candidate and that the Union did not grieve over that situation. She also said that in addition to the interview scores, the interviewers on January 25 looked at how they communicated and "work performance including any kind of disciplinary action or any kind of red flags or blue marks that should be considered." She also said that the interviewers did not have the applicants' past evaluations before them on January 25 because "the evaluations were substantially equal except for one person", i.e., Unger. 5/ She also claimed that different principals "in each building do these evaluations in distinctly different manners", which is why she did not give their evaluations much consideration.

She also said that Reibel was the best candidate because: "There was a distinct difference between Neil and the other candidates about how they responded, the eye contact, the smile, the

5/ Because of Unger's past disciplinary problems, the District properly passed him over. As a result, it is unnecessary to discuss his qualifications.

flow, posture, openness." She also said Diericks "is not in a position to be able to counter or override what any principal would say."

Recalled as a witness by the District, Nelson testified that the Union on March 31, 1994, proposed in negotiations that the District agree to the following contract language:

"'The Employer may select the best qualified applicant based on an objective assessment of the relative ability, training, qualifications, experience and performance among the employee applicants. The employer may select a less senior employee applicant provided an objective assessment of the applicant indicates that the successful applicant is head and shoulders superior to the senior applicants'."

Nelson explained that the District rejected this "head and shoulders" standard because it was too "restrictive" and that the parties in negotiations instead agreed to the language contained in Article 11.5 of the contract.

On cross-examination, he acknowledged that the Union in those negotiations "could have" stated that it would drop its proposal because the District still has the burden of proving that a junior employee is superior to senior employees.

The Union subsequently grieved the District's selection of Reible over more senior employees who the Union claims are just as qualified.

In support of the grievance, the Union argues that "the District's selection process rested exclusively on the interview process"; that the District's process was "improperly subjective"; that the "junior employee is not clearly superior to the grievant[s]"; and that the District therefore should be ordered to offer the position to Breunig and to make him whole.

The District, in turn, contends that negotiation history and principles of contract interpretation support its awarding of the position to Reibel; that there is no merit to the Union's claim that the process followed by the District was flawed; that Reible "was clearly the superior candidate"; that the Union has not proven that the District has acted in an arbitrary and capricious manner; and that the grievance therefore should be denied.

This case turns upon Article 11.5 of the contract which states:

11.5 The employer may select the best qualified applicant based upon an impartial assessment of the relative ability, training, qualifications, experience, and performance among the applicants. The employer may select a less senior applicant, provided that an assessment of the applicant's qualifications

indicates that the qualifications of the successful applicant is clearly superior to those of the senior applicant. An outside applicant may be considered if none of the employee applicants for the position are determined to meet the necessary qualifications to perform the position satisfactorily.

This proviso therefore requires the District to consider "training", "experience", and "performance" among the applicants. The record on this score establishes that Reibel was not the "clearly superior" applicant under any of these criteria.

To the contrary, since Breunig in 1993, 1994, and 1995 received the very highest number of points possible in his evaluations, his "performance" was at least as good, if not better, than Reibel who received lower points in his evaluations and who was told in 1995 that he needed to improve his patience with others.

Beth tried to pooh-pooh Breunig's better evaluations on the ground that individual school principals "in each building do these evaluations in distinctly different matters." Her claim though, even if true, does not negate the fact that the evaluations speak for themselves and that they show that Breunig has received better evaluations than Reibel. Moreover, if Beth believes that individual school principals do not follow uniform policies in evaluating employees, that is a management problem which must be addressed outside the context of this proceeding. It suffices here to only say that the evaluations are valid and that, as a result, they must be accepted at face value.

The District nevertheless argues that since the evaluations "were all completed by individual decision-makers, all of whom had different scoring systems . . .", it was "more appropriate" to defer to Diericks "who was in a position to share the performance information based on his first-hand knowledge." In fact, however, Diericks did not share such knowledge since he never told either Beth or Nelson that Reibel's most recent evaluation stated that he "Needs to improve posture with others." In addition, since Breunig's past evaluations were superior to Reibel's, Diericks erred when he also failed to bring that additional fact to their attention.

