BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GENERAL TEAMSTERS LOCAL UNION NO. 662,
affiliated with the
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

and

D.C. EVEREST AREA SCHOOL DISTRICT
and its BOARD OF EDUCATION

Case 51
No. 57014
MA-10489

(Job Posting Grievance)

Appearances:

Ms. Naomi E. Soldon, with **Mr. Jonathan M. Conti** on the brief, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of General Teamsters Local Union No. 662, affiliated with the International Brotherhood of Teamsters, AFL-CIO, which is referred to below as the Union.

Mr. Ronald J. Rutlin, Ruder, Ware & Michler, A Limited Liability S.C., Attorneys at Law, Suite 600, 500 Third Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050, appearing on behalf of D.C. Everest Area School District and its Board of Education, which is referred to below as the Employer, or as the District.

ARBITRATION AWARD

The Union and the Employer are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a grievance filed on behalf of Craig Brown and Terry Thomas. The Commission appointed Richard B. McLaughlin, a member of its

staff. Hearing on the matter was conducted on February 18, 1999, in Schofield, Wisconsin. At that hearing, the parties waived application of those contract provisions calling for and governing an arbitration panel. A transcript of the hearing was submitted to the Commission on March 9, 1999. The parties filed briefs and reply briefs by June 14, 1999.

ISSUES

The parties stipulated the following issues for decision:

Did the District violate the collective bargaining agreement when it did not award a Class I third shift full-time custodial position, which was posted on August 4, 1998, to either of the grievants?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 5 – SENIORITY

Section 1. Seniority shall apply to part-time custodians separate from full-time custodians. Part-time custodians will be given consideration for any full-time positions that become available. Part-time employees, upon becoming a full-time employee, shall establish their seniority as of that date within the full-time group. Seniority shall prevail and shall be determined by length of service from last date of hire plus additional time as is required to be granted for vacations, leaves of absence, illnesses and accidents. . . .

Section 3. Part-time custodians will be laid off or reduced before full-time custodians are affected. When it is necessary to layoff part-time custodians, those employees with the least seniority shall be laid off first, providing those employees retained are capable of carrying on the operation. When it is necessary to layoff full-time custodians, those employees with the least seniority shall be laid off first, providing those employees retained are capable of carrying on the operation. When employees are called back to work, those employees having the greatest seniority shall be called first providing they, together with those on the job, are capable of carrying on the usual operation. Any exception to this provision shall be by mutual agreement between the Employer and the Union.

Notice of Layoff. Whenever possible, in the event of a reduction in staff, the Board shall give at least two (2) weeks notice to the affected employee.

Order of Layoff. The Board shall have the right to determine the number and/or location of positions to be reduced or eliminated. Employees in reduced or eliminated positions shall have the right to replace less senior employees in unaffected positions within their pay classification or a lower pay classification if they are qualified to perform the duties and responsibilities of the unaffected position. Employees who are replaced by other employees under this section shall have the right to replace less senior employees as provided above.

Recall. Employees shall be recalled in inverse order of layoff within their classification provided they are qualified to perform the available work. Notice of recall for any employee who has been laid off shall be sent by certified mail, return receipt requested, to the last known address of the employee. It shall be the responsibility of each employee on layoff to keep the district advised of any change in his/her address. Within three (3) working days of receipt of a recall notice, the employee shall notify the district of his/her intentions regarding the recall. The employee shall report to work no later than ten (10) days thereafter.

. . .

Section 5. Seniority for part-time employees shall govern which employee gets the newly created job or vacancy, provided that such employee is qualified to perform the job. Seniority for full-time employees shall govern which employee gets the higher rated and newly created jobs or vacancies, provided that such employee is qualified to perform the job. In the event a question of qualifications to do the job arises, such issue shall be taken up between the Employer, the Union, and the employee involved. The intent is to give the senior applicant every reasonable consideration in filling the job vacancy. If the employee is then selected, he/she shall be given the job on a thirty (30) working day probationary period. Employees moving from Class III to Class I shall have a forty (40) working day probationary period. If the employee cannot handle the new position, he/she will be reassigned to his/her former position at the current rate of pay for that position.

. . .

BACKGROUND

The grievance questions the Employer's refusal to award a Class I Custodial position to the Grievant. Under the labor agreement, part-time custodians are Class IV positions. Custodial Classes I, II and III include only full-time positions. The highest paid classification is Class I. The position in question is a third shift, Class I position at D.C. Everest High School. The Employer posted the vacancy on August 4. The successful applicant was expected to be able to perform a number of functions concerning pool maintenance at the Employer's Greenheck athletic facility.

The position description for Class I Custodian reads thus:

. . .

PERFORMANCE RESPONSIBILITIES:

* Maintains building custodial supplies.
* Prepares building budget requests.
* Maintains athletic field care.
* Has a working knowledge of all building systems.
* Operates heating, ventilating, and air conditioning equipment.
* Coordinates activities between the principal and custodians.
* Checks in material received at building.
* Trains and directs student helpers.
* Maintains equipment and vehicles.
* Does all phases of ground maintenance.
* Operates ground care equipment (all phases).
* Makes heating and ventilating adjustments and repairs.
* Makes electrical repairs.
* Makes plumbing repairs.
* Operates and maintains high school pool.
* Cleans boilers (all phases).
* Promotes safe working conditions.
* Reports all malfunctions to supervisor.

Maps summer work schedule
Removes snow (all phases). Operates snow removal equipment.
Takes annual building custodial inventory.
Inspects building systems.
Maintains building security.
Sets up buildings for school functions.
Sets up new equipment and furniture.

Does required cleaning.
Makes roof repairs.
Does painting (all phases).
Does carpentry work.
Replaces glass.
Cleans up equipment.
Puts supplies away and maintains supply room.
Performs other duties as assigned.

QUALIFICATIONS:

High school graduation or its equivalent.
Custodial Experience.
Ability to understand and maintain building systems.
Cooperative and able to work efficiently with other people.
Must be well organized and carry out responsibilities with minimal direction and supervision.
Must be able to relate well with the general public.

DESIRABLE TRAINING AND EXPERIENCE:

Custodial experience.
Training in building maintenance.

TERM OF EMPLOYMENT:

52 weeks.

* REPRESENTS ESSENTIAL FUNCTIONS

The grievance form, filed on August 26, 1998, (references to dates are to 1998 unless otherwise noted), states the "nature of grievance" thus: "Seniority Rights, and be given working day probationary period." The form notes the "Settlement Requested" thus: "(G)iven opportunity to work my probationary period and to show I can do the work."

James Jaworski, the Employer's Supervisor of Personnel, denied the grievance at Step 2 in a memo dated September 1. That memo states:

. . .

> It is uncommon to have a Class IV Custodian move directly into a Class I position. Our system is designed to allow an employee to work up through the system and learn the necessary skills to perform in a higher classified, higher paying position. The Administration has an obligation to the District and to other Teamster Union members to fill the position with an individual who has the ability to properly perform duties associated with the position.
>
> Part-time and full-time custodians are contractually different. Seniority accrues separately in each group . . . The District gave equal consideration to the applicants by allowing them to demonstrate their skills on an examination. The contract does not state that part-time custodians will be given a full-time position on the basis of seniority. It only states that seniority is the determining factor when a part-time custodian bids on another part-time position.
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> . . .

Ultimately, the School Board considered the grievance at a meeting held on October 27. The minutes of that meeting detail the "Administration's Rationale" thus:

> Our contractual agreement with Local 622 (sic) expressly and intentionally restricts seniority separately within the part-time and full-time groups. Had this job been a part-time job, the most senior individual in the part-time group (Brown) would have been selected based on seniority within his respective group. However, since the opening in question was a full-time job, seniority was not a factor.
>
> As for the interpretation of the contract language "given consideration" in Article 5, Section 1, the District rejects the idea that this means the most senior part-time person should automatically be given a trial period.
>
> . . .

The Board voted to deny the grievance.

At the arbitration hearing, the parties stipulated, for the purposes of this grievance, that Craig Brown, the most senior applicant, is qualified for the custodian Class I position, and that he is able to perform all of the job responsibilities set forth on the job description (which is set forth above). Thus, the parties litigated the grievance as a matter of contract interpretation. The evidence submitted focused on past practice and on bargaining history.

The Evidence of Past Practice

Angie Jagler is currently employed as a full-time Custodian III at D.C. Everest High School. She started work for the Employer as a part-time custodian. In June of 1990, she signed a posting for a full-time position as a Custodian III. The District offered the position to a non-unit applicant. Jagler responded by filing a grievance. The parties ultimately executed a settlement agreement, dated October 4, 1990, resolving the matter. The agreement states:

1. The District shall offer the next vacant full-time Class III custodian position, anywhere in the District, to Ms. Jagler if she is qualified for that position.
2. If Ms. Jagler refuses the first Class III position offered to her as required under Section 1 above, she shall have no more of a right to any other vacant Class III position than any other bargaining unit employees.
3. If Ms. Jagler accepts the Class III position offered, she shall serve an 85-working-day trial period as provided by Article 5, Section 4, of the Labor Agreement. If Ms. Jagler fails to successfully pass the trial period, she will be returned to her prior position.
4. To be entitled to the position described in Section 1, Ms. Jagler must correct any deficiencies in job performance, including personal telephone calls during work time and have, at a minimum, a satisfactory job evaluation, at the time the position becomes vacant and is to be offered to her.
5. In regard to the next vacant Class III custodian position, the Union waives the provisions of Article 5 of the Labor Agreement and agrees not to file or support any grievance challenging the District's action in awarding the position to Ms. Jagler.
6. The grievance is withdrawn.
7. The parties understand that this agreement and settlement is nonprecedential in basis and cannot be used in any future proceeedings, including grievance or interest arbitration proceedings.
8. The parties understand that this settlement and agreement is subject to ratification by the District Board of Education.

Jagler turned down the first Class III position offered her after execution of this settlement, but accepted the next Class III position offered her. She was given a probationary period in that position, and successfully completed it.

Danelle Davidowski currently works for the Employer as a Class III Custodian. She started work for the Employer as a part-time Custodian. In April of 1993, she applied for a posted Class II Custodial position. The Employer initially offered her the position. Another part-time employe, Howard Hodgkins, grieved the matter, asserting he had more seniority as a part-time employe than Davidowski. The Employer ultimately withdrew the offer from Davidowski and awarded the position to Hodgkins. Davidowski testified that the then-incumbent Personnel Director informed her that Hodgkins would receive the position based on seniority. Hodgkins testified that the Personnel Director did not inform him why the Employer awarded him the position.

The Grievant testified that the position disputed here is the fourth full-time position at the Greenheck Fieldhouse which has been posted since November of 1997. In November of 1997, the Employer posted a Class I and a Class II custodial position. Four part-time custodians, including the Grievant, signed these postings. In each case, the employe offered the position had greater seniority than the Grievant. Sometime after these postings, the Employer posted a full-time position on its second shift. The Grievant signed that posting, but the Employer awarded it to another employe with seniority as a full-time custodian. This opened the full-time employe's position, which resulted in another posting which the Grievant signed. The Employer offered that position to another part-time employe with greater seniority than the Grievant.

Lee Jorgensen is the Employer's Supervisor of Buildings and Grounds and testified that the Employer's normal practice in posting positions is to post a vacancy in all school buildings and to an outside employment service. Jim Jaworski is the Employer's Supervisor of Personnel. He testified that the Employer may usually award full-time positions to part-time custodians based on seniority, but that the Employer is not bound to do so. In his view, the experience acquired by part-time custodians enhanced their chances to secure a full-time position.

The Evidence of Bargaining History

Prior to 1985, the unit represented by the Union did not include part-time custodians. On April 18, 1985, Gerald Allain, then the Union's Business Representative, filed with the District a memo indicating that the Union had majority support among part-time custodians and wanted the District to voluntarily recognize it as the exclusive bargaining representative for a unit composed of part-time custodians. The District did not agree to do so.

Sometime later in April, 1985, the Union filed a petition with the Commission, seeking an election in a bargaining unit restricted to part-time custodians. On May 23, 1985, the Commission issued the following Order directing an election:

> That an election by secret ballot shall be conducted under the direction of the Wisconsin Employment Relations Commission in the voting group consisting of all regular part-time custodians employed by the D.C. Everest Area School District . . . for the purpose of determining whether the required number of such employes desire to be represented by General Teamsters Union Local 662 for the purposes of collective bargaining with D.C. Everest Area School District, and further, should the required number of employes vote in favor of such representation then said employes shall be merged with the existing bargaining unit consisting of all full-time custodians . . . which merger will result in a bargaining unit consisting of all regular full-time and regular part-time custodians . . .

The Commission conducted this election on June 11, 1985 and certified that the part-time custodians voted eight to nothing to be represented by the Union. After the Commission certified the results of this election, Allain approached the Employer to determine if it would be willing to negotiate a separate agreement covering part-time custodians. Jorgensen was then a member of its bargaining team. He testified that the Employer was unwilling to bargain separate agreements for the full-time and the part-time custodians. He noted that Allain consistently noted that the full-time employes did not want to create a situation in which a part-time employe could come to exercise greater seniority rights for a position than could a full-time employe.

In a letter dated September 13, 1985, Allain requested from the Commission an informal statement of its "position as to negotiating a separate Labor Agreement for the part time custodians." The then-incumbent Chairman of the Commission responded to Allain in a letter dated September 25, 1985, which states:

. . .

> (T)he background is as follows. Local 662 has been the exclusive bargaining representative for a bargaining unit consisting of all full-time custodians. . . . The parties have a collective bargaining agreement covering said unit with a time period of July 1, 1984 through June 30, 1986. On April 22, 1985 the Commission received from Local 662 a petition for election among the part-time custodians employed by the District. Local 662 and the District stipulated to the conduct of an election among the part-time custodians on the basis that if a majority of said custodians voted for representation, then the part-time custodians would be included in the existing unit of full-time employes, and further, that if the part-time custodians voted to be represented by Local 662, the terms and conditions of the existing collective bargaining agreement . . .

> would not be automatically extended to the part-time custodians, but rather, would have to be bargained. On June 20, 1985 the Commission issued a Certification of Results of Election wherein it certified that the required number of part-time custodians had voted for representation by Local 662, and therefore, by stipulation of the parties, the part-time custodians were included in the existing bargaining unit of full-time employes. Under such circumstances the parties normally then enter into negotiations over the wages, hours and conditions of employment for the newly accreted employes. However, the parties could, if they wish, bargain separate terms for the part-time custodians.
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> . . .

The parties began a period of collective bargaining to seek to address the application of the existing labor agreement to the part-time employes.

In mid-December of 1985, the parties executed an addendum (the Addendum) to their 1984-86 labor agreement. Throughout this process, the Union insisted that part-time employes be kept separate from full-time employes regarding seniority and job security issues. The Addendum added to the labor agreement what presently appears as the first and third sentences of Article 5, Section 1. These sentences resulted from a Union proposal. At the time of the Addendum's execution, these sentences appeared as the first two sentences of Article 5, Section 1. The first paragraph of Article 5, Section 5, of the parties' 1984-86 Labor Agreement reads thus:

> Section 5. Seniority shall govern which employee gets the higher rated and newly created jobs or vacancies, provided that such employee is qualified to perform the job. In the event a question of qualifications to do the job arises, such issue shall be taken up between the Employer, the Union, and the employee involved. The intent is to give the senior applicant every reasonable consideration in filling the job vacancy. If the employee is then selected, he shall be given the job on a thirty (30) working day probationary period. Employees moving from Class III to Class I shall have a forty (40) working day probationary period. If the employee cannot handle the new position, he will be reassigned to his former position at the current rate of pay for that position.

The Addendum revised that paragraph to read thus:

> Section 5. Seniority for part-time employees shall govern which employee gets the newly created job or vacancy, provided that such employee is qualified to perform the job. Seniority for full-time employees shall govern which

> employee gets the higher rated and newly created jobs or vacancies, provided that such employee is qualified to perform the job. In the event a question of qualifications to do the job arises, such issue shall be taken up between the Employer, the Union, and the employee involved. The intent is to give the senior applicant every reasonable consideration in filling the job vacancy. If the employee is then selected, he shall be given the job on a thirty (30) working day probationary period. Employees moving from Class III to Class I shall have a forty (40) working day probationary period. If the employee cannot handle the new position, he will be reassigned to his former position at the current rate of pay for that position.

In the bargaining for a successor to the 1984-86 labor agreement and the Addendum, the parties added what now appears as the second sentence of Article 5, Section 1. Jorgensen testified that this sentence resulted from a Union proposal to "give the part-time people consideration along with the people from the outside." (Transcript at 93-94). The language of Article 5, Sections 1 and 5 has not changed since the execution of the 1986-88 agreement.

The Disputed Position

The position disputed here is a Class I, third shift custodial position at D.C. Everest High School, and was posted on August 4. No full-time employes applied for the position, and the Employer determined that the in-house part-time applicants were sufficiently qualified that it would not interview any outside applicants. The Employer tested and granted interviews to three part-time employes. In order of seniority, those three applicants were the Grievant, Terry Thomas and Bob Kasten. Jaworski, Jorgensen and Terry Marcott, the Employer's Custodial Building Supervisor, conducted the interviews. Although each applicant was considered qualified, the Employer determined Kasten was the most qualified and awarded the position to him.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The Union's Brief

After a review of the evidence, the Union argues that Article 5, Section 5 governs the grievance, and that the Employer failed to honor its intent by failing to award the position to Brown. The intent of Section 5 "is to give the senior applicant every reasonable consideration in filling the job vacancy." That it also affords a forty-day probationary period to the selected applicant underscores the Employer's failure to honor its terms by selecting the least senior applicant. Brown was the most senior applicant and is qualified to perform the job.

Article 5, Section 5 states a "sufficient ability" seniority clause which, under relevant arbitral precedent, entitles the senior applicant to preference over less-senior applicants provided the senior applicant can perform the work. In this case, Kasten's allegedly "more favorable interview . . . prior work experience with pools, and . . . 'better overall attitude'" are thus irrelevant to the proper application of the labor agreement. The Union concludes "Brown should have been provided (the) forty day probationary period to display his capabilities."

Even if the language of Article 5, Section 5 was not clear, relevant past practice establishes the Employer's violation of the labor agreement. From May of 1990 through November of 1997, the Employer consistently awarded "a full-time custodian position" to "the most senior part-time applicant." Beyond this, Employer supervisory employes have openly acknowledged the practice. That the Employer "failed to present a single instance where it did not follow the practice" underscores that "the evidence overwhelmingly shows the past practice."

Nor does evidence of bargaining history support any other conclusion. At most, that evidence underscores that the parties separate full-time and part-time service in the application of seniority. This "protected full-time employees' seniority," but fails to apply here, since there were no full-time bidders for the position. Bargaining history will not support the Employer's disregard of the plain language of Article 5, Section 5.

The Union concludes that "the Arbitrator should order the District to award the Class I position to Craig Brown and make him whole for all losses."

The Employer's Brief

After a review of the evidence, the Employer contends that "(a)pplication of relevant contract interpretation principles to the provisions of Article 5 of the Collective Bargaining Agreement demonstrate that no contract violation occurred." Arbitral precedent establishes that contract language must be ambiguous to require interpretation, and that ambiguity is established by conflicting, but plausible, readings of the contract. Such conflicting and plausible readings of Article 5 are posed here, and thus recourse to interpretive guides is appropriate.

The purpose of interpretive guides is to "determine and give effect to the parties' intent" at the time the governing contract language "was agreed to." Here, "the parties' bargaining history unequivocally establishes that the Union's reading of Article 5 is simply wrong." More specifically, this unit's composition, prior to 1985, was "solely full-time employees." When part-time custodians sought representation, the Union attempted to have them placed in a separate unit. The Commission, however, ordered an election which merged

full and part-time employes if the part-time employes voted for representation. When the part-time employes voted for representation, the Union sought Commission authorization to "organize a separate bargaining unit comprised solely of the part-time custodians." The Commission declined to do so. In the negotiations that followed, the parties strictly separated part-time and full-time custodians regarding contractual benefits. At no time did the parties agree that "an employee's seniority as a part-time custodian was to be given any weight when filling a full-time position." In fact, the agreement to add "consideration" for part-time custodians, in Article 5, Section 3, reflected only the parties' agreement to consider part-time employes together with outside applicants when filling a full-time position.

Reading Article 5 as a whole underscores this conclusion. Article 5, Sections 1, 3 and 5 establish a complete separation of the seniority rights of part-time and full-time custodians "in all respects." Beyond this, if the parties intended seniority to govern the filling of vacancies, "there would have been no need for the parties to differentiate between a part-time and a full-time employee's seniority." Jorgensen's testimony establishes that the separate seniority systems apply only to vacancies within each system. Thus part-time seniority governs the filling of part-time, but not full-time positions. That the District posts full-time vacancies to outside applicants further underscores that part-time employes acquire no rights beyond "consideration" for a full-time position.

That Article 5, Section 5 "is certainly not a model of clarity" cannot obscure that the "parties have agreed in Article 5 that the seniority of a part-time custodian is not a factor to be considered when filling a full-time position." The Employer concludes that "the Arbitrator (should) dismiss the Grievance in its entirety."

The Union's Reply Brief

The Union contends that even if the language of Article 5 is considered ambiguous, past practice compels granting the grievance. Bargaining history concerning the separate nature of part-time and full-time seniority has no bearing on the grievance, since "there is no danger that a part-time employee will be awarded a job that a full-time employee is entitled to." Since Brown "was the most senior of the three part-time employee applicants, and was qualified for the position," Article 5 demands that he be afforded a probationary period to demonstrate his qualifications. Past practice addresses any possible ambiguity on this point, since "the District has always awarded a full-time position to the most senior qualified part-time applicant." The Jagler and Hodgkins grievance settlements confirm this, as do comments made by management personnel to Hodgkins at his date-of-hire.

Beyond this, the Union contends that the Employer's "principal argument rests on a misinterpretation of the parties' bargaining history." The Addendum addresses only those "situations where full-time and part-time employees compete for the same position." Other benefits favor full-time employes, but "nothing in the Agreement nullifies part-time seniority for job bidding." In spite of the Employer's contrary claim, the presence of separate seniority lists has no significance outside of competition between part-time and full-time employes for the same position.

The Union concludes by restating its request that "the Arbitrator should order the District to award the Class I position to Craig Brown, and make him whole for all losses."

The Employer's Reply Brief

The Employer argues that the evidence will not support Union claims that "a past practice exists of awarding full-time custodian positions to part-time custodians based upon seniority if no full-time custodian has applied for the position." The Jagler settlement agreement did not concern competing claims of a part-time and a full-time custodian, and was, by its terms, "non-precedential in nature." The Hodgkins settlement agreement is, at best, sketchy regarding why Davidowski's claim for the position was not accepted. The evidence falls short of establishing that the November, 1997 vacancies were filled on the basis of seniority. Beyond this, the Employer contends that the evidence shows only that supervisory comments acknowledging a past practice are, at best, disputed.

Nor can the probationary period language of Article 5, Section 5, be applied to the grievance, since that language applies only to movement from Class III to Class I. In any event, arbitral precedent precludes reading that section as a "'try out' a job" provision: "Rather, pursuant to that provision, the Grievant was only entitled to a forty (40) day probationary period in the position if he had been selected to fill the position."

At most, the labor agreement requires the Employer to "give the Grievant consideration for the full-time position." The Employer did so, and its decision is owed deference. Arbitral precedent establishes that "(t)he offended employee bears the burden of proof of demonstrating that an employer's determination regarding his/her qualifications was arbitrary and capricious." The evidence establishes the Employer had objective, good faith reasons for selecting Kasten. The Employer concludes by repeating its request that "the Arbitrator dismiss the Grievance in its entirety."

DISCUSSION

The parties agree that the provisions of Article 5, particularly Sections 1 and 5, govern the stipulated issue. The language of those sections cannot, however, be considered clear and

unambiguous. It is not apparent on the face of Article 5, Section 1 what "consideration" means. No more apparent is how this reference is to be squared with the reference in Article 5, Section 5, that the Employer is "to give the senior applicant every reasonable consideration." Beyond this, the provisions of Article 5, Section 5, are ambiguous. The Union contends that the first sentence of Article 5, Section 5, clearly governs competition between part-time applicants for the same position. That sentence awards "the newly created job or vacancy" to the senior "part-time" employe. The second sentence, however, awards "newly created jobs or vacancies" to the senior "full-time" employe. Presuming a single vacancy is in dispute, the two sentences award it to different employes. This conflict can be resolved by implying that the sentences separately refer to vacancies in full or part-time positions. This implication is plausible, but no less plausible is the assertion that the sentences refer to employe seniority rights to either type of position. The plausible, but competing, interpretations establish that the sentences are not, on their face, clear and unambiguous.

The most persuasive guides to the interpretation of ambiguous language are past practice and bargaining history, since each focuses on the conduct of the parties whose intent is the source and the goal of contract interpretation. The Union points to past practice as the most reliable guide, but the evidence falls short of establishing a binding practice. Union witnesses testified that the Employer consistently awards positions based on seniority and that supervisors have acknowledged the practice. Jaworski and Jorgensen acknowledged that seniority plays a role in the filling of positions, and that the Employer does promote from within. This falls short, however, of establishing that the Employer views Article 5 as binding it to seniority in every instance. No employer witness acknowledged a binding practice on this point. Nor can the specific instances covered in testimony bridge this gap. Paragraph 7 of the Jagler settlement agreement precludes using it as evidence of a binding practice. To conclude otherwise would only serve to chill future settlement discussions.

