

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**MUKWONAGO AREA SCHOOL DISTRICT CLASSIFIED EMPLOYEES
LOCAL 1101, AFSCME, AFL-CIO**

and

MUKWONAGO AREA SCHOOL DISTRICT

Case 53
No. 60500
MA-11637

Appearances:

Mr. Michael J. Wilson, Representative at Large, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, appearing on behalf of Local 1101, AFSCME, AFL-CIO, Mukwonago Area School District Classified Employees.

Davis & Kuelthau, S.C., by **Attorneys Mark L. Olson and Daniel Chanen**, Suite 1400, 111 East Kilbourn Avenue, Milwaukee, Wisconsin 53202-6613, appearing on behalf of the Mukwonago School District.

ARBITRATION AWARD

The Mukwonago Area School District (hereinafter District) and Mukwonago Area School District Classified Employees Local 1101, AFSCME, AFL-CIO (hereinafter Union) are parties to a collective bargaining agreement that was in effect at all times relevant to this proceeding which provides for final and binding arbitration of certain disputes. A request to initiate grievance arbitration was filed with the Wisconsin Employment Relations Commission on October 31, 2001. The request for arbitration asked the Wisconsin Employment Relations Commission to forward a panel of five staff arbitrators. Said panel of arbitrators was forwarded to the parties on November 2, 2001. On February 15, 2002 (received by the WERC on February 19, 2002) the parties selected Commissioner Paul A. Hahn as arbitrator. Commissioner Hahn was appointed to act as arbitrator on February 19, 2002. Hearing in the matter took place on September 17 and October 16, 2002 at the offices of the Mukwonago Area School District in Mukwonago, Wisconsin. The hearing was transcribed. The parties were given the opportunity to file post hearing briefs. Post hearing briefs were received by the Arbitrator on December 2, 2002 (Union) and December 4, 2002 (District). The parties were given the opportunity and filed reply briefs. Reply briefs were received from the parties on December 23, 2002. The record closed on December 23, 2002.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUE

Union

Did the Employer violate the terms of the collective bargaining agreement when it did not award the vacant position driver/custodian/food service to the grievant? If so, what is the appropriate remedy?

District

Did the District violate the terms of Section 10.04(A) of the 1999-2001 collective bargaining agreement when it promoted Gary Johnson to the position of van driver in May of 2001?

Arbitrator

Did the District violate the terms of the collective bargaining agreement when it failed to promote Grievant to the position of Van Driver in May of 2001?

If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

Article 2: MANAGEMENT RIGHTS

- 2.01 RIGHTS: The Board and/or its designee (hereinafter the term "Board" shall connote Board and/or its designee) possesses the sole right to operate the school system and all management rights repose in it, subject only to the provisions of this contract and applicable law. These rights include, but are not limited to the following:
- A. To direct all operations of the school system;
 - B. To establish reasonable work rules and schedules of work in accordance with terms of this Agreement;
 - C. To hire, promote, transfer, schedule and assign employees in positions with the school system in accordance with the terms of this Agreement;

- D. To suspend, demote, discharge, and take other disciplinary action against employees for just cause;
- E. To relieve employees from their duties because of lack of work or any other legitimate reason;
- F. To maintain efficiency of school System operations;
- G. To introduce new or improved methods or facilities; or to change existing methods or facilities provided if such affects the wages, hours, or working conditions of the employees, the Union will be notified in advance and permitted to bargain;
- H. To determine the kinds and amounts of services to be performed as pertains to school system operations, and the number and kinds of positions and job classifications to perform such services;
- I. To determine the method, means and personnel by which school system operations are to be conducted;
- J. To take whatever reasonable action is necessary to carry out the functions of the school system in situations of emergency;
- K. The Union recognizes the Board has the right to contract or subcontract for goods or services, provided no unit employee shall be laid off or suffer a reduction in hours below forty (40) hours per week. Prior to exercising the subcontracting rights contained in this section, the district will exhaust the posting provisions set forth at Article 10.
- L. Nothing contained in this Article shall be construed as divesting an employee of any right granted elsewhere in this Agreement or the Wisconsin Statutes.

2.02 EXERCISE OF RIGHTS: the Employer agrees that it will exercise the rights enumerated above in a fair and reasonable manner, and further agrees that the rights contained herein shall not be used for the purpose undermining the Union or discriminating against its members.

. . .

Article 5: GRIEVANCE PROCEDURE

5.01 DEFINITION: A grievance shall mean a dispute concerning the interpretation or application of this contract.

...

5.02 STEPS IN PROCEDURE:

Step 1: The employee, alone, or with one (1) Union representative shall orally contact his immediate supervisor within forty (40) calendar days, exclusive of holidays, after he knew or should have known, of the cause of such grievance. In the event of a grievance, the employee shall perform his assigned work task. The employee's immediate supervisor shall, within five (5) calendar days, orally inform the employee of his decision.

...

Article 10: PROMOTIONS AND TRANSFERS

...

10.04

A. SELECTION: The selection of any applicant to fill the job vacancy shall be made on the basis of skill, ability, other qualifications and seniority; however, if the skill, ability and other qualifications of two or more employees are relatively equal, the employee with the greatest District-wide seniority shall be chosen. The employee shall have a sixty (60) calendar day probationary period in which to prove his qualifications for the job. If during such sixty (60) day probationary period, the selected employee fails to make satisfactory progress to qualify for the new position, or if the employee himself elects to return to his former position, he may return to his former position and selection shall be made among the remaining employees who signed the posting in accordance with the criteria set forth above. Any question involving the qualification of an employee may be submitted to the Grievance Procedure. Notification by the District to the chosen bidder shall be made within fifteen (15) working days following the end of the posting period. The award of a posted job shall be made within twenty-five (25) working days following the end of the posting period.

...

Article 28: PERSONNEL FILES

28.01 PERSONNEL FILES: The employee shall have the right, upon appointment, to review the contents of his/her personnel file and to receive copies of any documents contained therein. The employee shall be entitled to have a representative of the Union accompany him/her during such review. At least once every two (2) years, the employee shall have the right to indicate those documents and/or other materials in his/her file which he/she believes to be obsolete or otherwise inappropriate to retain. Said documents shall be reviewed by Administration and if they agree that the documents are obsolete or otherwise inappropriate to retain, then such documents shall be destroyed. No evaluations or negative material shall be placed in his/her personnel file unless the employee has an opportunity to review such material by affixing his/her signature to the copy to be filed with the express understanding that such signature in no way indicates agreement with the contents thereof. The employee shall also have the right to submit a written answer to such material and his/her answer shall be reviewed by the Administration and attached to the file copy. This provision is not intended to apply to routine and/or clerical additions to personnel files.

STATEMENT OF THE CASE

This grievance involves the Mukwonago Area School District and the Mukwonago Area School District Classified Employees Local 1101, AFSCME, AFL-CIO (Jt. 1). The Union alleges that the District violated the collective bargaining agreement by failing to promote the Grievant to the position of Van Driver pursuant to Section 10.04(A) of the collective bargaining agreement. (Jt. 2) Section 10.04(A) states in pertinent part:

The selection of any applicant to fill the job vacancy shall be made on the basis of skill, ability, other qualifications and seniority; however, if the skill, ability and other qualifications of two or more employees are relatively equal, the employee with the greatest District-wide seniority shall be chosen.

In responding to the grievance, the District's Business Manager William Cantwell stated that the skill, ability and qualifications of Grievant and Johnson, the other employee who bid for the position, were not relatively equal and therefore Cantwell denied the grievance.

(Jt. 11) In a further response to the grievance, the School Board, by its attorney, advised the Union Business Representative that the grievance would continue to be denied. (Jt. 12) With the Board's denial of the grievance, the grievance in the matter was submitted to arbitration under the parties' collective bargaining agreement.

The District operates a K-12 public school district in Mukwonago, Wisconsin. The education of approximately 3,000 students is carried out in several different school district buildings. In April of 2001, the District posted the driver/custodian/food service (the van driver position). (Jt. 3) The posting listed the following qualifications for the positions:

1. Must possess a valid Wisconsin driver's license and the driving record of the employee is subject to the approval of the insurance company; CDL may be required.
2. Must have the ability to do sustained lifting (50 pounds).
3. Ability to work without immediate supervision.
4. Ability to do minor maintenance of delivery vehicle.
5. Ability to plan, schedule and establish priorities in emergencies.
6. Ability to work/relate with staff, students, and public.
7. Working knowledge of materials, equipment and methods commonly used in general cleaning and maintenance work.
8. Ability to perform general cleaning, maintenance work, warehouse receiving and inventory work.
9. Ability to plan and schedule cleaning and maintenance projects.
10. Ability to use computer systems.
11. Must have demonstrated reading, math and writing skills to adequately perform job function.
12. Knowledge of and/or experience in boiler operations and maintenance or must complete WCTC or equivalent boiler course within one year.

