BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 95

and

WISCONSIN RAPIDS SCHOOL DISTRICT

Case 50
No. 57525
MA-10664

Appearances:

Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, by **Attorney Bruce F. Ehlke**, appearing on behalf of the Union.

Melli, Walker, Pease & Ruhly, S.C., by **Attorney James K. Ruhly**, appearing on behalf of the District.

ARBITRATION AWARD

Office and Professional Employees International Union, Local 95, hereinafter referred to as the Union, and the Wisconsin Rapids School District, hereinafter referred to as the District, are parties to a collective bargaining agreement which provides for the arbitration of disputes arising thereunder. The parties mutually agreed to the undersigned as the arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. Hearing was held in Wisconsin Rapids, Wisconsin, on July 19 and August 27, 1999. The hearing was transcribed and the parties filed briefs and reply briefs, the last of which were filed on December 14, 1999.

BACKGROUND

The grievant has been employed by the District since September 19, 1991. She began her employment as a Noon Duty Aide at Grant Elementary School and on February 6, 1995,

transferred to the position of Noon Duty Aide at Lincoln High School. As Noon Duty Aide, the grievant works 12.5 hours per week. In 1996, the District created the position of Attendance Supervisory Aide at Lincoln High School and the grievant applied for the position but it was awarded to Jon Russell. When Russell was absent, the grievant substituted for him in the position. In March 1998, Russell took a teaching position and the grievant filled the Attendance Supervisory Aide position for the rest of the school year as a substitute. In May 1998, the District posted the position and the grievant applied for it as did a number of other individuals including Jon Russell. The associate principals at Lincoln High School, Rod Henke and Gerald Fitzgerald, interviewed a number of the applicants, including the grievant and Jon Russell. The District awarded the position to Jon Russell, who performed in the position for two days at the beginning of the 1998-1999 school year and then took another position with the District. The grievant again substituted in the position and in August 1998, the District again posted the position. The grievant and other individuals posted for the position, including a Dawn Henke, the wife of Rod Henke's cousin. Henke recused himself from interviewing the applicants. Associate Principal Fitzgerald and Helen Novak, a Supervisory Aide at Lincoln High School in charge of in-house suspension, interviewed five or six candidates but not the grievant. The District selected Tammy Mientke, a Noon Duty Aide at Mead Elementary School. On October 12, 1998, the grievant filed a grievance alleging a violation of the agreement over her non-selection for the position. The grievance was denied and appealed to the instant arbitration.

ISSUES

The parties were unable to agree on a statement of the issues. The Union frames the issues as follows:

> Did the Wisconsin Rapids Public Schools breach its collective bargaining agreement with the Office and Professional Employees International Union, Local 95 and in a particular Section 1304 of the collective bargaining agreement when it failed to appoint Linda Bulloch to fill the Attendance Supervisory Aide position in October of 1998?
>
> If so, what is the appropriate remedy?

The District frames the issues as follows:

> 1. Is a determination by the School District as to the "most qualified applicant" for purposes of Section 1304-B of the agreement subject to review by the Arbitrator under Article III of the agreement and the past practices of the parties in implementing Section 1304-B?

2. If issue #1 is answered in the affirmative and such a determination is subject to review by the Arbitrator, what is the standard of review of that determination under the agreement?

3. If issue #1 is answered in the affirmative and the Arbitrator establishes a review standard which permits the Arbitrator to determine whether the District in fact selected the "most qualified applicant," has the grievant established that she was the most qualified applicant for the ASA position she sought in September, 1998?

4. If the Arbitrator reaches issue #3 and answers in the affirmative, what is the appropriate remedy?

The undersigned frames the issues as follows:

1. Is the District's determination of the "most qualified applicant" under Section 1304-B of the agreement subject to review by the Arbitrator?

2. If so, what is the appropriate standard of review?

3. Did the District violate Section 1304 of the parties' agreement by not selecting the grievant for the position of Attendance Supervisory Aide?

4. If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE III

MANAGEMENT RIGHTS

Section 301 – General

Except as otherwise specifically provided in this Agreement, the Board retains all rights and functions of management and administration that it has by law and the exercise of any such rights or functions shall not be subject to the grievance procedure.