The Davidowski/Hodgkins dispute in April of 1993 supports the Union's position. The basis of the settlement is, however, less than apparent. Davidowski stated the resolution was based on seniority concerns, but Hodgkins noted that no one advised him why the offer to Davidowski was withdrawn. In any event, this single instance falls short of demonstrating a binding practice. Two of the 1997 openings arguably demonstrate the preference of a more senior part-time applicant over a less senior part-timer. No less arguable, however, is the Employer's position that it made the selections based on the applicant's qualifications. In any event, the practice asserted by the Union is difficult to square with the Employer's normal practice of posting positions to outside applicants in addition to internal bidders. On balance, the evidence of past practice falls short of establishing Employer agreement to be bound by seniority in considering competing part-time applicants for posted positions.

The Employer's use of bargaining history is more compelling, but cannot be considered determinative. As the Employer asserts, bargaining history establishes that the parties created Article 5 to rigidly separate the seniority rights of full-time and part-time employes. The difficulty with the evidence is that this separation of the rights of full-time and part-time employe rights does not unequivocally establish the competing rights of part-timers regarding a vacancy for which there are no full-time or qualified outside applicants.

Ultimately, the language of Article 5, Sections 1 and 5 must be interpreted to give meaning to each provision in light of relevant practice and bargaining history. The evidence of bargaining history and past practice is not binding on this record, but does highlight the need to set limits within which Article 5 must be applied. For example, the Employer's past posting of vacancies to outside applicants precludes accepting the broad assertions of the Union regarding the role of seniority.

Against this background, the application of Article 5 to the grievance must be narrow and focused on the facts posed by the grievance. As noted above, the Employer determined that only part-time applicants would be considered for the August 4 posting. The Employer determined that each of those applicants was qualified. Thus, it is neither necessary nor appropriate to determine how Article 5 is to be applied to competition between qualified internal and external applicants. The issue, then, turns on the role of seniority between part-time applicants for a full-time position for which there are no full-time or qualified outside applicants.

The grievance starkly poses whether seniority plays any role in distinguishing between part-time applicants for a full-time position. As established in the Board's response to the grievance, the Employer did not consider itself to be bound, in any fashion, by seniority in filling the August 4 vacancy. Under the Board's view, seniority is not a factor in considering part-time applicants for a full-time position. The issue thus posed is whether seniority between qualified part-time applicants must be considered in awarding a full-time position for which there are no full-time or non-unit applicants.

The Board's view that seniority plays no role can be squared with Article 5, Section 1, but cannot be squared with the language of Article 5, Section 5. As established by bargaining history, "consideration" under Article 5, Section 1, refers to competition between part-time and outside applicants for the same position. There is no persuasive evidence that the Employer failed to "consider" the part-time applicants by administering the test/interview process to each.

In the absence of the language of Article 5, Section 5, the Employer's reading of Article 5, Section 1 would warrant the denial of the grievance. The language of Section 5, however, poses difficulties which evidence of bargaining history cannot resolve in favor of denying the grievance. Initially, the existence of a seniority preference must be acknowledged. Section 1 of Article 5 notes, for example, that "Seniority shall prevail". This general reference is not determinative here, but prefaces the broad language of Section 5.

Section 5 of Article 5 broadly states "(s)eniority of part-time employees shall govern" which employe "gets the . . . vacancy." The mandatory nature of the preference is apparent. Beyond this, the language does not distinguish between competition between part-time employes for full-time or for part-time positions. The Employer forcefully argues that the parties' established desire to separate full-time from part-time employes warrants concluding that the first and second sentences of Article 5, Section 5 refer to separate vacancies. The first sentence refers to part-time positions, while the second refers to full-time. Whatever support the assertion has in bargaining history is, however, lacking in the language of the two sentences. The subject of each of those sentences is "seniority," which under Section 1 is the attribute of an individual employe, not a position. Thus, the language of the sentences makes it difficult to imply that the role of seniority for part-time employes is defined solely by the position sought by the employe.