This is not to say that an employer must give total deference to past job evaluations. An evaluation may state, for example, that an employee "Needs to improve patience with others." That is a very strong negative factor which - if true - shows that the employee may have great difficulty if he/she is promoted to the position of Head Custodian where he/she will have even more frequent contact with others and where one's patience may be tested far more frequently.

If Breunig's evaluation contained this admonition, the District would be entitled to pass him over in favor of another applicant. But, that notation is not in any of Breunig's evaluations. Instead, it is contained in Reibel's June 20, 1995, evaluation, thereby showing that he may lack the

patience to serve as a Head Custodian.

How, then, did the District overlook such an unfavorable evaluation? Simple. It just totally ignored the past evaluations of any of the applicants since Nelson, Beth, and Diericks all testified that they did not have the evaluations before them on January 25 when they interviewed and graded the applicants.

That was a fatal flaw because Article 11.5 mandates that "experience" must be considered in such matters and because past evaluations, which measure that experience, establish that Reibel was not "clearly superior" to Breunig.

The only possible basis for concluding otherwise is the higher test score received by Reibel on January 25, a test score which, in Beth's words, was largely based upon "how they responded, the eye contact, the smile, the flow, posture, openness."

"Smile" may be very important for someone vying to become Bozo the Clown. It is impossible to see why it is so important for a Head Custodian position.

Moreover, while some subjectively may be permitted in testing, the subjectivity here far oversteps those boundaries when such matters as "eye contact", "the flow", and "posture" become the *sine qua non* for awarding a position.

The District's testing here therefore became the sole method for choosing an applicant, thereby effectively negating Breunig's better evaluations which demonstrated that his relative "ability, training, qualifications, experience, and performance" were at least as good as Reibel's. That is why the District's selection process was arbitrary and capricious and why its selection of Reibel must be overturned.

The District argues that the "system followed by the District is not unlike the process" followed in Sun Prairie Area School District, Case 81, No. 46649, MA-7036 (Knudson, 1992). That case, however, dealt with the validity of the employer's test questions and not on past evaluations clearly showing that one of the senior bidders is at least as qualified as the junior candidate selected. In addition, the testing here was flawed not because of the questions asked, but rather, because of the great subjectivity which the interviewers gave to the answers elicited.

The District also argues that its selection process "is entitled to a presumption of validity." Any such presumption, however, presupposes that an employer has properly considered an applicant's past work experience which is something the District did not do here. It also presupposes that an employer does not allow subjective and meaningless factors to color its decision-making process which is something that the District did do here.

The District argues that if its evaluation process or procedure is deemed flawed, such flaws

should be clearly identified and that the position should be rebid "so that a head custodian can be selected upon an unflawed process." Alternatively, the District states that if its "decision as to who was selected was wrong", I should select the "appropriate, qualified candidate."

Because of his superior evaluations, and because of his qualifications to serve in that capacity, I find that Breunig should have been selected as Head Custodian. As a result, he now must be offered that position and be made whole.

As for the District's request that I identify the flaws in its process, I believe that I have done so above. But, in order to clear up any future misunderstandings, I will again state here that the District must follow the criteria in Article 11.5 which requires the District to consider "relative ability, training, qualifications, experience and performance among the applicants." That means that each candidate must be evaluated based upon each of these criteria. That also means that the past evaluations for each applicant must be considered since they are the best way for measuring an employee's past work history. It also means that the District can conduct testing for any vacant positions, provided that such testing is directly work-related and provided further that such testing is not marred by the extraordinary amount of subjectivity found here. It also means that the District is bound by the evaluations conducted by its own management personnel and that, as a result, there is no merit to any District claim that such evaluations should be disregarded because they have been completed by different people who have different grading standards. For it is management's responsibility to see that its evaluations are fair and that they are based on uniform standards; when they are not, the District has only itself to blame.

Accordingly, it is my

AWARD

1. That the District violated Article 11.5 of the contract when it selected Neil Reible to fill the Head Custodian vacancy at Heritage Elementary School.

2. That to remedy that violation of the contract, the District shall immediately offer that position to Peter Breunig and it shall make him whole by paying to him the difference between what he has earned versus what he would have earned in wages and benefits had he been awarded that position.

3. That to resolve any questions which may arise over application of this Award, I shall retain my jurisdiction for at least thirty (30) days.

Dated at Madison, Wisconsin, this 2nd day of January, 1997.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator