

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**CUSTODIAL-MAINTENANCE EMPLOYEES,  
LOCAL 1750, AFSCME, AFL-CIO**

and

**SHEBOYGAN AREA SCHOOL DISTRICT  
BOARD OF EDUCATION**

Case 116  
No. 56616  
MA-10354

*(Ertel and Perez Grievances)*

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Appearances:

**Ms. Helen Isferding**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of Local 1750.

**Mr. Joseph Sheehan**, Director of Personnel Services, on behalf of the Sheboygan School District.

**ARBITRATION AWARD**

The Custodial-Maintenance Employees, Local 1750, AFSCME, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the Sheboygan School District, hereinafter the District, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The District subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on December 2, 1998 in Sheboygan, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by February 5, 1999. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

## ISSUES

The parties stipulated there were no procedural issues and to the following statement of the substantive issues:

Did the Employer violate the contract when it selected Wally Schneider to the position of C-3 at Grant Elementary School, rather than Verlin Ertel or Joe Perez? If so, what is the appropriate remedy?

## CONTRACT PROVISIONS

The following provisions of the parties' 1996-1999 Agreement are cited:

### *ARTICLE V – SENIORITY – JOB POSTING*

Section 1 – **Seniority** – Seniority for transfers, promotions, vacancies, and new positions shall be recognized.

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Section 3 – **Job Posting** – Notice of promotional vacancies or new positions shall be posted on bulletin boards for five (5) work days, and in the staff bulletin when, and if published, stating the area of work, shift, wage rate and qualifications. Employees interested shall indicate their interest, in writing, to the Director of Personnel Services. A new employee may not bid for any posted position during the first year of employment.

Qualifications being relatively equal, the senior employee shall be given the position. The employee receiving such promotion shall serve a four (4) month trial period. However, if the employee fails at any time during the trial period, he/she may be returned to his/her former classification before the four (4) months trial period is over. An employee who, after having been promoted to a new position, desires to return to his/her former position, may do so by stating in writing to the appropriate department head within the first thirty (30) working days after starting in the new position. If said employee feels dissatisfied, he/she may appeal the decision through the grievance procedure.

## BACKGROUND

The District maintains and operates a number of school buildings throughout the District and the Union represents the support staff of the District who work as custodians, maintenance staff, laundry, and kitchen help.

As a result of a retirement, a vacancy was posted in the position of C-3 head custodian at the Grant Elementary School in the spring of 1998. Four applicants for the position, Verlin Ertel, Joe Perez, Wally Schneider, and Bruce Becker, were interviewed for the position by Helen Mitchell, principal of Grant Elementary School and Wayne Kolzow, manager of Facilities Management Services in the District. In the interview process, the candidates were asked 23 questions and Kolzow and Mitchell then assigned a number from 1 to 4 to their answers. If all candidates received the same number for their response a zero was given to all and the question was not used in computing the average score. Kolzow and Mitchell determined that a minimum score of 3.0 was required to be considered qualified for the position. The score was determined by adding up the total number of points for the responses and dividing by the number of questions used. In this case, the applicants had the same score on three of the questions so that only 20 of the questions were used in the scoring. Becker scored a perfect 4.0, Schneider scored a 3.45, Perez scored a 2.45 and Ertel scored a 2.3. In scoring the interview questions, Mitchell and Kolzow took their own notes and graded the responses, and then reviewed personnel files to see if there was any information that confirmed or was contrary to the results of their grading. In scoring, they looked to see if there were significant differences in the responses of each applicant. Mitchell testified that extra weight was given for recent or current experience.

The seniority of the applicants was as follows: Ertel (hired 10/9/78), Perez (hired 8/29/94), Schneider (hired 6/25/95), and Becker (hired 7/22/96). Although Becker scored higher than Schneider, the latter was awarded the position based upon his seniority.

At the time of the interviews in April of 1998, Ertel had worked as a C-2 custodian for approximately four years at the Central Building, and 3 years, 9 months at Farnsworth School, and from 1986 to present, has worked as a delivery person in the District's Stockroom, delivering inter-school mail, supplies and materials and moving equipment and delivering meals to the schools. Perez has worked part-time since August of 1994 (four hours per day during the school year and 40 hours per week during the summer months) as a C-1 custodian at Pigeon River Elementary School. For approximately 10 years, Perez has also been responsible for the custodial and maintenance work at Temple Beth El. Schneider has been employed as a full-time C-2 custodian from June 25, 1995 until being awarded a C-3 position at South High School on the second shift approximately one and a half months before being awarded the C-3 head custodian position at Grant.

Ertel and Perez grieved the awarding of the position to Schneider. During the processing of the grievances, the Union requested a copy of the questions used in the interview process, however, the District refused that request on the basis that it intended to use the questions in the future.

The parties agreed to combine the grievances of Ertel and Perez for purposes of hearing. The parties were unable to resolve the disputes and proceeded to arbitration on the grievances before the undersigned.

### **POSITIONS OF THE PARTIES**

#### **Union**

The Union takes the position that the two Grievants are qualified and that the evidence shows that they were even more qualified for the C-3 position than was Schneider. The language of Article V, Section 3, is a “modified seniority” clause based upon “relative ability”. This means that approximate or near equality is sufficient to bring the seniority factor into play. Since the less senior employe, Schneider, is not substantially superior to either Grievant, he should not have been awarded the position.

The Union notes the “special qualifications” included in the posting for the position listing the required experience or training, as well as the desired experience or training, and asserts there are a number of problems with the District’s determination of the applicants’ qualifications in those regards. The “test” used in selecting Schneider over the Grievants was arbitrary, capricious and biased against the two senior candidates. The test was homemade, made up of questions the District refused to share with the Union or the Arbitrator. Without the test questions, it is impossible to determine whether the test was relevant or unduly difficult. Further, an interview test does not necessarily reflect the ability or inability to perform in a position of this type. Mitchell and Kolzow were not experienced testers, and the former conceded this was the first time she had hired anyone in a custodial position. Her testimony also indicated unfamiliarity with her building’s security system and H/VAC operation, yet she judged the candidates’ qualifications.

The test was subjective and biased. The scores were manipulated so that the Grievants would not obtain the required 3.0 score. Ertel, who received a total score of 49, should have been given higher scores based upon his prior custodial experience and having passed the Bennet Mechanical Aptitude Test, as well as his scheduling for meals, etc. The Union asserts that Perez, who was given a score of 46, should have received a 3 for question 14, (understanding of elementary students) based upon having rapport with students, and 3’s for questions 15, 19, 20 and 21, asking how the questions were posed and asserting he was never asked about the matters referenced in his personnel file. With those additional points, Ertel and Perez would both have received a 3.2 score. Becker’s receiving a perfect score of 4 on an interview test further demonstrates bias. From the testimony, it is evident that Ertel and Perez should have been considered qualified. The test was arbitrary in that it was designed to not give Ertel any credit for his approximately seven and one-half years of custodial experience.

After utilizing this arbitrary test, the District then mixed in whatever negatives it could find in the senior applicants' personnel files to further affect their scores. Although Mitchell's summary of the scoring was supposedly done at the same time as the scoring, the Union questions why the applicants were not asked to give their side of the story about matters found in the personnel files, and why letters that were "stale" or did not note that the employee received a copy, were utilized. Further, in Perez's file, his principal suggested in May of 1997 that he seek a full-time position, a positive comment that apparently was not considered. Documents placed into the record by the District as a basis for denying Perez's position actually highlighted his Jewish faith, i.e., comments regarding his accepting District policy on religious holidays and that he should wear an "actual faith headwear" rather than a baseball cap. The Union further asserts that it is more likely that Mitchell's summary was prepared for purposes of this hearing, rather than done simultaneously with the scoring. There were no references made by the District about items in the applicants' personnel file, attendance records, etc. when the administration gave its rationale at Step 3 of the grievance process for selecting Schneider, nor were they mentioned at Step 1. Thus, those items should be disregarded.

The assertion that Ertel showed no initiative since he did not apply for overtime in the custodial area was also never mentioned at prior steps of the grievance procedure. Further, the letter of the maintenance supervisor indicated that overtime would be given to "employees who normally work in that specific building or department - and . . .it will be filled by those in that classification first." Thus, Ertel was faulted for not taking overtime that he probably never would have received. Further, the letters to Ertel and Perez cited by the District were sent after the decision had been made to fill the position and are irrelevant.

The Union also asserts that the arbitrariness of the test is demonstrated by the scores given to Schneider. He received a 2 on question three (scheduling) with the notation of "no indication of experience." Conversely, Ertel received a one on question five (boiler operation) for having taken a boiler class. It is further demonstrated by the fact that Ertel, in a previous arbitration where he had sought a C-4 head custodian position, was deemed qualified by the arbitrator. Thus, in order to keep Ertel from being deemed qualified for the C-3 position, the District decided not to give him credit for past experience.

By failing to have Schneider testify at the hearing and producing only hearsay evidence as to his qualifications, the District has failed to demonstrate that Schneider is head and shoulders above the Grievants. The Union compares the qualifications of the Grievants and Schneider, noting the classifications they have held with the District, their supervisory, boiler, and security experience and training, their outside work experience, and their education. Looking at the required and desired experience or training, the Union asserts that both Grievants meet those basic qualifications and are as qualified or more qualified than Schneider.

From the evidence, Perez is more educated than Ertel or Schneider, and Ertel shows more education than Schneider, there being no evidence at all as to Schneider's education. Both Grievants had more custodial experience than does Schneider, and Schneider had not yet successfully completed his trial period as a C-3 at South High School at the time he applied for this position.

The Union asserts that the "test" given by the District may not be used to change the requirements of the job, nor can it be the sole factor in determining fitness and ability. Elkouri and Elkouri, *How Arbitration Works*, 5<sup>th</sup> Ed., p. 849. Here, the District changed the job posting requirements through its test when it required recent experience and the test should be given little or no weight. In ROCK COUNTY, an award in which the contract language required only that the employe be "minimally qualified" for seniority to prevail, the arbitrator discounted the employer's test where it was not placed into evidence and employer witnesses testified there was no key to guide the administration of the test, nor were there right answers, and the source of the test was unknown. The arbitrator held that the "minimally qualified" language placed the burden upon the employer to demonstrate that the senior employe was not competent for the job. While the Union concedes that it must first demonstrate that the Grievants are qualified, it is the District's burden to prove them unqualified. As in the ROCK COUNTY case, the Grievants' experience here is greater than that of the successful applicant, and the Arbitrator should find no reason to disqualify them for the position. Similar to ROCK COUNTY, the Arbitrator should set aside the results of the test, and the decision based thereon, and grant the grievance.

With regard to the prior awards between these parties, the issue was the meaning of "qualifications being relatively equal". Neither Behnke, nor Ertel, were deemed unqualified, rather the successful applicant was deemed more qualified. In the prior award involving Ertel, he was deemed by the arbitrator to be qualified for a C-4 position, with more responsibility in a bigger school. Ertel's grievance was only denied because the successful candidate's qualifications were found to be substantially superior based on past work experience and ancillary education in custodial matters.

In its reply brief, the Union first asserts that the District's brief states as "facts" matters that were not part of the record. In that regard, the Union references the District's listing of the applicants' responses to various questions in the interview. Looking at those listed responses demonstrates the difficulty one has, not knowing the exact questions being asked, in judging the responses months later. An example is the answer listed for Perez under item 21 (general knowledge of position's responsibilities) that he responded "90 percent of the time" for which he received a score of 1. Without knowing the exact question that was asked, it cannot be determined whether his answer was more correct, and perhaps more honest, in responding to a question about a new job.

The Union again objects to the District's listing responses of the applicants that are not substantiated by the record. The Union also does not recall there being testimony regarding the District's assertion in its brief that supervision by Ertel is limited to a pre-determined work schedule in the warehouse, nor any testimony about Schneider's apartment building maintenance, cited by the District in its brief.