Section 302 – Management Rights

Without limiting the generality of the foregoing Section 301, the Board's prerogatives shall include:

302.1 – The management and operation of the school and the direction and arrangements of all the working forces in the system, including the right to hire, suspend, discharge, discipline or transfer employees.

302.2 – The right to relieve employees from duty for poor or unacceptable work or for other legitimate reasons.

. . .

302.6 – The determination of the size of the working force, the allocation and assignment of work to employees, the determination of policies affecting the selection of employees, the establishment of quality standards, and the judgement of employee performance.

302.7 – The maintenance of discipline and control and use of the Board's property and facilities.

302.8 – The determination of safety, health and property protection measures where legal responsibility of the Board or other governmental unit is involved.

. . .

ARTICLE XIII

PROMOTION, TRANSFER AND CHANGE OF ASSIGNMENT

Section 1301

A promotion is hereby defined as a move from a lower group classification to a higher group classification. An employee who is promoted to a higher group classification shall receive the new wage rate less twenty (20) cents per hour during the probationary period, but not less than his present rate of pay. An employee who is promoted shall maintain his step classification and complete a thirty (30) working day probationary period. In the event an employee does not successfully complete the probationary period, or if the employee chooses to return to the employee's former position, such employee shall be returned to the former position without any loss of seniority or pay.

. . .

Section 1304

When the Board decides to fill a vacancy, notice of the vacancy in the bargaining unit shall be sent to each building by the Board. This will only occur during the school year. During the summer notices will be sent to each employee. This notice shall include the job classification, qualifications and a brief description of the job duties.

For employees who make application within five (5) working days of receipt of the posting, every effort will be made to fill such vacant positions from within the bargaining unit, provided the applicants are qualified for said positions according to the following considerations:

A. In filling a position in the same classification, a lower classification or one step above the employee's current classification for employees in Group I-IV, the unit member who meets the qualifications and has the greatest seniority will be awarded the position.

B. In filling positions in a higher classification, the unit member with the greatest seniority shall be given the position if the employee is the most qualified applicant.

Successful applicants will be notified of their selection within ten (10) days and non-successful applicants will be notified at the same time.

Should there be a dispute as to whether or not an employee meets the qualifications, a grievance may be filed at Step One with the Director of Human Resources.

UNION'S POSITION

The Union contends that an employe's qualifications for promotion must be determined based on objectively ascertainable, tangible evidence regarding the same, and not on subjective opinion alone. It submits that in this case the District is required under the contract provisions to evaluate the relative qualifications of two employes who applied for the same promotion as well as the employes' relative seniority. It asserts that there are several approaches as to which party has the burden of proof in case of managerial action taken under "relative ability" clauses with some cases the burden being on the employe, others on the employer and in still others, an even heavier burden is placed on the employer to not only show greater ability in the

junior employe but to also show the absence of discrimination and arbitrariness and the presence of good faith. It notes that under certain relative ability clauses the employer took the initial action and it should be able to justify it. It notes that some arbitrators are of the opinion that even relative seniority clauses confer certain rights on senior bidders and selection of the junior must be reasonably demonstrated by the employer. It asserts that the standard of proof is the "head and shoulders" standard. It argues that there must be a definite, distinct, substantial and significant difference between two competing employes with respect to ability to perform the work in favor of the junior employe before the employer can award the job to the junior employe. It observes that employers are given leeway in promotions to jobs requiring special working conditions but the employer must have had a fair and ample opportunity to judge it.

The Union insists that in the instant case there was virtually no evidence that Mientke was qualified for the position and there was no comparison of her qualifications with the grievant's qualifications. It submits that Mientke received a favorable recommendation from her elementary principal and Fitzgerald chose to recommend her for the position but there was no objectively ascertainable, tangible evidence on which any sort of neutral independent fact based conclusion concerning the relative qualifications of Mientke and the grievant could be based. It states that the conclusory opinion that Mientke was the "most qualified" applicant is not sufficient to prove the District's case.

The Union claims that the administrators' criticisms of the grievant are not credible as none were voiced to her until Mientke was recommended for the position. It notes that when criticism was first related to her in October 1998, it included an incident that did not even involve her. It states that one incident involved misrepresented facts and the others occurred after the grievance was filed. It submits that the criticism of the grievant appears contrived as a reason to reject her for the position and the purported criticisms are not credible.

The Union contends that the grievant was the most qualified applicant to fill the position. It observes that the grievant was asked to take on responsibilities in addition to her regular duties. It points out that teachers and other staff testified that the grievant interacted well with students and was pleasant and congenial when working with other staff. It observes that the senior High School Aide, Helen Novak, who had interviewed the other candidates, was of the judgment that the grievant was the most qualified person for the position and she so informed the administrators. It asserts that this conclusion is also compelled by the evidence of record in this case. It concludes that the grievant should be appointed to fill the position and be made whole.

DISTRICT'S POSITION

The District contends that the determination of the "most qualified applicant" is reserved to the District under the management rights clause and is not subject to arbitral review. It notes that Section 1304-B provides that in filling a higher grade position, the unit

employe with the greatest seniority should receive the position if the employe is the most qualified applicant. The District acknowledges that the grievant met the minimal qualifications for the position so the final sentence of Section 1304-B is not applicable. It asserts that Article III, the management rights clause, reserves to the Board all rights and functions of management and provides that such rights should not be subject to the grievance procedure. It refers to Section 302 which lists the allocation and assignment of work to employes, the determination of policies affecting the selection of employes and the judgment of employe performance as rights of management. It states that the agreement contains no provision binding the District to any particular procedures in filling unit vacancies, does not require or forbid interviews and does not prohibit consideration of internal job applicant's district job performance. It insists that the determination of "most qualified applicant" rests with the District and no provision can be said to forfeit that determination to an arbitrator.

It submits that the Union has attempted to reduce the District's discretion in implementing Section 1304-B or to secure a different interpretation of that language; however, the Union has not been successful in either bargaining or persuasion and should not do so through this arbitration. It argues that the District has relied repeatedly on its reserved rights which protects the exercise of these from review in arbitration and the District's determination of the "most qualified applicant" cannot be subject to arbitration because the contract says so. It seeks dismissal of the grievance as beyond the scope of the arbitrator's authority.

The District argues that if its determination is subject to review, the arbitrator should sustain the District's determination unless the grievant shows by clear and convincing evidence that such determination was made in bad faith or is arbitrary and capricious. Contrary to the Union's suggestion that the absence of detailed documentation to substantiate the administrators' concerns about the grievant's performance is injurious to their negative concerns of her skills, the District points out that the contract does not require regular or written evaluations of unit employes nor do administrators have to communicate each and every observed performance deficiency. It argues that requiring the District to defend every "most qualified" decision by proving all performance-related misgivings would turn the contractual arrangement on its head as the contract does not compel or even suggest such a result. It relies on Article III for the proposition that the determination by the administrators of most qualified should be left to their discretion as much as possible. It does not deny that the grievant was not interviewed but explains that she was interviewed for the same position three months earlier and the interviewers were thoroughly familiar with her work, but they did not have such knowledge of the other applicants. It also takes the position that the contract does not require interviews or any other particular process in order to form a judgment which could be formed based on work history. It asserts that the only way to protect the District's exercise of rights under Article III is a standard of review which accords deference to the judgments and determinations that are a product of the exercise of these rights. It argues against a de novo determination because it would alter the contract and elevate seniority to a more dispositive role than the language provides and would invite more grievances. It urges a

standard of review that recognizes the reservation of management rights without imposing formalities and obstacles into the decision making process which are inconsistent with the management rights provisions.

The District insists that its determination that the grievant was not the most qualified must be sustained. It submits that the grievant failed to establish that she was the "most qualified" applicant. The District claims that its selection was consistent with prior decisions in similar situations and the grievant presented no evidence that the parties have interpreted the contract as urged by the grievant here. It lists a number of other appointments where junior or "outside" applicants were selected over senior employes and the "most qualified" determinations made by the administration trumped seniority.

