

BEFORE THE ARBITRATOR

---

In the Matter of the Arbitration  
of a Dispute Between

**LOCAL 150 SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC**

and

**PEWAUKEE SCHOOL DISTRICT**

Case 25  
No. 55432  
MA-10016

---

Appearances:

**Ms. Marianne Goldstein Robbins**, Attorney at Law, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, and **Mr. Steve Cupery**, Assistant to the President, Local 150 Service Employees International Union, AFL-CIO, CLC, appearing on behalf of the Union.

**Mr. Mark L. Olson**, Attorney at Law, Davis & Kuelthau, S.C., appearing on behalf of the Employer, and **Ms. Nancy L. Pirkey**, Attorney at Law, Davis & Kuelthau, S.C., appearing on the briefs.

**ARBITRATION AWARD**

The Union and the Employer named above are parties to a collective bargaining agreement for 1990-91 through 1992-93, which provides for final and binding arbitration of certain disputes. The parties selected Morris Slavney to serve as the Arbitrator to hear and decide the grievance of Leo Zedrow. Hearings were held on January 27, April 26 and June 30, all in 1995. The parties completed filing briefs by January 3, 1996. The record, which was at that time labeled as Case A/P M-95-32, was transferred to the WERC in July of 1997 and renamed Case 25, No. 55432, MA-10016. In August of 1997, Karen J. Mawhinney, a member of the WERC, was selected by the parties as the Arbitrator to decide the case. The substituted arbitrator advised the parties on August 29, 1997, of the documents that she received, and the Employer responded with an additional arbitration award to be added to the record. The record was closed on September 15, 1997.

**ISSUE**

The parties did not agree on the framing of the issue, but there is no substantive difference between them about the issue. The Arbitrator frames it as this:

Did the Employer violate the collective bargaining agreement by failing to promote the Grievant, Leo Zedrow, to the position of Head Custodian in July of 1992? If so, what is the appropriate remedy?

**CONTRACT LANGUAGE**

**ARTICLE V - WORKING CONDITIONS**

...

**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.

...

**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 vacation) 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

## **BACKGROUND**

The Grievant is Leo Zedrow and the grievance is over the District's failure to promote him as a Head Custodian while it chose two other custodians with less seniority for the positions of Head Custodian. This grievance goes back to the summer of 1992, when the District had openings for Head Custodian positions at three schools -- the elementary school, the new middle school called Asa Clark, and the high school. The incumbent of the Head Custodian at the elementary school transferred to Asa Clark, thereby creating the opening in the elementary school. The incumbent was John Tall, and although it was considered to be a lateral transfer, Tall was also included in the promotion interview process. The Union does not contest the transfer of Tall to the middle school, but it contests the promotion of Lane and Christian to positions as Head Custodians and asserts that Zedrow should have received one of those positions.

The Head Custodian is a bargaining unit position and is more or less akin to a lead worker rather than a supervisor with supervisory duties that relate to labor relations. The parties have some disagreement about the terms lead worker, head custodian, and supervisor, but the duties envisioned by the District are those of a lead worker, and not those of a supervisor as defined in labor relations terms in this state. The Head Custodian is expected to schedule employees and assign them work, train employees, check their time cards, plan and inspect work, orders supplies and equipment. The Head Custodian also makes long range plans and meets with vendors regarding supplies, chemicals and floor waxes. At the end of the school year, teachers check with the Head Custodian to make sure their room is clear of personal matters and left in an acceptable condition. The Head Custodian also sits on an interview team to hire custodians. There are about six or seven custodians and a couple of part-time custodians at the high school, and two full-time and two part-time at the elementary school, and four full-time and one part-time at the middle school.

Zedrow started working full time for the District in 1988 but had worked part time as a substitute since the latter part of 1984. His educational background included four years of college at North Central College in Naperville, Illinois and Roosevelt University in Chicago. After serving in the military, he worked for a furniture factory and then in 1963, started working with Travelers Insurance Company as a safety engineer and supervisor. In 1978, he moved to Northwestern National where he also worked as a safety engineer and as a supervisor in charge of nine people. As an engineering supervisor between 1978 and 1984, Zedrow's responsibilities included hiring, training, performance evaluation and work flow for a staff of four professionals, budgeting and preparation of reports, establishing risk management programs, implementing them through safety instruction and liaisons with management, evaluating commercial accounts and implementing loss prevention procedures. In 1984, the company was purchased and Zedrow was given an early retirement. He then started working in custodial and maintenance positions, first at a church in Waukesha on a part-time basis and another church in Big Bend on a part-time basis. During that time, he also took care of the day care and church property. Later, he did some work at the YMCA in Waukesha. In 1987, he started out as a custodial housekeeper with Carroll College in Waukesha and became the lead custodian. As the lead custodian there, he had five people that he assigned to different areas and saw that they got the work done. The work included both custodial work, such as floors, as well as housekeeping, such as changing linen and beds in dormitories.

Zedrow has worked in all three schools in the Pewaukee District and used a variety of cleaning equipment. The former Head Custodian at the high school, Wade Johnson, was ill during the fall of 1990 and asked Zedrow to fill in for him. Zedrow changed his hours of 11:00 a.m. to 7:00 p.m. to 6:00 a.m. to 2:00 p.m. to take over Johnson's duties. Zedrow had to take over Johnson's custodial duties as well as some of the lead worker duties, such as seeing that the other custodians were on the job and doing their work. Additionally, Zedrow had to monitor the boilers, check two compressors for the freezer and cooler in the kitchen, and check the electrical/heating system for the second floor. He monitored the boilers during that period of time, something that the custodians do not do. He also had to assign other employees to set up chairs or bleachers for special events, and he brought custodians in from the second shift to take care of the gymnasium for some sports activity. When a shipment came in, he had to get employees down from the second shift to help him unload it. No one in the administration told Zedrow that he was to work as Head Custodian for Johnson, and Johnson was the only one who asked Zedrow to fill in for him. Zedrow was not paid at the Head Custodian wage rate while filling in for Johnson, which went on for three or four months. Zedrow did not grieve the wage rate being paid during that period of time. When John Tall became a Head Custodian, Zedrow did not grieve that either, although Zedrow had more seniority than Tall.

The District did not know how long Johnson would be gone. At one point during that time, the Business Manager, Michael Barry, told Zedrow that Warren Bub, a more senior custodian, wanted the first shift, and that Barry was obligated to give him the first shift and that Zedrow was to go back to his regular hours. Johnson did not return to work, and Bub took over that position.

Patrick Acker started working for the District as the Building and Grounds Director in July of 1991. He supervises the custodians and maintenance person. Zedrow testified that Acker told him in the break room that he could not understand why they needed a union, that \$8.00 an hour was a fair enough salary to be earning. Zedrow said the statement came out of the blue, that they were not discussing negotiations. Later that year, Zedrow became a member of the bargaining committee for contract negotiations, along with John Tall and Joseph DiTorrice. The Union was trying to eliminate the two-tier wage system. Zedrow was one of the custodians that was at the lower tier of the wage system. The Union was successful in eliminating the two-tier system in the bargaining for the 1990-1993 labor contract. DiTorrice was the most vocal of the bargaining committee members. After negotiations were done, DiTorrice was moved to a third shift and a prohibited practice case was filed, which was settled when DiTorrice was removed from the third shift. Zedrow was to be a witness in the prohibited practice hearing, which never took place and was settled on April 30, 1992. DiTorrice later grieved the District's decision to not promote him to Head Custodian, the Arbitrator Daniel Nielsen denied the grievance on April 22, 1996.

Zedrow also had a conversation with Acker in 1991, when a part-time custodian named Gordon Morey who was 58 years old sought a full-time job with the District. Zedrow was looking at the bulletin board in the hallway between Acker's office and the Head Custodian's office, when Acker came up to Zedrow and said that he (Acker) was interested in having young people "full of piss and vinegar." At that time, Zedrow was 63 years old. Morey was not hired, and Christian was hired. Christian is probably in her 30's. Morey filed a complaint of age discrimination with the Equal Rights Division against the District, and Zedrow told the Equal Rights investigator that Acker wanted "younger people full of piss and vinegar." The Equal Rights investigator issued a "probable cause" finding regarding the hiring issue and found no probable cause in the discharge/layoff issue. The case was eventually settled.

Acker denied ever telling Zedrow that the custodians did not need a union or that he wanted to hire younger employees "full of piss and vinegar."

On June 16, 1992, the District posted a job notice for Head Custodian positions open at the high school and the middle school. Six people applied for the position of Head Custodian, and they were interviewed by a panel on July 1 and July 15, 1992. Five of them were interviewed on July 1st and Tall was interviewed on July 15th. One of the candidates, Dick Noble, indicated during the interview that he was no longer interested in the position.

The seniority dates for the applicants are the following:

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, Custodian	06/11/91

The Business Manager, Michael Barry, and the Director of Buildings and Grounds, Patrick Acker, both supervise the custodial staff. Barry supervises Acker and administers the labor contract. When the Head Custodian vacancies occurred in 1992, Barry set up the process by which they would be selected. He reviewed the relevant contract sections, namely Article 5.2 and 5.11, as well as the job descriptions that are part of the labor contract.