The Union also disputes the District's assertion that it did not give a "test". According to *Robert's Dictionary of Industrial Relations*, 3<sup>rd</sup> Ed., the test is "any device or questionnaire, written or oral, for the purpose of measuring a person's abilities, interests, aptitudes, and other qualities for the purpose of hiring, placement, or special training." The Union questions that if it was not a test, what was it that the Grievants allegedly failed?

Finally, the Union disputes what it feels is the District's mischaracterization of the contract language and the prior arbitration awards. Those awards involved qualified candidates, and not as the District asserts here, unqualified candidates. The Union questions how the District can say that Schneider, at 3.45 is substantially higher than Ertel at 2.45, when the spread is the same 1% that would have promoted Ertel if he had received the minimum score of 3. In its Step 3 response to the grievance, the District conceded that a 1% difference in scoring is "relatively equal" when it stated that if Ertel or Perez had passed, they would have been selected. Further, if the requirements for being a C-3 is being a C-1 or C-2, that should have been stated on the job description as a requirement, but was not. The Union notes that as a delivery person, Ertel is making \$13.07 per hour, while a C-3 base pay would be \$13.00 per hour, requiring him to take a \$.07 per hour cut. As a C-2 he would have had to have taken an \$.82 an hour cut to do custodial work again. There is no reason that an employee should be required to take such a pay cut after having had successful experience at that level previously. Finally, the District's assertion that the "central consideration and primary basis for Schneider's selection is "demonstrated success and experience in a C-3 position" is inaccurate. Schneider has not demonstrated such success because he had not completed the four-month trial period in the C-3 position at the time he was awarded this position. The Union requests that Ertel's grievance be sustained, or in the alternative, if not granted, that Perez's grievance be granted and the successful grievant be made whole.

### **District**

The District takes the position it did not violate the Agreement. Article V, Section 3, of the Agreement has been previously interpreted to provide that when qualifications of applicants for a vacant position are not relatively equal, a less senior employee with superior qualifications may be selected. In a factual context very similar to the instant grievances, the arbitrators in the prior Ertel grievance and in the Behnke grievance found that Article V, Section 3 permitted the District to assess the relative ability of the candidates when filling the head custodian position through internal posting. In Ertel, the arbitrator held that where a

junior employe's qualifications are substantially superior, he/she may be promoted over a more senior employe. The arbitrator in Behnke specified that "seniority governs only where the qualifications of competing candidates are substantially or about equal." That arbitrator also found that the Union had the burden to establish the unreasonableness of the District's decision.

In the Ertel grievance, the arbitrator ruled that the District properly promoted the junior employe to the position on the basis that his work experience and educational training was superior to that of Ertel. In the Behnke grievance, it was undisputed that both applicants were highly regarded for their mechanical skills and working knowledge, however, the District determined that the junior applicant had significantly greater intangible qualifications, such as creativity, problem solving, etc. The head custodian job description specifically called for such qualities, and the arbitrator observed that a willingness to learn, a showing of initiative, and capacity to assume responsibility are valid considerations in evaluating applicants. Concluding that past performance may predict future performance, the arbitrator found that the junior applicant's intangible qualifications made him a significantly superior candidate.

Those decisions demonstrate that the District may consider a variety of criteria in determining an applicant's qualifications, including work experience and ancillary education, as well as intangible qualifications such as responsibility, leadership, creativity, initiative, etc. In this case, the District identified a number of selection criteria. Applying those criteria to the applicants, it is evident that the less senior employe had superior qualifications, and the Grievants were not qualified for the appointment.

The District asserts that although it had the authority to do so, it elected not to select the most qualified candidate and instead selected the best qualified candidate having the most seniority. Mitchell testified that Becker was by far the most qualified candidate, but also the least senior. Even though the District could have selected Becker under the prior decisions, it attempted to afford weight and deference to the seniority clause and selected Schneider, since he was substantially better qualified than the Grievants and had more seniority than Becker. While giving due weight to the seniority clause, the District declined to appoint an unqualified applicant on the sole basis of greater seniority.