The District takes the position that merely because the grievant substituted in the position was not sufficient to overcome her performance shortcomings. It insists that substituting in a position may not be an automatic positive factor under the "most qualified" standard and it may be a factor in favor or a negative factor. In the grievant's case, the District alleges that it was a negative factor in that the grievant was viewed as not skillful in handling volatile situations with students and she failed to handle student situations effectively without the need to seek administrative intervention. It submits that the grievant allowed situations to escalate or caused the escalation or failed to adopt a strategy to prevent them from escalating. It states that the administrators were not alone in this observation as fellow unit member Novak acknowledged that the grievant was very "black and white," the qualities Novak had seen in another applicant whom she ranked last. It claims that the Union's argument that because the grievant did not have a full-blown trial over these, their merits should be downplayed. It maintains that seasoned administrators can distinguish legitimate student complaints and the grievant's substitute experience reinforced the negative perceptions of the administrators. It admits that the grievant's performance as a substitute was adequate but that does not translate into an endorsement for the regular position nor a judgment as to the most qualified candidate.

The District contends that the grievant's attacks on the administrators' process are without merit and do not make the grievant the most qualified. The grievant was the only available aide indicating an interest in substituting, but that is insufficient to establish that she was the most qualified. It rejects the grievant's argument that she should have been interviewed in the fall of 1998 or that the interview process would elicit information to allow comparison with another applicant. It notes the grievant's September 24, 1998 letter to the administration does not ask for an interview or claim an injustice but was a defense of her performance and a vigorous advocacy of her candidacy. It insists that the grievant failed to show she was more qualified that Mientke and the District has shown why it considered the grievant among the least qualified despite her experience substituting and the grievance has no merit.

The District posits that if a remedy is in order, it should be prospective, subject to the probationary period provision, and if back pay is ordered, it should be offset by all the grievant's earnings received. It concludes that the grievance should be denied.

UNION'S REPLY

The Union contends that whether the grievant was the "most qualified" candidate to fill the Attendance Supervisory Aide position in the fall of 1998 is arbitrable. It relies on the definition of a grievance in Article XII as the issue of the grievant's qualifications falls under Section 1304 of the contract. It seeks rejection of the District's arguments under the management rights clause as Section 301 sets out a prefatory condition that management prerogatives are not grievable "[E]xcept as otherwise specifically provided for in this agreement . . ." and Section 1304 provides that the filling of a vacant position is grievable where there is a dispute as to whether or not an employe meets the qualifications to fill the position and this specific language takes preference over the more general language in Section 302. It concludes that the dispute is arbitrable.

The Union maintains that whether a candidate is the "most qualified" presents a question of fact and subjective opinion is not dispositive. It states that the after-the-fact criticisms by the administrators should not be taken as proof positive that the grievant was not the "most qualified," and the opinion of senior aide Novak that the grievant was the most qualified should be credited. It insists that if the subjective opinion of the administration is the standard of review then the right to grieve a manager's decision regarding an applicant's qualifications would be rendered meaningless and the objective "most qualified" standard would have no application other than the "employe chosen by the managers for whatever their reasons." It argues that the standard for review should be based on a recognition that Section 1304-B is a modified seniority-relative ability clause intended to give considerable weight to seniority and that there must be measurable and significant differences between junior and senior before seniority will not be given effect. It claims that the District has the burden to prove by objectively ascertainable, tangible evidence establishing a definite, distinct, substantial and significant difference that Mientke's qualifications were "head and shoulders" above those of the grievant.

The Union claims the evidence compels the conclusion that the grievant was the "most qualified" candidate. It reiterates its arguments made in its brief in chief that the criticisms of the grievant were not brought to her attention until the decision was made not to appoint her to fill the position and these criticisms should not be credited.