The interview team for the District was made up of the Assistant High School Principal Hollis Herrell, High School Principal James Sprester, Elementary School Principal Norman Bruce, and Director of Buildings and Grounds Patrick Acker. The principals of the schools were involved because the positions would be in their buildings. The District has implemented a site-based management concept. The middle school principal at the time was Ron Fuerstein, who was on vacation when the interviews took place. Barry outlined the process for the selection or interview committee and directed them to find that where qualifications were equal, award the job on seniority, and if qualifications were not equal, assign the job to the most qualified applicant. The interview panel made recommendations to Barry regarding the applicants, and Barry consulted with Acker after the last day of interviews, July 15, 1992.

Barry prepared a summary sheet for the selection committee to use during the interviews. Acker, Bruce, and Superintendent Lee Will participated in drafting the document which follows:

### **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 system (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 operation?

If yes:

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?

If no:

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.

The questions on the summary sheet were based on the job descriptions in the contract. Acker asked all the questions in the interview to make sure that everyone was asked identical questions. Other panel members were permitted to ask follow-up questions, and the 30 minutes was not a hard and fast time line. Barry testified that the question regarding a license to operate low pressure boilers was used for an indicator, indicating considerable knowledge, even though the former occupants, including Tall, did not have such licenses. Lane was the only custodian and applicant that had a license, and Acker would have been aware of that by the time the summary sheet was drafted. Also, the summary sheet question called for a question of whether the applicants had any experience as a supervisor of custodial/housekeeping operation, although the job description has no reference to housekeeping duties. Barry also provided the interview committee with a ranking sheet, numbered one through six, with a line for each name. He asked the committee members to draw a line between those that they recommended and those that they did not.

Zedrow's interview lasted about 20 minutes. He was asked about his heating and ventilating experience and told the panel that he had worked with two churches where he had to monitor the boilers in both of them. One of the churches had three boilers, the other had a boiler in the church and hot air unit in the day care area. He mentioned his experience with three boilers at the YMCA in Waukesha and stated that the boiler heated the building and also the swimming pool, and that he was responsible for starting up the boilers when they went down, testing the water, and providing it with a delimer so it would not build up scale. He also had to watch the boilers for leaks because the equipment was old. The panel asked Zedrow if he had a license for boiler operation, and he explained that one did not need a license for the low-pressure boilers in the school. From his prior 25 years of experience as a safety engineer in the insurance business, he is aware of the qualifications to operate different types of boilers. When asked if he had considerable knowledge of heating and ventilating systems, Zedrow answered it depends on what you mean by considerable knowledge.

Zedrow told the panel that he had been the head or lead custodian at Carroll College for one year and that it included custodial/housekeeping work. Zedrow's application does not show that his work at Carroll College included head or lead custodian work. He told the panel that he had about five people he supervised at Carroll College and assigned work to the crew and trained them. Zedrow tried to tell the panel three times that there was information regarding his supervisory experience in the insurance industry in his personnel file which contained his resume, and Acker told him three times that they did not have time to get his personnel file out then. Acker looked at his watch, said let's get on with it, we've got other interviews, and went on to the next question. Zedrow offered to go and get his personnel file which was only a few feet away, but the committee said they did not have time. Zedrow did not mention during the interview that he had filled in for Johnson as the Head Custodian at the high school for two or three months while Johnson was ill. Two of the panel members -- Herrell and Sprester -- were Assistant Principal and Principal at the high school at the time Zedrow took over Johnson's duties. Barry was also aware of Zedrow's work there, because he eventually came to Zedrow to tell him that Bub was getting that position.

Zedrow was asked in the interview about his relationship with co-workers, students and teachers. He responded that he had no complaints from any of them and that he tried to go out of his way to help them whenever possible. He said that he also went out of his way to help members of the public that came into the school. He told the panel that the custodial staff was a great crew. Zedrow did not ask the panel for more time during the interview, although he felt that Acker cut off the interview early after 20 minutes.

All three schools in the District have low-pressure boilers. Zedrow testified that no license is required to operate low-pressure boilers, and a license is required to operate and maintain high-pressure boilers. The District hires an outside contractor to take care of serious problems with the boilers, such as a breakdown or malfunction. Similarly, the District hires outside contractors to handle major electrical repairs, and the custodians handle minor repairs. There is no local authority in the District's jurisdiction that issues boiler licenses, comparable to licenses issued by the City of Milwaukee, where Lane was certified. Acker stated that a high-pressure boiler license allows one to operate both high and low pressure boilers. Acker has such a license. Lane testified that there is a low-pressure and high-pressure license, and then engineering three, two and one at the top. Everyone agrees that the Head Custodians are not required to have any license to operate the District's boilers.

The successful applicants were Rick Lane and Cheryl Christian, both of whom had less seniority than Zedrow. John Tall was also a successful applicant, although he had already been a Head Custodian and the Union considered his position to be a lateral transfer even though he went through the same interview process with the others.

Lane had considerable boiler experience and even a license to operate high-pressure boilers. He operated and maintained three low-pressure boilers and upgraded the heating system at Cicero Bible Church in Cicero, Illinois. Before that, he operated boilers, chillers and pumps

at the Moody Bible Institute in Chicago. And before that, he was the manager of a dry cleaning franchise and maintained a high-pressure boiler. He had about 15 years of boiler experience altogether. Lane held a stationary engineer's license issued by the City of Milwaukee Department of Building Inspection which certified him to perform the duties of a high-pressure boiler operator.

Lane supervised second and third shift students who performed rounds and some light maintenance at Moody Bible Institute. During the interview, Lane told the panel that he supervised employees at Milwaukee Psychiatric Hospital and Moody Bible Institute, although his resume shows nothing regarding Milwaukee Psychiatric Hospital. However, he testified that it was on the handwritten portion of his first application for employment with the District. He told the committee that he was responsible for three employees at Milwaukee Psychiatric and ten at Moody. At Milwaukee Psychiatric Hospital, Lane supervised a group of "guys" in charge of taking care of the floors. He assigned them duties and taught them techniques. He met with salesmen and decided which products to use and how the hospital was to be maintained. That job was for two years from 1971 to 1973. The people he supervised at Moody from 1980 to 1983 were fellow students (Lane was attending college at the time) and he assigned them duties for their second and third shifts. The students were considered engineers and were not performing custodial work, except for cleaning grease traps. Lane was considered to be a crew leader of the student engineers who made rounds and performed some light maintenance such as adjusting thermostats. The students checked other mechanical operations, such as elevators, lighting systems, sump pumps, laundry rooms, but they did not clean floors.

Christian had no boiler experience except what she learned on the job with the District. She was initially hired by Barry and Acker as a custodian and had been with the District for one year when she applied for the Head Custodian position. Her employment background consisted of one main employer, Olympia Resort, where she worked for more than 11 years. She started as a hotel janitor and dishwasher and became an assistant sanitation supervisor for two years and a sanitation manager for four years. She had three shifts of employees consisting of custodians at night and dishwashers. At Olympia, she trained new employees, hired and fired employees, scheduled employees for three shifts, directed their activities, and had responsibility for payroll, ordering supplies, and cleaning the kitchen and exposition center for trade shows. Christian had 30 employees at one time on the average, and there was a lot of turnover because many of them were high school students. She thought the hours of work and low wages -- usually minimum wage -- also caused high turnover of employees. During the interview, Christian told the panel that she was also in charge of working with vendors to get up at a big exposition center. She thought that Acker had her resume in front of him, the resume that she attached to the letter applying for the job. Christian got the position of Head Custodian for the elementary school. After her promotion, she received some training on the heating system.

John Tall was previously a teacher and the head of the music department with the District before becoming a custodian. He then became a Head Custodian. His boiler experience was limited to training he received while on the job in the District. He had no custodian experience in boilers before working for the District, and no prior experience in supervising custodians.

Acker's notes from the interviews show that he found that Lane seemed very "positive." Acker recalled that Lane was alert, attentive, and very interested in the job. Acker stated that the District needs to have a positive person in the position of Head Custodian, because that person is here when people come in and he or she must be a good representative of the District and willing to help people. Acker noted that Lane had supervisory experience as a head housekeeping supervisor at either Moody Bible Institute or Milwaukee Psychiatric Hospital and that he had ten employees under him. Acker believed that supervising a sales force (as Zedrow had done) was not as important as supervising custodians. Lane had implemented a schedule for stripping, waxing, cleaning and nightly automatic scrubber and high-speed burnishing at the District's high school, and Acker was impressed by that and took it into account.

Acker's notes also showed that he took notice of Christian's appearance as being neat and clean, and that she had a great attitude. He testified that she came into the interview with a big smile on her face, and she impressed the committee with her presence and attitude. Although she knew little about boilers, in Acker's mind, she stood out on the qualification regarding supervision. He noted that she was in charge of 30 custodians for four years, and that she did the hiring, firing, scheduling, ordering of supplies, and all the things that a Head Custodian does, and that she did this at a profit-motivated place with high standards. Acker stated that Christian is "just full of bubbly life and energy and a great attitude..." He had also interviewed her when she was originally hired as a custodian and checked out her background then.