The District did not administer a "test" requiring some form of validation when it used the interview process. Mitchell testified that the job description for the C-3 head custodian position was analyzed and the essential job tasks of the position identified. A series of questions intended to elicit the qualifications of each applicant with respect to those essential tasks were then developed. The questions were asked of all the applicants and the responses rated on a numerical basis. Total scores and averages were then developed for each of the applicants. Based upon his total qualifications presented in the course of the application



process, along with his average score, Schneider was determined to be the best qualified applicant. His average score was a full point higher than either Ertel or Perez, and well above the minimum 3.0 identified as the minimum qualification score. The evaluation process was undertaken in an open and forthright manner, and in many instances Ertel scored at the same or higher level than that of Schneider. The result of the process was not predetermined, and the questions were not intended to confirm a preselected candidate. The Agreement imposes no limitations upon the authority of the District to determine the means through which it will assess qualifications and in the absence of such limitation, the Union may not successfully object to the selection procedures.

The qualifications of Schneider are “far superior” to those of either Grievant. Schneider received a substantially higher interview score than either Grievant and a comparison of the qualifications shows Schneider is substantially better qualified. Further, there are aspects of the records of both Ertel and Perez which disclose they are unqualified. Ertel was last employed as a C-2 custodian in 1986, and since then has been employed in the District’s warehouse as a delivery person, a completely dissimilar position. Mitchell testified that the management and employe supervision background of Ertel is limited to implementing a pre-determined schedule within the warehouse, and his last contact with HVAC systems was in 1986. While Ertel took a class with respect to boiler operation, it was in 1982, and he has no record of ever operating such a system. Ertel’s last experience in being responsible for locking a building would have been prior to July of 1986, and he has no experience with regard to building safety. His last performance evaluation as a C-2 custodian could be characterized as mediocre, with major weak points identified as self-motivation and confidentiality. Further, his evaluations as a deliveryman may be characterized as adverse, with problems identified while he was a custodian apparently still existing. In his interview, Ertel demonstrated he has little initiative, stating he compels himself to promptly process orders, otherwise, they would likely sit for a while. When offered the opportunity to perform overtime custodial work in January of 1997, Ertel failed to respond and did not take advantage of this training opportunity until after the selection decision had been made. Further, the record establishes that Ertel had a “very extensive” record of absences. Due to the nature of the responsibilities of an elementary school head custodian, it is essential that the person in the position attend work regularly with few, if any, absences during the school year.

Perez has worked part-time as a C-1 custodian, which is basically a cleaner with no responsibility for leading employes, scheduling work, or exercising oversight. However, he is probably more qualified than Ertel with respect to the technical aspects of the C-3 position because of his recent custodial experience. With regard to the “intangible” aspects of the position, however, Perez ranked lowest of the applicants. He received a two-day suspension in March of 1996 for inappropriate comments directed at the school principal arising out of a failure to lock several building doors. In December of 1997, he received a lengthy counseling

memorandum regarding complaints by staff members, inappropriate labeling of a bleach container, communicating with the head custodian, courtesy toward other employes, and handling requests for assistance from teachers. He also received a written warning in March of 1998 regarding the potential consequences of falsifying a time sheet relating to sick leave. The "essential functions" section of the job description states that the head custodian must have "excellent people skills" and "positive public relations". The head custodian has to respond not only to the requirements of operating and maintaining the school physical plant, but also to the requirement of students, faculty, staff and administration for custodial services. Positive interaction with others is essential. Perez has demonstrated a serious difficulty in that regard, especially as to his attitude toward supervisors. Further, in the course of the interview, Perez stated he understood the job description for the C-3 position "90 percent of the time". His attendance record, if converted to a full-time equivalency for a comparison, would be similar to that of Ertel.