The Union alleges that the failure to interview the grievant was arbitrary and capricious and denied her a fair opportunity to be considered for the position. It insists that because the grievant was denied an interview, her application was measured against a different standard

than the other candidates as she was judged on the basis of perceived deficiencies in her performance in other positions while the others were judged on their "interview personality." It maintains that the failure to discuss criticisms of her performance and the lack of an interview denied her any opportunity to respond to those or to explain the differences in her duties and responsibilities. It observes that the administrators could not make a fair comparison between her potential performance as distinguished from her perceived performance. It points out that the other applicants were never observed interacting with students and staff and had no statistical information about the grievant's interaction, so the grievant was judged on uninformed and essentially wrong perceptions of deficiencies in her performance while the others were judged on the relative positive impressions they made during the interviews. It claims that a comparison could not result in a favorable outcome to the grievant and the denial of an interview guaranteed it.

The Union argues that even if there were deficiencies in the grievant's work performance, it does not mean she was not the "most qualified." It notes the District acknowledged that she was qualified for the position and the issue is whether she was the most qualified. It disputes that the grievant had to show she was more qualified than Mientke claiming the District had the burden of proving the applicant selected was the "most qualified" and, in fact, the grievant proved she was the "most qualified" candidate. It insists that the District failed to prove that Mientke stood "head and shoulders" above the grievant. It asserts that the grievant presented tangible evidence regarding her substantial background experience, the varied and sophisticated responsibilities the administrators asked her to undertake and her interaction with students and staff. It submits that nothing even remotely comparable was offered in evidence about the other applicants and the conclusion is compelled that the grievant stood "head and shoulders" above the rest. It asks that the grievance be sustained, the grievant be placed in the position without any probationary period requirement and she be made whole to October 5, 1998.

DISTRICT'S REPLY

The District takes issue with several of the Union's assertions of fact. It observes that the grievant submitted the September 28, 1998 letter after she became aware that she might not be interviewed again for the position. It notes that the letter did not request an interview or assert any disadvantage by not being interviewed and this is significant to measure her complaint about not being interviewed. It asserts that while the grievant characterizes her letter as reminding the administration of her qualifications, the letter defends the manner in which she handled students. It contends that the administrators did not share her opinion of her performance and the grievant argues that her own subjective opinion should be given greater weight than the administrators'. The grievant, it notes, claims support from staff and teachers, none named, but does not include any administrator. It points out that the grievant suggests Novak's support but ignores Novak's testimony that this support was based on the grievant's greater seniority which entitled her to the job, an interpretation at odds with the

contractual language because it eliminates any difference between Sections 1304-A and B. The District observes that the grievant ignores Novak's testimony that the grievant demonstrated the same difficulty dealing with students that another applicant had shown with the result that Novak ranked that applicant last.

The District disputes the grievant's claim that the administrators were instructed to discount her experience as an Attendance Supervisory Aide. It states that the grievant's prior service in the position as a substitute was taken into consideration.

Contrary to the Union's assertion that the administrators had not told the grievant about performance deficiencies until October 2, 1998, the District insists that it gave the grievant constructive criticisms prior to that date and while these were not documented every time, situations were discussed with her. It insists that the fact the grievant claims they were not critical of her performance does not mean that such comments were not given. It asserts that the administrators had concerns and believed they had communicated them to the grievant. The District takes the position that communication of these concerns was not a prerequisite to consideration of them in their "most qualified" assessment.