Acker noted that Zedrow had a laid back attitude, that he had poor body language and lacked any kind of spark or a positive attitude. Acker stated that they were looking for someone that was outgoing, energetic, positive, and pleasing to be with, and that Zedrow did not appear to be those things. Regarding Zedrow's boiler experience, Acker was left with the impression that Zedrow had some experience five or six years ago and that he would need some training. Acker testified that while Zedrow was a lead custodian at Carroll College, a lead custodian is not a head custodian, and that he did not hold that position for very long. Acker stated at hearing that a lead custodian does not supervise. Zedrow told him and the committee in his interview that he supervised five employees at Carroll College as the lead custodian. Acker admitted that Zedrow's experience in planning, organizing and scheduling nine people in the insurance field had some value but not as much as if he would have been supervising custodians. Acker also did not like Zedrow's response to dealing with problems when Zedrow said that he would walk away from Johnson who ranted and raved, and Acker stated that one needs to deal with things and not just forget about them. Acker also stated that he was not impressed with Zedrow's statement that there was a tremendous crew at the elementary school. Acker testified that he felt that Zedrow did not seem interested in learning about boilers when he tried to show him how to do some of the things with boilers. Zedrow testified that the only conversation he had with Acker was at the middle school after the interviews, when Acker asked him to check the dials and lights to make sure they were operating, and Zedrow did that numerous times. Acker testified that Zedrow was unqualified to be a Head Custodian and required constant supervision as a custodian.

Sprester testified that Lane was very congenial in the interview, very well groomed, and presented a clean, crisp image. Sprester felt such an image was significant because the Head Custodian is often the first person who meets the public or students. Custodians have a uniform to wear. Sprester also noted that Lane said he would like to work on the image of the custodian, and Sprester thought that was important. Sprester admitted that Zedrow is a very pleasant person, that they got along well, but that he felt that Zedrow did not have the enthusiasm or the congeniality of Lane and Christian.

Sprester made notes in the interview that Christian had a very positive outlook and good attitude. In fact, he testified that "...she just kind of bubbled, she was just an enthusiastic person." He found her positive and enthusiastic demeanor to be very important, because the Head Custodian will be in contact with the public, even though the Head Custodian generally works the first shift and many activities and events with the public take place later during the second shift. He testified that she stood out in the area of supervision because she had been a manager for Olympia Resort for four years where she supervised custodians. Sprester felt that her supervising of approximately 30 people put her head and shoulders above the other candidates. Sprester had also been on the interview for Christian at the time she was initially hired by the District, and he contacted a former employer at Lac LaBelle Country Club, who gave her an excellent reference. The Lac LaBelle Country Club is not listed on her resume, but she had mentioned in the course of her hiring interview that she worked there.

Sprester found Zedrow to be much less enthusiastic than Christian, that he was very laid back, and he was not sure that Zedrow really wanted the job. Sprester thought Lane showed enthusiasm and professionalism in the interview. Sprester concluded that Zedrow was not qualified for the Head Custodian position because he felt that Zedrow had less supervisory experience than others, and his knowledge of boilers was not as impressive as Lane's and slightly less or almost equal to Christian's. Sprester testified that he did not recall that Zedrow said he supervised nine individuals as a safety engineer.

Herrell worked with custodians and the Head Custodian in his position as the Assistant High School Principal. His notes from the interviews shows that he made a separate appraisal of each candidate's demeanor. For example, his notes regarding Lane say confident, good eye contact, seemed at ease, and polished and educated. Herrell's notes for Christian say confident, dressed neatly, great sense of humor. His notes regarding Zedrow say letter but no resume, confident - almost to the point of blase, shorts and custodial shirt. Herrell considered demeanor to be very important. Herrell found that Lane had a great deal of experience in heating and ventilating systems as well as supervisory experience in similar capacities to the District's custodians, as well as having an excellent and positive demeanor or attitude. He noted that both Lane and Christian were selling themselves through a positive attitude and good demeanor. He felt that Zedrow did not want the job and his attitude surprised him. Herrell admitted that Christian and Zedrow were pretty much equal regarding their experience with boiler systems. He did not view Zedrow's supervisory experience at Carroll College the same as the Head Custodian at the District, while he considered Christian's supervisory experience at Olympia Resort to be similar to people she would be supervising at the high school.

Herrell denied that he was aware that Zedrow was checking boilers and compressors or assigning tasks to other custodians during Johnson's absence. However, Herrell was not aware of who actually made those assignments. Herrell noted the way candidates were dressed, because he stated, "If all other factors are equal this could be a determining factor." While he made a note that Zedrow wore shorts and a custodial shirt, he made no similar note regarding Lane and could not recall whether or not Lane wore shorts or whether it was a hot summer day when the crew would all have been working.

Herrell discounted Zedrow's statement that he was a lead custodian supervising others at Carroll College and did not equate it with supervisory experience. He noted that in response to a question about how to handle a difficult situation, Zedrow used the example that he listened to Johnson rant and rave and then just walked away. Herrell wrote down in his notes that Zedrow had a good grasp of the situation regarding a discussion on how one determines why one person is faster than another at a job.

Bruce had supervised Tall for a year and a half when the interviews took place, and he did not interview him. Bruce was impressed that Christian had hired 250 people in four years and had 30 working under her on a daily basis. He drew a connection between the Olympia operation and the elementary school, in that the public comes into the building, looking for a clean facility and friendly people. He thought her experience had to do with the kitchen, and the school had a kitchen. Bruce testified that she had a positive demeanor, she had pride in her work and showed initiative. In contrast, Bruce found Zedrow to be laid back, even the way he was sitting in his chair. Christian sat forward in her chair while Zedrow sat back. Zedrow gave less specific answers to questions, in Bruce's opinion. Bruce made assumptions regarding Christian's specific supervisory tasks based on her answer that she hired 250 people. He assumed that she trained them and had a responsibility for payroll and ordered supplies, even though she did not specify those things. He assumed that Christian's level of supervision was higher than that of Zedrow's when Zedrow was a lead custodian at Carroll College. Bruce testified that Lane had been a lead person at Milwaukee Psychiatric Hospital and a supervisor at Moody. Bruce drew another parallel between Lane's supervisory experience and the school's position.

Bruce wrote down that Zedrow was the lead custodian at Carroll College, but he felt that the Head Custodian position at the District would involve much more supervision at a much higher level than a lead custodian. He did not consider a lead custodian to be someone that supervises employees, even though Zedrow said he was doing the work and supervising employees. He felt that Zedrow gave a blase answer about his specific duties and responsibilities, while Christian gave a whole list of things. Bruce discounted Zedrow's supervisory experience in the insurance business because he thought it involved a lot of forms or paperwork. When asked what changes he would make in a building, Zedrow said no changes, and Bruce felt there was always something to improve. Christian gave the same kind of answer, and Bruce did not see her answer as a negative response. While Zedrow gave more

specific answers to his experience with boilers, Bruce saw Christian's response as more specific in the number of items circled about plant operations -- such as ballasts, switches, receptacles, sinks, urinals, painting.

Bruce was looking for a person who would be a good ambassador for the school, who could work with the public, although he acknowledged that most of the interaction between custodians and members of the public occurs after school when a lot of the contacts would be with regular custodians, not the Head Custodian.

Bruce testified that after the interviews, Acker asked the committee, "What do you think?" There was a discussion regarding the process and the qualifications. Someone from the committee said that Noble was not really interested in the job and they should not consider him. The group then agreed that the most qualified person was Lane. After that, they looked at the other four candidates, none of whom had as much boiler experience as Lane, and compared notes back and forth on who had the best qualifications. The discussion was short, taking only about five or ten minutes. Each of the panel members drew the line regarding where to separate the unqualified candidates from the qualified candidates.

The selection committee did not use anything from employees' personnel files, such as their original applications and resumes. No one on the committee advised Zedrow that if he wanted his personnel file or resume to be considered, he should bring it to them. Acker wrote Cupery on September 18, 1992, during the processing of this grievance, and stated that the committee used resumes and job application forms contained in employees' files and used background check findings from the candidates' original hiring. However, three out of four members of the committee did not review the candidates' resumes and job application forms. Only Acker reviewed them later with Barry.

Barry made out a form that had the numbers one through six on it with a line next to each number. He told Acker that he was looking for the people that were being recommended to fill the three jobs. Barry testified that anybody below the line was unqualified and did not have to be looked at by Acker and himself when they finished on July 15, 1992. Zedrow was the first name below the line on all the panel members' sheets, ranked fourth behind Lane, Christian and Tall. Barry stated if someone was below the line, he or she did not have the qualifications for the job. Those above the line were both qualified and recommended, according to Barry. Barry stated that he did not tell Acker there could be only three people found to be qualified and that there could be more than three people who were being recommended.

Barry testified that if someone stated that the committee should look in his personnel file for more information, it would be an inadequate response, and that Barry would expect more initiative in the interview itself. Barry testified that the degree of initiative exercised by the job applicants in the interview or application process was a consideration because the Head Custodians need to anticipate what a principal needs and meet those needs. Thus, he stated that

if a candidate did not provide information or relied on the interview committee to get information, the candidate had not done a good job. Lane, Christian and Tall supplied additional information with their applications, and all three were promoted. Lane and Christian submitted the same resumes that they submitted when they were initially hired. The job posting did not indicate to potential applicants that they should provide additional copies of their resumes if they wanted them to be considered. Nor did the job posting say anything about initiative being a qualification.