Both Ertel and Perez seek to skip over the intermediate C-2 position in favor of immediate appointment to the C-3 head custodian position. Perez has been urged to seek a full-time C-2 position, but has failed to do so. While Ertel has held the C-2 position, he left it in 1986 for a completely dissimilar position, but now seeks immediate appointment to a head custodian position without any recent experience as a custodian. In contrast, Schneider worked for two years and seven months for the District in the C-2 position prior to assignment to the C-3 position at South High School, which he subsequently held for three and one-half months prior to his selection to this position. He has received consistently positive performance evaluations, has had formal training in boiler operation and regular responsibility for building safety and security. Schneider had the highest interview rating in all aspects of personal relations, has recent experience in both the C-2 and C-3 positions, and has demonstrated success and experience in the C-3 head custodian position. This was the "central consideration" and primary basis, for his selection. Thus, Schneider must be viewed as being substantially more qualified for the C-3 head custodian position, while the Grievants are not even minimally qualified.

In its reply brief, the District asserts that determining qualifications and the manner in which they are assessed are matters within the exclusive authority of the employer. The applicants were interviewed, not "tested", with respect to their qualifications in terms of the position's job description. The District has no obligation to disclose the interview questions to the Union, as this would compromise the interview process for filling future vacant positions. The applicants and the Union were advised of the subject matter of the interview questions and the manner in which the qualifications were assessed. Mitchell's qualifications with regard to security systems, HVAC and other maintenance and operational requirements are not in issue, rather, the issue is the qualifications of the applicants to provide those services in the building for which Mitchell is responsible. Mitchell testified she has over 10 years of experience in

hiring employes, and she is certainly qualified to assess the ability of the applicants to meet the custodial/maintenance and operational requirements of her building.

The C-3 position is not simply a manual labor job; verbal communication skills are an essential component of the job and those skills were appropriately assessed in the interviews. The Union misstates the testimony of Mitchell. She did not testify that if three people scored the same, and another slightly below four, that person automatically scored a "one". The applicants were assigned scores merited by their responses and no answers were automatically marked down. A score of three as the minimum qualification was established prior to the interviews.

The Union has also attempted to readjust the Grievants' scores. Ertel was not given a higher score for his prior work, as that experience was gained at least 12 years prior to the interviews. Regarding his Bennet Mechanical Aptitude Test results, Ertel did not present those during the course of the interview. Ertel was also not assigned a higher score based on scheduling employe meal breaks, as that was not the equivalent of work scheduling. Perez scored low regarding understanding of elementary students and problem solving on the basis of his responses and a review of his employment history indicates that rapport is not one of his strengths. Also, the District could reasonably expect that Perez would understand the requirements of the position he was applying for, and his indication that he understood 90% of the C-3 job description rated a score of one.

While the Union alleges bias on the part of the administrators conducting the interview, it has the burden of proving that bias and has not done so. The job posting announcement identified the requirements of the position, including custodial training or work experience in that field and building safety and security, and there is nothing in the posting or the Agreement that prohibits the District from giving more weight to recent experience in those areas in assessing the relative qualifications of the applicants. The disciplinary and performance records of Perez also were decidedly relevant considerations, and there was no indication that he was not aware of the documents in his personnel file.

The District disputes any suggestion that Perez was "hassled" about his religion. Perez was directed to comply with District policy, which policy conforms to law. The inability of Perez to accept such direction clearly impacts upon his qualifications as a head custodian.

As to the alleged failure to disclose its case to the Union at the Step 3 grievance conference before the Board, the District asserts that neither party was required to disclose its entire case, and neither party did so. The manner in which the administration presents its case in the course of the grievance conference does not affect the admissibility of information introduced at arbitration, nor diminish its impact.

Ertel's failure to sign up for overtime work within the buildings was relevant as to his motivation, qualifications to perform the work, and his interest in performing the work. His assertion that he did not sign up for the overtime upon the assumption that he would never be offered the work is unbelievable. The Agreement specifically requires that additional overtime hours be based upon overtime lists which are developed upon interest and qualifications. Ertel was invited to sign up, but failed to do so, and the only reasonable inference to be drawn from that is that he was not interested in custodial overtime work. Contrary to the Union's assertion, the arbitrator in the prior Ertel arbitration did not find that he was qualified for a C-4 position. Rather, the arbitrator declined to find that he was unqualified based upon his verbal interview, and because she was prepared to find that the selected candidate's qualifications were far superior to those of Ertel. Ertel has also not taken the opportunity in the ensuing six years to enhance his qualifications and they have necessarily degraded in that time.