The District denies that the notes on the grievant's birthday card are evaluative of her performance and simply were positive comments as negative comments are seldom written on special occasion cards. The District refers to the Union's brief where it details events that occurred post grievance suggesting the administrators were giving her a raw deal. It asserts that the administrators were simply trying not to repeat the mistakes the grievant claimed they made in dealing with her. It submits the grievant's reactions to the after grieved events undermine her claim that she expected such treatment prior to the grieved event. It notes that no new grievance was filed nor was there any amendment of the first grievance raising a reprisal claim. The District insists that the Union's lengthy quotes in its brief from Elkouri & Elkouri, How Arbitration Works, 5th Ed. BNA, 1997, do not advance the grievant's cause as the reference omits footnotes of relevant and instructive information and deals with the burden of proof under "relative ability" clauses; however, the parties' agreement is not really a relative ability clause and there is no discussion of contract language which states that the most senior gets the job only if he/she is the most qualified applicant for it. It also asserts that the quote from Labor and Employment Arbitration, 2nd Ed. T. Bornstein, A. Gosline and M. Grunbaum, ed. 1999, provides little guidance because it does not deal with the contractual language set forth in the parties' agreement. It also distinguishes JACKSON COUNTY, CASE 99, NO. 49676, MA-8024 (MAWHINNEY, 1995) because it is not a "most qualified" case. The District claims that contrary to the Union's assertion, the record contains substantial credible evidence of the successful applicant's qualifications. It notes that Mientke had prior successful employment in the District, received a strong recommendation from her supervisor, Fitzgerald's wife gave her a positive comment, she was ranked higher by an interviewer than other applicants who had the same student relation deficiencies as the grievant, Mientke had not been the subject of complaints in dealing with students and the administrators concluded that Mientke was a better applicant than the grievant. It concludes that the Union produced no

evidence of bad faith and the administrators using their experience and familiarity with the demands of the school, selected the most qualified applicant. The District contends that if a remedy is awarded, the grievant should serve a probationary period with the discount of 20¢ per hour for the probationary period.

DISCUSSION

The first issue to be determined is whether the District's determination of "most qualified" is arbitrable. Article III of the agreement provides in Section 301 as follows:

> Except as otherwise specifically provided in this Agreement, the Board retains all rights and functions of management and administration that it has by law and the exercise of any such rights or functions shall not be subject to the grievance procedure.

Article XIII of the parties' agreement provides procedures related to promotion, transfer and change of assignment. Section 1304 discusses the procedures that will be followed when the Board decides to fill a vacancy. In this case, the District filled a vacancy and applied the provisions of Section 1304-B. Article XII, the grievance procedure, defines a grievance as a "dispute between the parties concerning the interpretation or application of specific provisions of this contract." This is a broad definition and the grievance filed in this matter claims the grievant was the most qualified applicant. The Wisconsin Supreme Court in JT. SCHOOL DISTRICT NO. 10 V. JEFFERSON ED. ASSOC., 78 WIS2D 94 (1977) stated the test for arbitrability was "whether there is a construction of the arbitration clause that would cover the grievance on its face and whether any other provision of the contract specifically excludes it." There is a dispute about whether or not the grievant is the "most qualified" applicant and the arbitration clause is broad enough to cover this grievance on its face. The language of Section 301 provides that except as otherwise specifically provided in the agreement, the exercise of rights are not subject to the grievance procedure. Section 1304 is specific language which acts as a limitation on the District's exercise of its retained rights. Thus, it cannot be said that Section 301 specifically excludes arbitration of the grievance. Thus, the grievance is arbitrable. If the determination under Section 1304-B was not arbitrable, then the selection of an applicant because he/she had red hair and no other qualifications over someone well qualified but with brown hair would not be arbitrable. Section 1304-B infers the most qualified will be selected and a grievance challenging this under JEFFERSON, SUPRA, is arbitrable.

Having concluded that the grievance is arbitrable, the next issue is the appropriate standard for review. The Union has set forth a standard of review related to a modified seniority clause, asserting a "head and shoulders" standard. It refers to a number of cases

including JACKSON COUNTY, CASE 99, NO. 49676, MA-8024 (MAWHINNEY, 4/95). The job posting language there provided that seniority and qualifications will be considered and "[W]hen the qualifications of two or more bargaining unit employes are relatively equal, seniority shall be the determining factor." Section 1304-B of the agreement provides that "[I]n filling positions in a higher classification, the unit member with the greatest seniority shall be given the position if the employee is the most qualified applicant." This is not a relative seniority clause. The application of seniority is illusory as seniority only comes into play if the senior employe is deemed to be the most qualified, thus qualifications is the determining factor in selecting the successful applicant and seniority is only a factor where the most qualified coincides with the most senior. Section 1304-B does not provide a standard of review of the District's decision with respect to determining the "most qualified" applicant. The District has the discretion to evaluate applicants and make the decision as to who is the most qualified subject to the Union's right to challenge this decision as reasonable. Arbitrators are often guided by the following principle:

> . . . if management's decision in the matter was not arbitrary, capricious or unreasonable, or based on mistake of fact, its decision should stand. Furthermore, the boundaries of reasonableness should not be so narrowly drawn that management's judgment must coincide exactly with the arbitrator's judgment . . .
> TRANS WORLD AIRLINES, INC., 41 LA 142 (BEATTY, 1963)

The undersigned finds that the burden of proof is on the Union to show that the District's decision as to the most qualified applicant was discriminatory, arbitrary, unreasonable or capricious.