(Jt. 3)

In addition to the twelve job qualifications so identified, the job posting listed 14 performance responsibilities that define the Van Driver position:

1. Delivery of food supplies and prepared food to satellite schools throughout the District.
2. Receives and checks in supplies in Central Kitchen as the need arises. Restocks, rotates and dates food products, maintaining proper inventory control. Gives daily assistance with products needed.
3. Cleans all assigned areas in Central Kitchen using proper methods and equipment. Includes major summer cleaning at the Central Kitchen and related storage areas.

4. Performs major summer cleaning in the high school serving kitchen and related storage areas.
5. Completes basic maintenance tasks in Central Kitchen such as replacing light bulbs, monitoring temperatures, etc.
6. Collects and disposes of all waste in Central Kitchen – recycled and otherwise.
7. Keeps all equipment in Central Kitchen, including boiler, in good operating condition, lubricating, sharpening, adjusting and minor fixing.
8. Delivery of inter-school mail and correspondences, etc.
9. Delivery of equipment and consumable instructional supplies.
10. Timely delivery of custodial supplies.
11. Responsible for minor maintenance and weekly cleaning of delivery vehicles.
12. Keeps Central Kitchen and dock neat and clean at all times.
13. Informs Supervisor, Buildings & Grounds and /or Food Service Supervisor regarding maintenance of equipment and facilities.
14. During vacation and summer periods, other duties as assigned by Food Service Supervisor and/or Supervisor, Buildings & Grounds.

(Jt. 3)

The Van Driver is an essential employee in the daily operation of the District. The Van Driver is responsible for the delivery of over 2,000 prepared meals from a central kitchen to six outlying schools in the District. The Van Driver is responsible for maintaining the kitchen boiler which is used to operate a significant part of the kitchen's food preparation equipment. Along with the boiler maintenance in the kitchen, the Van Driver is responsible for regular cleaning of the kitchen area, the proper care and rotation of kitchen supplies and food preparation materials. The Van Driver also responds to requests for supplies from outlying District buildings as well as requests from the kitchen staff for perishable items. While the Van Driver is supervised by the Supervisor of the District Food Service program and the Supervisor of Buildings and Grounds, this supervision is seldom exercised directly, supporting the need for the Van Driver to be able to work well without supervision on a daily basis.

The Van Driver position was posted District-wide from April 24 through April 30, 2001. Two employees, the Grievant and Gary Johnson, both custodians in the Clarendon school building, applied for the Van Driver position. (Jt. 4) The Grievant at the time of the job posting and determination of who would be awarded the Van Driver position had five years and 7.75 months of employment with the District, and Johnson had four years and 9 months employment with the District. (Jt. 4)

Harris and Kraus, the two supervisors, reviewed Grievant's and Johnson's applications for the Van Driver position. Grievant and Johnson completed a "skills and experience record" summarizing their employment history, educational record, special skills and ability and other relevant information. (Jt. 6 & 8) Harris and Kraus evaluated the two applicants using a

District “food service qualifications” form for the Van Driver that relied on the applicants’ personnel records with the District and Kraus’ opinion as the overall supervisor of the custodians within the District. (Jt. 5 & 7) Harris and Kraus also conducted personal interviews with the Grievant and Johnson using a set of questions asked of each applicant from which they developed notes based on the applicant’s responses. (Jt. 9 & Dist. 10, 11, 13 & 14) Harris and Kraus also spoke with John Shanahan, the principal of the school building in which both employees worked. Neither Harris nor Kraus spoke with the immediate supervisor of the two applicants, Caren Jasinski, who had been the Grievant’s and Johnson’s immediate supervisor since 1999. Jasinski was in the same bargaining unit as Grievant and Johnson.

Based on the results of the aforementioned process, Harris and Kraus recommended to District Director of Business Affairs, William Cantwell, that the District promote Johnson to the Van Driver position. Cantwell also spoke with Principal Shanahan, reviewed the personnel files of Grievant and Johnson and accepted the recommendation of Harris and Kraus. Cantwell made the final determination for the District to award the Van Driver position to Johnson. Cantwell determined that the qualifications of the Grievant and Johnson were not relatively equal and therefore seniority would not play a role.

The District’s action led to the filing of a grievance. (Jt. 2) The parties failed to achieve resolution through the grievance procedure. The matter was appealed to arbitration. No issue was raised as to the arbitrability of the grievance. Hearing was held by the Arbitrator on September 17, 2002 and October 16, 2002.