The District was not required to have Schneider testify in order to establish his qualifications. His qualifications have been established by Mitchell's testimony and documentary evidence and are uncontested in the record. He was the only applicant who was actually performing C-3 duties and who had specialized training in boiler operation and building security and recent experience in directing and supervising other employees. There is not any basis to conclude that the Grievants were more qualified than Schneider. The Union overstates Ertel's qualifications, fails to note his last custodial experience was in 1986, and does not address his adverse performance evaluations. The fact that the Grievants have more combined custodial experience than Schneider is irrelevant. Further, unlike the Grievants, Schneider has demonstrated success as a C-3.

The ROCK COUNTY award cited by the Union involved an entirely different seniority and job posting provision. Also, unlike this case, the grievant's qualifications were found to be as great or better than the less senior applicant's. Thus, that award is not applicable. Even if the Arbitrator adopts the position of the arbitrator in the prior Ertel award and defers finding the Grievants are unqualified, on the basis of the record he must find Schneider is substantially more qualified. Thus, the grievance must be denied.

### DISCUSSION

As Arbitrator Schiavoni concluded in an earlier award involving these same parties, it is Section 3 of Article V that controls in this case, as it specifically applies to filling posted positions. This provision expressly makes seniority the determinative factor when the applicants' qualifications are "relatively equal". Also as Arbitrator Schiavoni concluded,

“Relatively” does not mean “exactly” equal. . . Only an approximate or near equality in qualifications is necessary to bring seniority into the decision as the determining factor. Conversely, where the qualifications of the junior employee are substantially superior, he/she may be given preference over the senior employee.

Where, as here, the contract is silent as to how and by whom determinations of qualifications are to be made, it is management’s responsibility/right to decide on the methods to use to determine ability so long as they are fair and nondiscriminatory and the factors considered are directly related to the job’s requirements and the applicant’s ability to meet those requirements. Elkouri and Elkouri, *How Arbitration Works*, 5<sup>th</sup> Ed., pp. 845-846.

In this case, the District utilized a set of questions and criteria for ranking responses developed by the Principal of the school building in which the C-3 position was located and the Manager of Facilities Management Services, Helen Mitchell and Wayne Kolzow, respectively. The criteria were based upon the “essential functions” listed on the C-3 position description, looking primarily at each applicant’s recent or current experience and background in each of those areas. The criteria and the rankings were shared with the Grievants and the Union in the course of the grievance procedure; however, the District did not share the questions it asked the applicants with the Union, nor did it make them available to the Arbitrator at hearing. The District did present at hearing an explanation of why Mitchell and Kolzow ranked the applicants as they did with regard to each criterion and Mitchell also testified in that regard. It appears that some of the questions were meant to elicit factual responses describing the applicant’s experience or training in each area, while others were such that there was a correct or more appropriate response, rather than simply a factual response. The latter type of questions are indeed more of a “test” and it is necessary to review the questions in order to judge the responses. Also, the weighting system favoring more recent training and experience, and utilized to score the responses, may be useful in distinguishing between applicants, but it is not necessarily helpful in determining whether an applicant has the minimum qualifications to do the job. Thus, like Arbitrator Schiavoni, the undersigned will not find Ertel or Perez to be unqualified for the position on the basis of their average scores. Contrary to the Union’s assertion, however, that is not tantamount to a finding that they are qualified.

There is, however, sufficient evidence in the record regarding the bases for the District’s conclusions as to the applicants’ respective training and experience in the areas listed as the C-3 position’s “essential functions”. In that regard, the District claims its selection of Schneider was primarily based upon his recent experience as a C-2 and as a C-3. It is not unreasonable to favor more recent experience in comparing the applicants’ experience in an area, given that the C-3 is a lead worker position. Thus, while Ertel had more total years of custodial experience (7 years, 9 months as a C-2 in the District), it has been almost 12 years

since he worked regularly in that capacity. Conversely, Schneider and Perez were currently working as custodians at the time. Schneider was already performing as a C-3 custodian at South High and had been a C-2 for approximately two and one-half years in the District. Perez has been a part-time C-1 Custodian in the District for approximately three and one-half years and has been responsible for the custodial and maintenance work at the Temple Beth El for approximately 10 years. Similarly, Schneider's "supervisory" experience was current as a C-3 and before that when he had filled in for C-3's, while Ertel had little such experience and Perez' supervisory experience was in the late 1970's or early 1980's in a Detroit machine shop. It also appears he did not inform Mitchell and Kolzow about the classes he took in supervision at the area technical college.