More significant than this, however, is the fourth sentence of Section 5. As the Employer points out, evidence of the parties' intent is the goal of interpretation. In this case, however instructive bargaining history might be, the express statement of "intent" in Section 5 must be considered a more persuasive source of interpretation. The sentence states the parties' intent "is to give the senior applicant every reasonable consideration in filling the job vacancy." As noted above, the Board approved its administration's stated position that seniority plays no role in the application of part-time employes for a full-time position. This view, although supported by bargaining history, cannot be squared with the fourth sentence of Section 5.

The fourth sentence of Article 5, Section 5 was in existence prior to the negotiation of the Addendum. Arguably, this could be read to limit it to full-time employes. The Addendum demonstrates, however, that the parties carefully stated those contract provisions which apply separately to part-time and to full-time employes. The first and third sentences of Article 5, Section 1 seal part-time employe seniority from that of full-time employes. The second sentence of Section 1 applies only to part-time employes. Similarly, Section 3 carefully distinguishes the layoff procedure governing full-time and part-time custodians. Other references in Article 5 are, however, equally applicable to full or to part-time employes. Thus, the subsections of Section 3 dealing with "Notice of Layoff," "Order of Layoff," and "Recall" refer generally to "employee" or to "employees." Presumably, this reflects that the rights are common to unit employes. Such general references occur throughout Article 5 and

pre-dated the negotiation of the Addendum. Thus, the general statement of intent in the fourth sentence of Article 5, Section 5 cannot persuasively be restricted to full-time employes. Rather, it must be applied to unit employes generally. It follows that, as the "senior applicant," the Grievant was entitled to "every reasonable consideration." The Employer's failure to consider seniority at all thus violates Article 5.

There is some evidence that the Employer considered Kasten more qualified than the Grievant. While this may pose a fine issue in a future case, it poses no issue of interpretation here. The Grievant was qualified for the posted position. At what point a difference in qualifications can overcome "every reasonable consideration" in favor of a senior applicant is an inevitably factual issue. There is no persuasive evidence of a significant disparity in qualifications in this case.

The remedy appropriate to this violation requires limited discussion. The grievance seeks a probationary period for the Grievant to prove his qualifications. This is granted below. The Union seeks a make whole remedy in its brief. Such relief is, at this point, speculative, and the Award states the point conditionally. Beyond this, the parties may have a difference on the appropriate length of the probationary period. The Award entered below notes the remedy in general terms and contains a retention of jurisdiction should such differences not be resolvable by the parties.

Before closing, it is appropriate to tie the conclusions stated above more closely to the parties' arguments. The Union's contention that the provisions of Article 5 state a "sufficient ability" clause has support in arbitral precedent. However, characterizing contract language by type has its risks. More specifically, the general "typing" of a clause can obscure the specific language used by the bargaining parties or their unique practice or bargaining history. The language posed here is unique, as is the evidence of its bargaining history. The interpretive task posed here is to give effect to what was bargained by these parties, not by bargaining parties generally. More to the point, the Employer's posting of positions to outside applicants poses greater complication on this record than the Union acknowledges.

The Employer's reliance on bargaining history is forceful, and sets limits to the conclusions stated above. The separation of full-time and part-time seniority, however, cannot obscure the general intent of Article 5 "to give every reasonable consideration" to "the senior applicant." The competition involved here pitted three qualified, part-time applicants against each other for the same position. To disregard the Grievant's seniority reads the fourth sentence of Article 5, Section 5 out of existence.

The Employer notes that it has guarded its ability to consider outside applicants for full-time jobs because the pool of applicants for part-time positions may not be sufficient to rely solely on promotion from within. This potentially significant issue is not posed on these facts, which concern three qualified part-time applicants and no competing outside applicants.

AWARD

The District did violate the collective bargaining agreement when it did not award a Class I third shift full-time custodial position which was posted on August 4, 1998, to either of the Grievants.

As the remedy appropriate to the District's violation of Article 5, it shall afford Craig Brown, as the senior qualified applicant for the Class I third shift full-time custodial position which was posted on August 4, 1998, the probationary period required by Article 5. If the Grievant successfully completes that probationary period, then the District shall make him whole for the wages and benefits he would have earned but for its violation of Article 5.

For the sole purpose of resolving any dispute regarding the implementation of the remedy noted above, I will retain jurisdiction over the grievance for a period of not less than forty-five days from the date of issuance of this Award.

Dated at Madison, Wisconsin, this 30th day of August, 1999.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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