Barry also stated that in Zedrow's original application for employment with the District, he had not marked under special skills by "Boiler Man" category as one of his special skills. Barry noted that the fact that Zedrow said in the interview that he had some experience with boilers was inconsistent with his original application form. Further, Barry noted that the application form did not indicate prior experience in supervision of custodial or maintenance employees. Another inconsistency -- Lane mentioned his supervisory experience at Milwaukee Psychiatric Hospital, but his employment application or resume says nothing about that employer. Barry did not note that inconsistency.

Barry testified that Zedrow was competing with Lane, who demonstrated both boiler knowledge and experience and supervisory experience, and with Christian, who had ten years of custodian and head custodian or sanitation manager experience. Barry said that Zedrow's qualifications were not stacking up with Lane and Christian. Although Zedrow had supervisory experience in the insurance business, Barry stated that the selection committee valued the experience that Lane had in the custodial field and Christian's experience in the field more highly than supervisory experience in a different field. Barry was aware that Zedrow was filling in for Johnson as Head Custodian when Johnson was ill, although he did not believe that Zedrow was doing Head Custodian duties.

Barry accepted the recommendation from the selection committee that Lane, Christian and Tall should get the jobs. In the processing of Zedrow's grievance, Acker gave the following reason in writing to Union Representative Steve Cupery on August 19, 1992:

Mr. Zedrow was not rated as qualified by the selection committee. The committee found that the candidate did not possess the mechanical or supervisory qualifications required for the position. On qualification A, the candidate indicated that he would require training in order to gain the necessary knowledge of heating and ventilation systems. The candidate's job application form indicates no boiler operation skills or experience. On qualification B, the candidate has had little or no experience as a supervisor of custodial, housekeeping or building operations. On qualifications C and D, the candidate's answers were less specific and therefore less persuasive than the responses of other candidates.

Regarding the "D" qualification, relating to good public relations, Zedrow had stated in his interview that one is courteous to people, bend over backwards, taxpayers are the bosses,

and that the custodians are a tremendous crew. Christian gave similar answers, saying the customer is always right and that the schools were in good shape and she saw no need to make changes. Barry agreed at hearing that those answers provided the same amount of specificity.

While Zedrow's grievance was filed in a timely manner, there was a long delay between the grievance filed in August of 1992 and the first day of hearing in January of 1995. The Union requested certain information from the Employer which was refused, and the Union filed a prohibited practice complaint, alleging that the District failed to provide the Union the information it needed to represent its members. Cupery stated that a WERC mediator was assigned to the prohibited practice complaint regarding failure to provide information. The Union was seeking the interview notes and the original applications of the job applicants. There were some ongoing discussions with the WERC mediator about the complaint. On April 12, 1994, Cupery advised the WERC that the Employer provided the information and the Union withdrew its complaint.

The grievances of Zedrow and DiTorrice finally made their way to the final step of the grievance process, before the School Board, on June 15, 1994. On June 9, 1994, Barry prepared a memorandum to give to the Board on June 15th, and it states in the relevant part:

. . .

5.11.1 That the qualifications of the candidates were not equal, and therefore, seniority was not a compelling factor in the head custodian selection.

The selection committee made an informed judgment regarding the qualifications of each candidate based on personal interviews and such documents as resumes and job application forms. Upon review, the committee found that the applicants were not equally qualified. Specifically, the committee found the following:

1. Qualification A requires the head custodian to possess a knowledge of the operation of heating and ventilation plants. The committee found that the qualifications of the candidates were not equal. Mr. Rick Lane was recognized as more qualified than the other candidates based on his license to operate low/high pressure boilers and his experience at Moody Bible Campus and Cicero Bible Campus as a maintenance man and supervisor. Mr. Tall was recognized as more qualified than the other candidates based on his two years of training at Pewaukee Elementary School as the head custodian in that building.

2. Qualification B requires the head custodian to possess an ability to plan, assign and supervise the work of subordinates. The committee found that the qualifications of the candidates were not equal. Ms. Cheryl Christian, Mr. John Tall, and Mr. Rick Lane were recognized as being better qualified than the other candidates. Ms. Christian worked in housekeeping and operations at Olympia Page 18

MA-10016

Resort for twelve years, four and a half as a supervisor of approximately thirty

custodians. Mr. Tall worked for two and a half years as the head custodian at PES supervising a staff of 5. In addition, Mr. Tall taught for thirty years as a music teacher at PHS. Mr. Lane was a supervisor and maintenance man at Moody Bible Campus for three years and at Cicero Bible Campus for three years.

3. Qualification C requires the head custodian to demonstrate an ability to get along with teachers, pupils and other employees. The committee found the candidates nearly equally qualified based on the information presented. However, the committee noted with disfavor that Mr. DiTorrice expressed dislike for middle school and high school students. The committee felt that any such general disregard for a group of students was inconsistent with the role of a head custodian. The committee viewed Cheryl Christian's experience at Olympia Resort as a positive.

4. Qualification D requires the head custodian to create effective public relations. The candidates were considered equally qualified based on the information presented.

5. Qualification E requires the head custodian to operate certain vehicles and equipment. All candidates were considered equally qualified based on the information presented.

The selection committee contends that it acted in a manner consistent with the contract. As required, each candidates' training was considered as a prerequisite for the head custodian position. As required, the committee weighed carefully the previous experience of each candidate. The selection criteria were based on the job descriptions found in the contract. As a result of this process, the committee found that the qualifications of the candidates were not equal. The head custodian positions were awarded to Mr. Tall, Mr. Lane and Ms. Christian.

. . .

The above memorandum was not given to Cupery. The grievance was processed to arbitration.

### THE PARTIES' POSITIONS

#### The Union

The Union argues that the Employer failed to identify and equitably apply standards to determine whether the candidates for Head Custodian were qualified or not. Zedrow was disqualified because the Employer claimed he needed training of heating and ventilating systems, but the same requirement for additional training existed for Christian. The Employer never Page 19  
MA-10016

established a clear yardstick for measurement of boiler knowledge. All the Head Custodians do is to take three or four tests, monitor controls, adjust water with chemicals, push a reset button, bleed pumps, adjust temperature settings and call for help when things go down. Zedrow has

done the duties of monitoring, minor maintenance and testing before in the District and before coming to the District.

The Union submits that Zedrow was more qualified in terms of knowledge of heating and ventilating systems than was Christian and was as qualified as Lane, given the level of skill needed to do this job. Zedrow was not applying to be a boiler technician or to operate high-pressure boilers, in which case Lane would be more qualified. The Union believes that there is evidence to suggest pre-selection. The qualification summary sheet contained a question regarding a boiler license. Candidates had never been asked this question before, and there were no former Head Custodians who held such a license. There was no requirement for a boiler license within the County or Village, and there was no evidence that knowledge needed to acquire a license was related to the level of knowledge needed to do Head Custodian work. Further, the interview committee did not ask questions about the candidates' knowledge of specific procedures that they would actually do in the District.

It was Barry's suggestion that a question about licenses be added to the summary, and he knew of Lane's license and had access to personnel files where information about Lane's license was kept. The final draft of the summary was prepared after Lane had applied for the position to Acker, and Acker acknowledged that Barry spoke with him on this subject.

The Union wonders why Lane submitted a resume. He and Christian were the only ones to do so. Lane's resume is the same one he submitted to the District when initially hired and was not updated to indicate any internal boiler experience. The posting did not suggest that applicants submit resumes. Yet Barry considered the submission of a resume to be an important sign of initiative.

While Zedrow was also disqualified from consideration because he had little or no experience supervising custodians, housekeeping and building operations, the Union believes Zedrow had ability equal to or greater than both Lane and Christian. The contract with its job description refers to supervising subordinates, but the Employer -- without authority from the contract -- changed the yardstick and demands supervision of custodians instead of subordinates. The Employer argues that experience within a similar field is a reasonable predictor of ability. Yet the Employer failed to ascertain employees' claims about supervision. Christian testified to six years of supervisory experience at Olympia, but the committee members note that she stated four years during her interview. The District did not check with Olympia and there is no verification of the position she held there and whether or not it involved supervision. The contract requires candidates to have the ability to plan, assign and supervise the work of subordinates. The committee did not define "supervision" and it ascribed to this word authority and responsibility far greater than that given to the word when describing Head Custodian duties. Head Custodians do not hire and fire employees.

Lane was not disqualified even though his only alleged supervision of custodians is over 20 years old, claimed to occur when he was 19 years old, while a crew leader, reporting to a head custodian, with a job as a floor man, and in a position which is not on his resume. Yet committee

members claim that Zedrow's more recent work as head custodian should not be given the same weight as Lane's crew leader work. Committee members also claim that Lane supervised custodians when he himself says he did not. With respect to Christian, there was no evidence that the work performed by employees at Olympia involved the same scope of duties performed by Pewaukee custodians. The employees there held minimum wage jobs, many of the high school students, with an extremely high turnover rate, and none of that stimulated any curiosity with committee members.

The Union maintains that the Employer failed to weigh experience carefully as required by contract. The contract speaks of ability to plan, assign and supervise assignments. Zedrow had experience in this area but it was not afforded weight by the committee members. The record shows numerous inaccurate and contradictory assessments of the candidates' experience. The Employer disregarded the candidates' experience at Pewaukee. Zedrow had been a satisfactory employee for four years, while Christian had been there just one year at the time of the promotion. Lane had a limited range of experience at the District working almost exclusively on floors at the high school. Zedrow had worked in three different buildings, had filled in for a Head Custodian, and had monitored heating/ventilating equipment at the District. The Employer failed to weigh carefully this factor.

The Union asserts that the contract establishes a trial period to test ability. This is the express purpose of 5.2.4, and prior Head Custodians were given such a trial period and it was denied to Zedrow. The Union believes Section 5.2.1.1 is not applicable, although the Employer invoked the use of this clause through its August 19, 1992 letter to disqualify Zedrow because he would need training. The Employer did not equitably apply this standard as it promoted Christian without enforcing a standard that training was a prerequisite. This prerequisite was not applied in the past, for example, to John Tall.

The Union has raised evidence of animus and discrimination to show the willingness to violate the contract or the state of mind that impacts decision making in a manner that violates the contract. The Union believes that Acker made the statements about getting rid of the Union and hiring younger people full of "piss and vinegar." Zedrow provided evidence of these statements to the state equal rights division investigator and the WERC.

Arbitrators have held that the difference between a selected junior applicant and the senior applicant must not only be substantial, but also objectively determinable. The Employer must make a fair and reasonable effort to judge ability, qualifications and work records between applicants in a logical manner which avoids discriminatory treatment. The Union believes the criteria used by the Employer to assess the relative abilities and qualifications of the applicants are not related to the job duties of a Head Custodian. The Union states that the "attitude" and "potential" factors applied by management were not spelled out in the contract and were

unreasonable and arbitrary. There is considerable evidence that the committee was influenced by things such as dress and grooming. These factors were counted against Zedrow. Attitude and/or demeanor was applied in an arbitrary and discriminatory fashion and the appearance of the

Grievant was a significant consideration in the relative ranking of applicants.

In conclusion, the Union states that the Employer violated the contract when it promoted both Lane and Christian over Zedrow to the Head Custodian positions, and it asks that Zedrow be promoted over both candidates and be made whole for any and all losses suffered.

### **The Employer**

The District states that as a general rule, arbitrators will defer to management's assessment of whether an employee is qualified for a particular job, unless the decision is unreasonable, arbitrary, capricious, discriminatory or made in bad faith. The District used a fair and objective procedure to determine which candidates were qualified for the position of Head Custodian consistent with contract language and the job descriptions in the contract. The interview team had no preconceived ideas about the applicants, and all applicants were given the same chance to interview and present information and documents to the committee during the interviews. The committee made their decisions based only on the facts and information presented at the interview in conjunction with information provided by the applicants before and after the interviews. Because the committee found that the candidates were not equally qualified, the contract language requiring use of seniority as a tie-breaker was not applied.

The District submits that the Grievant was not qualified for the position of Head Custodian because he lacked the essential knowledge and abilities needed for the position as found in the job description. The contract states that when all qualifications are equal, then and only then seniority determines which employee will be promoted. The Grievant was not equally qualified with Lane or Christian, and he did not have the background, training, skills or experience to be rated as equally qualified with those two.

Grievance arbitrators recognize that there are several different types of seniority clauses. The "modified seniority" clauses in which factors other than seniority are also to be taken into account are more prevalent than strict seniority clauses. Modified seniority clauses fall into different categories, and the parties here have agreed to a "relative ability" clause for filling vacancies. The contract language requires the Arbitrator to compare the abilities of the applicants to determine if they are equally qualified for the position of Head Custodian.

The interview committee was required by contract to make a comparison of the relative qualifications of each candidate, and it made such an evaluation. Arbitral precedent recognizes that evaluation and determination of the relative qualifications of each candidate is inherently a subjective process. The committee used fair and objective considerations to determine whether the Grievant was qualified. The Grievant failed to offer any demonstrable skills, abilities or experience in four of the five areas of essential skills.

First, the Grievant has absolutely no experience supervising the work of custodial subordinates, according to the District. While he claimed to have supervisory experience in the insurance industry, the express language negotiated by the parties indicates that it is essential that the Head Custodian have experience supervising maintenance and custodial employees. While the

Grievant served as a lead custodian at Carroll College, he was never a head custodian there and he himself described this work as that of "custodian" in his employment application with the District.

Also, the Grievant never informed the interview committee that he was allegedly performing the duties of Head Custodian during Johnson's medical leave and only raised this allegation two years after he interviewed for the job. He never grieved the rate of pay that he claimed to be the Head Custodian and he was never appointed by any administrator from the District.

In contrast, both Lane and Christian had extensive prior experience supervising custodial and maintenance employees. Christian's detailed response to the interview committee's questions regarding prior supervision must be contrasted with the Grievant's incomplete response to the same questions. The Grievant failed to provide the committee with specific and detailed information or any information, and instead, continually referred the committee to his personnel file.

The committee found that Christian had significantly more relevant experience than the Grievant in supervising the work of subordinates. Not only did she have more years of experience supervising more employees, she also had significant experience performing the same duties as a Head Custodian performs, namely supervision of custodial employees. The Grievant never claimed any previous experience supervising custodial employees. Lane supervised custodial employees at two previous jobs, while the Grievant claims to have supervised nine employees in the insurance industry. While both Lane and the Grievant supervised the same number of employees, Lane supervised custodians -- the same group of employees that the Head Custodian in the District supervises. The job description states that the ability to plan, assign, and supervise the work of custodians is an essential qualification for the Head Custodian position.

Moreover, the District adds that the Grievant did not satisfy the qualification for considerable knowledge of heating and ventilating systems and he told the committee he would need training in this area. The District admits that Christian did not meet this qualification either, but Lane clearly had superior experience and training in this area. The Grievant received a neutral ranking on the ability to get along with teachers, pupils and fellow workers, while Lane received a very favorable rating on this qualification. He indicated that he had received very positive comments from teachers and administrators on the floor plan he implemented at the high school, and he was the most qualified candidate for this particular job qualification.

Finally, the District states that the Grievant received an unfavorable rating on the qualification relating to public relations. Each of the committee members testified that the Grievant appeared disinterested and unenthusiastic. Lane and Christian presented very positive

image at their interviews -- they were composed, confident and well-prepared. The Grievant did not project the positive image that the District wants for the Head Custodian who has regular contact with the public. When the Grievant's abilities are compared to those of Lane, Lane received a high rating in four major areas. When compared to those of Christian, Christian received a higher rating in two major areas. The Grievant did not receive a more favorable rating

than Lane or Christian in any of the essential qualifications listed on the job description. The District has met its burden, and there is no evidence that the Grievant was equally qualified for the position with the successful candidates.

The District argues that it did not violate the collective bargaining agreement when it refused to give the Grievant a 90-day trial period. The employee has to meet the threshold of being qualified for the position when applying for it before being given 90 days to prove his or her ability. Employees do not have an automatic right to a 90-day trial period. Since the parties included the phrase "if all other qualifications are equal," seniority is only a factor in awarding a job to an internal applicant when all other qualifications between the candidates are deemed equal. The District is under no contractual duty to award the Grievant the position for a 90-day trial period so he can learn the position and acquire qualifications which he did not have and could not demonstrate on July 1, 1992.

The District claims that its procedure for determining whether the candidates were equally qualified was fair and impartial. Barry reviewed the contract language, looked at job descriptions, and selected four administrators to serve on the interview committee. Each of those administrators had considerable experience in conducting personnel interviews in a group setting. The use of an interview team has been accepted as a reasonable method to avoid discriminatory, unfair, arbitrary or capricious results. All candidates were asked the same set of questions and the interviewers could ask additional questions if they felt the information would be relevant and useful. The committee members individually rated the candidates as qualified or not qualified. No directive was issued telling them they had to find three candidates qualified. Barry carried out one additional step to ensure the fairness of the process and pulled the personnel files of the applicants and reviewed them with Acker in order to verify representations made to the committee by the applicants and to review any other relevant work experience applicants may have forgotten to reference.

Although the Union has accused the District of refusing to select the Grievant because of his union activities, this is a baseless assertion, the District states. Tall was a Union steward and a member of the Union bargaining team and he was selected for the position. Lane was promoted and he currently serves as a Union steward. In addition, the Union failed to present any evidence that age was a motivating factor in these promotions. This was a smokescreen by the Union to avoid the real issue -- that the Grievant does not possess the necessary skills and abilities to perform the functions of a Head Custodian.

**REPLY BRIEFS**

**The Union**

The Union responds to the District by first stating that the Employer erred in its claims about the duties performed by Head Custodians in the District. Christian's responsibilities at Olympia Resort of hiring, firing and disciplining employees are not the same activities that the Head Custodian would perform on a daily basis. The only involvement in hiring is that they sit in on interviews for custodian positions, but they have no authority to hire or discipline or discharge. Furthermore, the Union states that it is false for the Employer to claim that experience in supervising the work of custodian and maintenance employees is specifically listed as an essential qualification on the Head Custodian job description. The job description addresses the ability to supervise subordinates, and says nothing of experience supervising custodians. There is no reference in the contract or job description to supervising maintenance employees. Finally, the Employer erred when it claimed that Barry and Acker developed the questions for the summary sheet before any employees declared his or her candidacy for the position through the posting procedure. The Union established through Barry's own testimony that drafts of the summary sheet continued to be revised right up to a few days before the interview.