Given the C-3 head custodian position's responsibilities for the day-to-day physical operation of his/her building and lead functions with respect to the building's other custodial staff, the applicants' respective attendance records were also of some relevance. See Elkouri and Elkouri, at 868-869. While Ertel explained his sick leave usage in 1996 (113 hours) was due in part to his parents being ill and his usage in 1997 (114 hours) was possibly due in part to being out on Worker's Compensation, it is somewhat telling that he had already used three and one-half days (28 hours) of sick leave a month and a half into 1998. Perez took seven days (28 hours) in 1996 and eight and one-half days (35 hours) in 1997 and had taken three days (12 hours) by mid-February of 1998. Schneider's total of seven days for 1996 (16 hours) and 1997 (40 hours) and zero days for 1998 was sufficient to significantly distinguish him from the other applicants in this regard.

Given the C-3 position's leadworker functions and the need to be able to work with building administration, students and staff, as well as with the building's other custodial staff, less tangible factors such as initiative, understanding of students, problem solving, conflict resolution skills, people skills and reliability are also relevant and may reasonably be considered. Elkouri and Elkouri, 878-880. It is in these areas, however, that it is necessary to know how the questions were posed to the applicants in order to fairly judge their responses. There is, however, additional evidence in the record that sheds some light on these areas in the form of the applicants' recent evaluations and disciplinary records. Contrary to the Union's assertions, how an employe has been evaluated in the past in these areas and if he has been disciplined for shortcomings in a particular area, are relevant in comparing the applicants' abilities. Schneider was rated above both Grievants in their respective 1996-1997 evaluations with regard to "attitude and cooperation" "creativity" and "drive" and above Ertel as to "dependability". Ertel was rated average on "cooperation" and "attitude" and lower than average on "dependability" "creativity" and "drive". Perez was rated above average on "dependability" and average on "attitude" and "cooperation" "creativity" and "drive". However, Perez has also demonstrated an inability to get along with his supervisor and fellow staff. He received a two-day suspension without pay in 1996 for using vulgarity and

inappropriate responses to criticism he received from his building principal. In December of 1997, Perez was issued a memorandum regarding several "job performance concerns" that included his handling of complaints from fellow staff, his responses to teachers or other staff members regarding tasks he is asked to do that are beyond his scheduled routine, his being courteous to fellow staff and his communications with teachers and the head custodian at his school building. Since the head custodian must work with his/her building principal and be able to get along with and communicate with the other building staff and custodial staff, Perez' problems in these areas are relevant in considering his qualifications.

Finally, the District also relied upon Schneider's training in the military and the District with regard to boiler operation. While Perez also has experience in maintaining boilers in working at Temple Beth El, Ertel's last experience in this regard was as a C-2 custodian in 1986 and a class he took prior to 1982.

Given Schneider's recent experience as a C-2 custodian, the fact that he was already performing satisfactorily as a C-3 custodian, his better attendance record and above average evaluations, and his experience and training regarding boiler operations, the District's conclusion that he was substantially more qualified than either Ertel or Perez was reasonable. Thus, the District did not violate the parties' Agreement when it awarded Schneider the C-3 head custodian position at Grant Elementary School, rather than either of the Grievants.

Based upon the foregoing, the evidence and the arguments of the parties, the undersigned makes and issues the following

**AWARD**

The grievance of Verlin Ertel is denied.

The grievance of Joseph Perez is denied.

Dated at Madison, Wisconsin this 10<sup>th</sup> day of August, 1999.

David E. Shaw /s/

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David E. Shaw, Arbitrator

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