The next issue to be determined is whether the District violated Section 1304-B by not selecting the grievant as the most qualified applicant. The Union has asserted that the District did not interview the grievant which resulted in disparate treatment. As noted earlier, the agreement does not spell out the procedures under which the District must assess applicants so the District is free to make assessments as it deems appropriate as long as it acts reasonably. The District did interview other applicants but not the grievant; however, the grievant had been interviewed for the same position a few months earlier and was well known to the interviewers and she also sent a letter to Mr. Fitzgerald. The undersigned cannot conclude that the District's interviewing unknown candidates and not interviewing the grievant, who they knew and had observed, is so unacceptable or irrational that it would rise to arbitrary and capricious or unreasonable conduct on the part of the District. The District was seeking an applicant with positive interpersonal communication skills who knew how to handle student problems effectively and efficiently and could relate well to students. Fitzgerald, as one of the interviewers, determined that others could do this more effectively than the grievant. This conclusion is supported by Ms. Novak who testified as follows:

By Mr. Ruhly:

Q. And did you explain – tell me why Marianne Nystrom was the last on your list?

A. Because she was very black and white, the same way that Linda Bulloch was, and that's why we had her lowest on our lists.

Q. And did you also indicate at that time that Linda needed a different attitude towards student?

A. I had talked with Linda and told her if she was interested in another position that was coming up she couldn't be so black and white, she had to find a gray line. (Tr. 106 and 107)

The Union's argument that Ms. Novak recommended the grievant as most qualified is not persuasive. Ms. Novak testified that she was "under the assumption in our Union if we were there we had the seniority and you were qualified to do that job when a posting came open and you applied for it, that you could get it." That appears to be the standard under Section 1304-A, but is not under Section 1304-B which is applicable here because the grievant who was in Group II was seeking a Group VI position.

The grievant's assertion that she was the most qualified has not been demonstrated. Novak testified she was too black and white. Dave Martin testified that he too was black and white and the grievant's methods were similar to his. (Tr. 161, 164) He further testified that things changed (Tr. 162-164) and it was kind of a gray area to him, but Jon Russell had great rapport with students and he would say things to students that would be taken in a completely different manner than from himself. (Tr. 167) He testified that his approach did not work as well for the grievant as for him. (Tr. 165)

It does not make any sense that if the grievant was the most qualified that the District would not select her. The District wants the most qualified person in the position and has retained language in the contract to permit it the discretion to select the most qualified applicant. There was no showing of any animosity. The grievant was put in the position as a substitute on a number of occasions and put in substitute positions in other higher grade positions. Also, she never grieved the two time selections of Jon Russell for the position. The District in this case, after the interviews and their knowledge of the grievant, decided that Mientke was more qualified. The standard allows the District the discretion to make this determination and the Arbitrator cannot second-guess its decision unless it is shown to be arbitrary and capricious, discriminatory or unreasonable. The evidence presented failed to demonstrate that the District acted improperly. Although the Union may disagree with the selection process, the appropriate method to change the selection procedure is at the bargaining

table. Given the contractual language here, the Union has not shown the District's decision to be arbitrary and capricious, discriminatory or unreasonable, so there is no violation of the contract.

Based on the above and foregoing, the record as a whole and the arguments of counsel, the undersigned makes the following

AWARD

For the reasons stated above, the District has not violated the parties' collective bargaining agreement by not selecting the grievant to fill the Attendance Supervisory Aide position, and therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 24th day of January, 2000.

Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator

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