While it is claimed that the interview committee members individually determined certain candidates to be most qualified because of their high marks in specific qualification areas, there is no evidence that individual committee members ever rated and ranked candidates on each of the separate qualifications and then communicated such ratings to Acker and Barry. The claim as to whether candidates were rated individually or collectively is a matter of unresolved conflict. Bruce testified that there was a group discussion but all other committee members claimed no such discussion occurred. Moreover, the Employer's claim that each committee member determined whether a candidate was qualified or not was premised on the information provided before, during and after the interviews is incorrect. Bruce based his assessment of Tall entirely on his work experience with Tall.

The Union takes issue with the Employer's claim that the Grievant received an unfavorable rating on Qualification D. There is no evidence that there was any such rating on this qualification or that it was communicated to Barry and Acker. Barry's June 9, 1994 letter to the Board ranked all the candidates equal on this factor. Yet the Employer now maintains that there has been a change in the rating and Zedrow is ranked below the other candidates. Similarly, although the Employer claims that Zedrow was ranked below Lane on Qualification C, Barry's letter says the candidates are rated as "nearly equal" with no mention of Lane having any edge over Zedrow.

The Union also objects to the Employer's claim that the Grievant presented the interview committee with no previous boiler experience or training. The notes of the committee members all indicate that the Grievant provided information about his prior experience with boilers, that they were low-pressure boilers, that he performed water tests and had general knowledge of

heating and ventilating systems. He even described the names of boilers he worked with when tending them for the YMCA. While Zedrow monitored boilers in Johnson's absence, he never claimed he was promoted to the Head Custodian position. Now the Employer claims Zedrow was dishonest in his representations, but he gave an accurate credible account of what happened during Johnson's absence.

The Union further objects to the Employer's statement that Zedrow did not volunteer any information in the interview about his prior work history which would demonstrate he was qualified as a Head Custodian. Zedrow gave the committee considerable information. He stated that at Carroll College, he supervised employees. Bruce and Acker claim they were never told this by Zedrow, but Acker could not explain why his notes indicate that Zedrow supervised employees at Carroll College. While the Employer attempted to demean Zedrow's experience at Carroll by claiming that he worked as a "lead" as opposed to a "head" custodian, the Employer could never describe a difference between the two and failed to verify any difference with Carroll College.

Then, the Union notes, the Employer tries to cast doubt on the Grievant's credibility because his job application did not contain a reference to a lead custodial position at Carroll College. Lane said he was a crew leader at Milwaukee Psychiatric Hospital, but this did not appear on his resume and was not held against him. The Employer also tried to diminish Zedrow's supervisory experience at Carroll by noting he did not tell the committee he was ordering supplies or doing payroll at Carroll. Neither do interview notes indicate Lane told the committee these things. Finally, Zedrow gave the committee members considerable detail about his supervisory responsibilities at Northwestern National Insurance Company, and told them about planning, organizing programs, inspections and scheduling employees. The Employer's claim that Zedrow was not interested in the position or interested in learning new job duties and skills was never raised until the arbitration hearing.

The Union objects to the Employer placing greater importance on candidate experience during a 25 minute interview than experience as a custodian with the District. Both Lane and Christian were selected, in part, because of their performance during the interview. However, Tall's work experience was given weight, the type of weight the Union believes to be appropriate. It objects to the Employer's failure to give work experience the same weight with the Grievant.

The Union is not arguing that seniority should rule under any circumstances and that the Grievant should be given a trail period to prove his ability. The Union believes that contract clauses containing trial periods give greater latitude to the extent to which employees must be "equal" before seniority is determinative.

The Union believes the record supports its contention that the Employer acted in bad faith, unfairly, arbitrarily and treated the Grievant in a manner different than it did its selected candidates. The Employer arbitrarily made up rules not found in the contract when it came to

the weight given to interview performance, the failure to evaluate employee's work experience, disqualified the Grievant for failing to have sufficient experience in boilers while promoting Christian when she failed to meet the same qualification. The Employer was unfair when it gave weight to the resumes of Christian and Lane and then refused to allow the Grievant the opportunity to retrieve his resume from his personnel file during the interview. Tall did not submit a resume and no negative remarks were made about his lack of initiative. The Employer allowed the interview process to become an exercise in self-promotion. The employee who markets their professed abilities and experiences the best is the one who obtains the promotion.

### **The Employer**

The Employer responds to the Union by stating that the Union's brief is filled with arguments that are beyond the scope of this arbitration proceeding. The Union seeks to have this Arbitrator rule on issues that are both untimely and beyond the scope of the collective bargaining agreement. The Union has made accusations that the District violated state and federal employment discrimination laws and the Municipal Employment Relations Act. The allegations are beyond the Arbitrator's authority as recognized by Section 10.3.3 of the labor contract. The District cites eight issues it deems specious, such as whether the District failed to promote the Grievant as a retaliatory measure for his cooperation in an investigation of an age discrimination claim, whether the District failed to promote the Grievant because he was a member of the Union's bargaining team and a vocal support of the Union for several years and sought elimination of the two-tier wage system, etc. It is improper, inappropriate and prejudicial to raise these issues at this late date, and the Arbitrator should not be misled by the Union's ill-conceived attempts to obfuscate the issue -- whether the District complied with all the terms of the collective bargaining agreement when it failed to promote the Grievant to the position of Head Custodian in July of 1992.

The District states that the Union has misrepresented and misstated the facts in its lengthy and convoluted summary of the facts. While the Union's summary of the facts is replete with conjecture and innuendo, it offered no hard evidence to prove that the process used by the District to select the most qualified candidates for the positions of Head Custodian was discriminatory, arbitrary or unreasonable.

The District objects to the Union's argument that the District narrowed qualifications from the ability to supervise "subordinates" to the ability to supervise "custodians." The Union believes the District did this to pre-select Lane and Christian. However, the Union overlooks one simple fact -- the only subordinates that the Head Custodian supervises are the custodians. The use of the phrase "supervise the work of custodians" on the summary sheet is the equivalent of the use of the phrase "supervise the work of subordinates" on the job description. Even the contract uses the phrases "subordinates" and "custodians" interchangeably.

Although the Union argues that the Grievant performed Head Custodian duties when Johnson was ill, this argument is unsupported by the record. He was not appointed to the job, he did not receive the higher pay, and he did not perform the duties of the Head Custodian, such

as assigning work to other custodians, establish cleaning standards, inspect building areas, order

supplies, plan assignments and schedule preventative maintenance work. He never told the interview committee that he served as Head Custodian at the high school.

The District also takes issue with the Union's assertion that the Grievant was more qualified than or at least equally qualified with Christian and Lane. The Grievant had no prior experience supervising the work of custodians and the committee determined that Lane and Christian had significantly more relevant experience than the Grievant in supervising the work of subordinates. The District disputes the Union's assumption that Christian and Lane were told to submit a resume in response to the posting and there is no evidence to support that assertion. An applicant's level of enthusiasm and interest in the position is a factor in the qualification of the ability to create and maintain effective public relations.

The District did not take the position that a boiler license is necessary to be promoted to the position of Head Custodian. It used the license as an indication of an individual's skills and experience in working with heating and cooling systems. The Union's arguments about the District's motives for seeking information about a candidate's license is an attempt to distract the Arbitrator from the Grievant's lack of experience in this area when compared to Lane's skills and experience.

The District also states that the Union relies on innuendo and unsubstantiated statements about past contract violations to show that the District must have violated the contract now. The Union refers to the District's propensity to retaliate against employees perceived hostile to the District or its managers, and other evidence of animus and unfair treatment of other employees. There is no evidence that the District violated the contract in the past. The Equal Rights Division did not rule on an age discrimination claim. The prohibited practice complaints were settled voluntarily. The Union implies that the Grievant was not promoted because he served on the bargaining team that eliminated the two-tier wage system, but it fails to mention that Tall also served on the bargaining team and Tall was promoted. The Union makes the sweeping statement that the District engaged in age discrimination by failing to promote the Grievant but it filed no discrimination charge and ignores the fact that the Arbitrator has no authority to decide issues of age discrimination.

Finally, the District states that if the Arbitrator finds that the District should award the Grievant the position of Head Custodian, it requests that the Grievant be denied any back pay for the two-year time period during which the Union failed to process this grievance. The underlying grievance was filed on August 13, 1992, and an amended grievance was first filed on April 8, 1994. While the Union may argue that this time delay was caused by the District when it failed to provide requested data to the Union, the District played no part in the decision to amend the original grievance in 1994. Although the Union may amend its grievance, the District should not be penalized for the Union's sloppy pleading of its first grievance. The facts that led the Union to amend the grievance in 1994 were known in 1992.

Page 28  
MA-10016

### DISCUSSION

The District correctly recognizes that the relevant contract language here is a modified

seniority clause, and that the parties have agreed to a "relative ability" clause for filling vacancies, pursuant to Article V, Section 5.11.1 of the collective bargaining agreement. Under this type of clause, the senior employee's ability must be equal to the junior employee's ability, and seniority will be taken into consideration only where the ability of the two employees is equal. It is the term "equal" that apparently gives the District some trouble in this case. It recognizes that no two people are perfectly equal, and relatively equal is the standard. Some arbitrators interchange "equal" with "relatively equal" or "substantially equal." Arbitrator Luskin, in INTERLAKE STEEL CORPORATION, 46 LA 23, stated a standard to measure relative equality, one that has been repeated many times:

The term "relatively equal" when applied to the factor of "ability to perform the work" has been interpreted, defined, and applied on numerous occasions by many arbitrators. In many instances the term "relatively equal" has been defined to mean that the Company must establish the fact that one employee has substantially or significantly greater ability to perform the work than does a senior employee before the junior employee can be promoted to the vacancy. . . . Although the term "relatively equal" has been given many definitions, including the application of the concept of a requirement that the junior employee must be "head and shoulders" above the senior employee before he can be awarded the job, all of the various definitions boil down to the fact that there must be a definite, distinct, substantial, and significant difference between two competing employees with respect to "ability to perform the work" in favor of the junior employee before the Company can award a vacant job to a junior employee where the senior employee does have the basic ability to perform the work.

The District also correctly states that an employee has to be qualified before being given the 90 day trial period called for in the contract. However, its assessment of Zedrow's qualifications is arbitrary and unreasonable. Not only does the record show that Zedrow was qualified to be promoted to the job of Head Custodian, he was substantially equally qualified with the candidates chosen who had less seniority.

The Arbitrator has carefully considered the transcripts, the exhibits, and the briefs of the parties and will not address every argument that has been made. For example, the parties argue over the lesser duties of a Head Custodian, such as ordering supplies and chemicals, signing time cards and payroll information, checking inventories, etc. They argue over whether Acker discriminated against Zedrow based on his age, as well as his role on the negotiating committee that successfully eliminated the two-tier wage structure. They argue over whether Zedrow filled in as Head Custodian in Johnson's absence, and what kind of duties he performed during that time. They argue over who knew what when, such as whether Lane and Christian were urged to submit their resumes with their applications, and whether Barry and Acker knew that Lane

had a boiler license when they drafted the questions for the interviews. And on and on it goes. None of these sub-issues plays a determining role in this decision and will not be dealt with in this Award.

This case is more than five years old and it's time to get on with it. The case centers on three main areas -- (1) boiler knowledge, (2) supervision of subordinates or supervision of custodians, and (3) attitude and demeanor. It is those areas that the Arbitrator will address, because if the District's case does not stand up to its contentions in those areas, the rest of the sub-issues will not mean anything for the result here.

### **Boiler Knowledge**

First, the District contended that Zedrow lacked the essential qualification of having considerable knowledge of the operations of heating and ventilating plants. Zedrow admitted that he needed training in this area, that he was unsure of what the District meant by "considerable knowledge" and he told them of his prior experience, which included starting up boilers, testing the water and deliming it. Zedrow modestly and honestly could not claim that he had "considerable" experience in working with boilers. However, neither did Christian. In fact, she had less experience in working with boilers than Zedrow. Zedrow had prior experience with boilers at other places as well as at the District. He certainly had some knowledge, not as much as Lane had, but much more than Christian.

The fact that Christian was promoted despite lacking this qualification runs against the District's argument that Zedrow was not "equal" in qualifications to the successful candidates. The fact that prior Head Custodians, such as Tall, had no experience in working with boilers diminishes the "essential" nature of the qualification in the first instance.

However, while in the past the District has waived the requirement of considerable knowledge of the operations of heating and ventilating plants, it is entitled to consider this as a qualification where it still exists in the job description attached to the contract. It is acknowledged by all that Lane had superior knowledge and qualifications in working with boilers than either Zedrow or Christian. The fact that the District put a question on the interview summary sheet about having a license appears to be somewhat troublesome, since no one would need a license and there is no local authority that even issues those types of licenses. However, it is a harmless error where Lane's superior knowledge and experience in boilers would rise him to the "head and shoulders" level above both Zedrow and Christian in this area. However, Zedrow was certainly equally qualified in this area compared to Christian, as well as Tall.

### **Supervisory Experience**

The second area is the qualification of the ability to plan, assign and supervise the work of subordinates. The District claims that Zedrow was not equally qualified compared to Lane and Christian in this requirement. It is this area that gave the parties the greatest trouble, Page 30

MA-10016

because the three people at issue here -- Zedrow, Lane and Christian -- all had some supervisory experience. It is all different, and the District starts to make very arbitrary and unreasonable distinctions in this area.

Most troubling to the Arbitrator is the District's total failure to acknowledge Zedrow's

experience as a lead custodian at Carroll College. Nothing could be more on point in this decision regarding promotions. Yet the District goes through all kinds of rationale to try to ignore this very relevant background.

First, the District states that supervising custodians is the relevant experience it is looking for, even though the job description in the contract refers to supervising subordinates. Then, even when Zedrow tells the interview committee that he has supervised custodians, the Employer completely ignores this information and somehow deems it to be not relevant. The people on the interview committee tried to make a distinction between a lead custodian (at Carroll College) and a head custodian (at Pewaukee). However, they were making an arbitrary distinction without any basis to do so. They had no knowledge of the difference between a lead custodian at one place and a head custodian at another. While they made the analogy that Christian's supervisory experience at Olympia was similar to the work at the District, what could be more on point than the supervisory experience at Carroll College?

Zedrow told the interview committee that he had been the lead custodian at Carroll College for one year, and that the work included custodial and housekeeping work. The interview summary sheet specifically asked -- "Have you any experience as a supervisor of custodial/housekeeping operation?" The reference to "housekeeping" is somewhat odd, since there are no "housekeeping" duties at the District, and the Union speculates that this question was designed to support Christian's candidacy. Nonetheless, the question was answered by Zedrow in the affirmative, and it was still disregarded. Zedrow told the panel that he supervised five people and assigned work to them and trained them.

Why was such relevant information ignored? Acker testified that a lead custodian does not supervise. Herrell said he did not view Zedrow's supervisory experience at Carroll College the same as the Head Custodian at the District, while he considered Christian's supervisory experience at Olympia Resort to be similar to the kind of people she would be supervising at the high school. Herrell also did not equate Zedrow's lead custodian position with supervisory experience. Bruce assumed that Christian's level of supervision was higher than Zedrow's experience as a lead custodian, and saw a parallel between Lane's supervisory experience and the District's job. Bruce stated that he did not consider a lead custodian to supervise employees, even though Zedrow said he was supervising employees.

Let there be no confusion about job titles. Whether one is called a "lead custodian" or a "head custodian" or a "supervisor," it is the duties that are relevant, not the title. Certainly this interview panel -- some of whom had a lot of experience interviewing job applicants -- should know that the title one has held at a different location may or may not be the same as

what the employer is looking for. The assumptions made by the committee were unreasonable and arbitrary. Zedrow said he supervised custodians -- but the committee disregarded this information while making parallels between other job applicants' supervisory experience that included similar and potentially erroneous assumptions. For instance, there is nothing to show that the employees supervised by Christian were the same kind of employees that work at the District. In fact,

Christian testified that many of them were part-time high school students paid minimum wages and accordingly had a high turnover rate. The employees supervised by Lane were also part-time students, college students in this case. Zedrow, on the other hand, was supervising "custodians" -- the same type of people he would be supervising as the Head Custodian in the District.

The interview committee -- particularly Herrell and Bruce -- seemed to elevate the Head Custodian's duties to a more important function, perhaps in an effort to justify their judgment. There is virtually no difference between a "lead worker" and a "head worker" in many employment settings. The fact that the parties have always agreed that the Head Custodian is a position properly placed within the bargaining unit is evidence that the "Head Custodian" here is more like a "lead worker" than a supervisor. A true supervisor -- one that hires, fires, disciplines, and makes major personnel decisions -- would not be included in the bargaining unit at all. Therefore, someone who has done "lead" duties would have more relevant experience than someone doing the full range of "supervisory" duties. Zedrow's experience was more relevant than Christian's under that type of analogy, which the District failed to make.

The interview committee was also impressed with the number of people supervised by Christian -- 30 at any given time. Actually, she stated that she supervised three shifts, so presumably she did not see all 30 on her own shift, but she was responsible for scheduling 30 and seeing that the shifts were covered. Of the 30, there is nothing on the record to indicate how many of them were part-time high school students and how many were working with her on her shift. The Head Custodians at the District do not have a large number of custodians to oversee. Zedrow's experience with being the lead worker over five employees is just as relevant as Christian's experience with more employees.

The other attack on Zedrow's supervisory experience came from Barry, who testified that Zedrow's statement to the committee regarding his prior supervisory experience was inconsistent with his original application form, which did not include that information. It was unreasonable to hold that fact against Zedrow, where Barry did not similarly note that Lane did not put anything on his application about his supervisory experience at Milwaukee Psychiatric Hospital. The Employer seems to pick and choose what it wishes to regard or disregard, and this is arbitrary and unreasonable.

Further, the committee chose to disregard Zedrow's extensive supervisory experience in the insurance business, even though it knew that he had experience in planning, organizing and scheduling nine people. While the District states that supervising custodians is more relevant, the fact that one has been a successful supervisor in the past should be given some weight. The

tasks of supervising anyone have some overlap, such as being able to delegate work to others, seeing that others are completing the jobs needed to be done, etc. It was unreasonable to give no weight to Zedrow's prior experience, and the job description itself stated that one of the essential qualifications was the ability to plan, assign and supervise the work of subordinates. Zedrow

demonstrated that he had this qualification in two areas, and yet this was disregarded.

When Zedrow tried to point out his prior experience by referring to his resume which the District already had on file and which was only a few feet away from the interview committee, the committee rejected the opportunity to examine his resume. It was unreasonable for the committee to accept resumes from Christian and Lane and not consider Zedrow's offer to go get his own resume. It was especially unreasonable and arbitrary for Barry to state that Christian and Lane showed more initiative by attaching their resumes to their application for a promotion within the District. After all, when one is already working for an employer, and the employer has such information that is current except for the period of employment with that employer, it would be reasonable to rely on that employer's records. Furthermore, initiative in the application process is not a criteria for the job.

If the committee accepted and considered one person's resume, it should have accepted and considered all resumes. The fact that the committee had and could consider Lane's and Christian's resumes should have triggered some sense of fairness in them to get other resumes from the personnel files which were only a few feet away from them, especially after Zedrow mentioned it three times.

The record is clear that at a minimum, Zedrow was relatively equally qualified with Lane and Christian in the area of prior supervisory experience. One could argue that Zedrow was above Lane in this area and at least equal to Christian -- but that misses the point of judging qualifications in accordance with the contract. If applicants are relatively equal or substantially equal, then the senior person gets the job. It would be fair to say from the record that neither Zedrow, Lane nor Christian stood "head and shoulders" above one another in this category, and they should have been regarded as "equal" under the bargaining agreement for the qualification of ability to supervise subordinates.

### **Demeanor and Attitude**

The third area that this case centers on is attitude and demeanor. It is the most confusing area, because on one hand, the District admits that candidates were equally qualified in the areas of public relations and ability to get along with others, while on the other hand, it argues that Zedrow was not equally qualified in the area of public relations. Before the grievance went to arbitration, it went to the Board. Barry wrote the Board a memo on June 9, 1994, in which he stated:

Page 33  
MA-10016

. . .

3. Qualification C requires the head custodian to demonstrate an ability to get along with teachers, pupils and other employees. The committee found the candidates nearly equally qualified based on the information presented. However, the committee noted with disfavor that Mr. DiTorrice expressed dislike for middle school and high school students. The committee felt that any such general

disregard for a group of students was inconsistent with the role of a head custodian. The committee viewed Cheryl Christian's experience at Olympia Resort as a positive.

4. Qualification D requires the head custodian to create effective public relations. The candidates were considered equally qualified based on the information presented.

. . .

Barry underlined "nearly equally" and "equally" and these terms would fall within the contract language that says, "Any vacancy in the custodial or maintenance department shall be filled on the basis of seniority if all other qualifications are equal." (Emphasis added.) Barry understood the contract's term "equal" to mean "relatively equal." Thus, the District had admitted up through the processing of this grievance that Zedrow was equal to the other successful candidates in the areas of ability to get along with others and in public relations. Yet, at the hearing and in its briefs, the District argues that Zedrow received an "unfavorable" rating on the qualification relating to public relations.

The selection committee turned the process of judging qualifications into a personality contest, in which Christian and Lane shone. While Barry's letter to the Board on June 9, 1994, states that the candidates were found to be equally qualified in the areas of public relations and ability to get along with others, that is not the judgment of the committee members who stressed over and over again the attitude and demeanor of the candidates, the way they dressed, the way they sat in a chair before the committee. The words "confident" and "enthusiastic" and "zest" were used by the committee members. Christian particularly charmed them, as Acker said she was "just full of bubbly life" and Sprester noted twice that she "just bubbled." The committee forgot that they were looking for a Head Custodian, not a super sales person. The person who could pitch themselves the best did the best here. Herrell even noted that Lane and Christian were selling themselves through their positive attitudes and good demeanor. Further, he put down a note on how candidates were dressed because, he stated, it could be a determining factor if all other things were equal.

Sprester testified that Zedrow is a "very pleasant person." What more does the District need from a Head Custodian? It wants enthusiasm, energetic, zestful, bubbly personalities, apparently, even though this is not a stated job requirement and has no tangible relationship to

Page 34  
MA-10016

the position. One obviously needs to be pleasant and friendly. Zedrow is that and understands the role that he has to play to greet the public, work with others and make accommodations to teachers, principals, public and students.

Sprester was overly impressed by salesmanship in the interview process. Twice he mentioned that Christian just kind of bubbled. He thought Zedrow was too laid back. Herrell noted that Christian had a great sense of humor and that Lane had an excellent and confident

demeanor, and that demeanor was something that was very, very important to him. Herrell thought Zedrow was confident, but almost to the point of being blase. In other words, he was not sitting on the edge of his chair and showing great zest and enthusiasm. He was simply confident.

There is no basis for determining a Head Custodian position on how one dresses for the interview. The committee knew that these people were all at work and taking time off from their duties to come to the interview. Dressing in their regular clothes for their jobs would be perfectly appropriate. But the clothes, the demeanor, the attitude, all took on special significance in this case. This is what impressed the committee more than prior supervisory experience, prior knowledge and experience with boilers, ability to maintain effective public relations, or the ability to get along with teachers, pupils and fellow workers. The committee did not give much, if any, consideration to the candidates' work record with the District, and this tends to show that they based their decisions on how the candidates presented themselves in the interview, rather than their qualifications or their working experience.

One of the reasons for a modified seniority clause such as found in this labor contract is to make sure that qualified senior employees are not passed over by junior employees because of the personal preferences of managers. This case is a good example of the personal preferences overriding the common sense in evaluating whether qualifications are substantially equal, or whether there are definite, distinct, substantial, significant differences that elevate the junior employee to be head and shoulders above the senior employee.

There is nothing in the record that would tend to show that Zedrow was not qualified in this area, and there is plenty in the record to show that he was equally qualified with Lane and Christian in the area of public relations and the ability to get along with others. Barry even stated so in his memo to the Board, and this is the knowledge that the Board would have had in evaluating the grievance.

### **Conclusion and Remedy**

The District violated the collective bargaining agreement by failing to promote Zedrow to the position of Head Custodian. Zedrow was equally qualified with one of the more junior employees promoted, Christian. Lane could be considered to be substantially more qualified than either Zedrow or Christian because of his considerable knowledge of heating and ventilating systems, one of the essential qualifications for the position. The District was willing to waive

this requirement and did so in the past, such as for Tall, and did so in this case, for Christian. However, the qualification remains in the contract and Lane is the only candidate who meets this qualification. Therefore, Lane could be properly chosen over Zedrow. But the same is not true for Christian. Zedrow and Christian were equally qualified in all the areas of essential qualifications. The fact that Christian was more enthusiastic and full of zest is just not good enough to pass over Zedrow.

The District has argued that any remedy be limited to the date of the amended filing of the grievance. The original grievance was filed on August 13, 1992. No one argues that it was untimely. In it, Zedrow grieves that he was not selected for a building head custodian position. The grievance refers to two openings -- one at Asa Clark and the other at the high school. Then the parties got into a dispute over the right to certain information, information held by the District, which eventually led to the filing of a prohibited practice and a later settlement in 1994. In April of 1994, the amended grievance was filed to note that Zedrow applied for three Head Custodian positions -- one at Asa Clark, one at the elementary school, and one at the high school. The amended grievance is nothing more than a clarification noting that there were three openings instead of two. This has no bearing on the original grievance, because the District knew that Zedrow wanted a Head Custodian position, and it knew at the time of the filing of the grievance that it had three such openings, once Tall made it clear that he wanted to be transferred to Asa Clark. Whether there were three or two, the result was the same. Zedrow was not chosen, and he should have been selected for one of the positions because he was equally qualified. Having found he was equally qualified, his seniority should have then come into play and he should have been selected for one of the positions of Head Custodian.

Although more than five years has gone by since the filing of this grievance and the issuance of this Award, none of that lapse of time has been the fault of the Grievant. Therefore, the usual remedy will be an order to make the Grievant whole.

### **AWARD**

The grievance is sustained.

The Employer violated the collective bargaining agreement, specifically Article V, Section 5.11.1, by failing to offer the position of Head Custodian to the Grievant, Leo Zedrow.

The Employer is ordered to immediately offer the Grievant, Leo Zedrow, the position of Head Custodian, and to make him whole for any loss in wages and benefits by paying to him a sum of money for the difference in wages between his regular pay and the pay of the Head Custodian position, from the

Page 36  
MA-10016

date it awarded positions of Head Custodian to either Rick Lane or Cheryl Christian, to the date it offers the position of Head Custodian to Leo Zedrow, or to the last date of Leo Zedrow's employment with the School District if he is no longer employed there.

I will retain jurisdiction until December 19, 1997, solely for the purpose of resolving any disputes over the scope and the application of the remedy ordered.

Dated at Elkhorn, Wisconsin this 7th day of November, 1997.

Karen J. Mawhinney /s/  
Karen J. Mawhinney, Arbitrator

rb  
5578