POSITIONS OF THE PARTIES

Union

The Union takes the position that the Grievant and Johnson were relatively equal in skill, ability and other qualifications and that the Grievant, as the senior applicant, should have been promoted to the Van Driver position in May of 2001. The Union submits that Joint Exhibits 5 and 7 were the key documents the District used at the time of the Grievant’s job bid to determine the differences between the two applicants. Jt. 5 (Grievant) and Jt. 7 (Johnson) were forms developed by Harris to determine the qualifications for the Van Driver position. Each form listed 10 qualifications of which 9 were used. Each qualification was given a score of plus 1, exceeds requirements for this area in current position, a zero, meets requirements for this area in current position, or a minus 1, improvement needed in this area. After each qualification, there was a section for comments which were completed for six of the nine qualifications. The Grievant achieved a score of minus 6 and Johnson achieved a neutral score of 0. The Union argues that Grievant’s minus 6 should have been zero because each instance where the Grievant scored a minus 1, the District relied on obsolete, inappropriate documents from Grievant’s personnel file and failed to fairly evaluate the Grievant in a timely manner.

The Union points out that the only formal evaluation of Grievant prior to the May 2001 Van Driver application was a 1997 evaluation. There was, the Union points out, no current evaluation performed by the District until the Fall of 2001, after Johnson had been awarded the Van Driver position. The District conducted biannual evaluations but had not performed a biannual evaluation for the period November of 1999 to November of 2001 which would have been more up-to-date than the 1997 evaluation. The Union avers that the evaluation from November of 1999 to November of 2001 indicates that Grievant "meets requirements" in all areas including those areas checked as "needs improvement" in the December 1997 evaluation. (U. 1)

The Union argues that Kraus did not fairly evaluate the grievant because Kraus never talked to Grievant's immediate supervisor Jasinski and based his remarks on the 1997 evaluation and warning letters from 1997 and 1998. The Union submits that Kraus did not routinely observe the Grievant's work activity and could not possibly know about Grievant's job performance on a day-to-day basis. Although Principal Shanahan was questioned as to his beliefs regarding the qualifications of the applicants and decided that Johnson was a better candidate, Shanahan's comments do not show up on Joint Exhibit 5.

The Union takes the position that Joint 5 and Joint 7 should be the critical documents to decide this arbitration because, in his response to the grievance, Cantwell only referenced those two documents and never referenced the recommendation of Shanahan, the personal interviews and the applicants' personnel files. Therefore, the District should be limited to defending the grievance solely on Joint 5 and Joint 7 and should not be allowed to enhance its case by testimony and documents that only came out at the arbitration hearing. The Union argues that Kraus made things up as he went along in his testimony and never bothered to tell Harris or Cantwell that he believed boiler experience was a key factor, which he stated at the arbitration hearing was a significant factor. Further, in the response to the grievance, Cantwell never informed the Grievant or the Union that boiler experience was a significant reason why the Grievant did not receive the promotion.

The Union takes the position that during the hearing this was only one example of many where Kraus embellished the facts. The Union argues that Harris had to rely on Krause for Grievant's job performance as she had never supervised the Grievant's work performance. The Union points out that it would have been impossible for the Grievant to receive a zero rating, which was a neutral rating, unless he had exceeded the requirements because in defining a good performer Kraus testified that a good performer would meet expectations and at times would exceed them.

The Union takes the position that under applicable arbitration case law most arbitrators apply the "head and shoulders rule" that the junior employee's "skill, ability and other qualifications" must be "head and shoulders" above the senior employee. Similar standards, the Union submits are "substantially and demonstratively superior," "significantly,

measurably, and demonstratively greater” and “measurably and substantially greater.” The Union argues that generally arbitrators under modified seniority clauses find that management is entitled to make the initial determination as to qualifications but that management’s determination is subject to grievance and arbitration where the union challenges that determination as unreasonable, arbitrary, capricious or discriminatory.

The Union submits to the Arbitrator that had Kraus done his job and fairly evaluated the Grievant in a relevant timeframe to the Van Driver promotion, the results would have been different; the Union notes that Harris testified that if the Grievant’s work performance had improved over the 1997 evaluation (Jt. 15) it would have made a difference in evaluating the Grievant. The Union argues that Grievant’s job performance under Jasinski was given less consideration than the opinion of the previous head custodian Gaszak with whom Grievant had a problematic relationship. Although the Grievant never filed any grievances regarding discipline in 1998, as he felt it would only bring him more problems, this punishment should not have affected the 2001 job promotion given the three-year span of time in which Grievant was never reprimanded again. The Union submits that the November 13, 2001 evaluation (Union 1) is more representative of the Grievant’s work performance at the time of the promotion in May of 2001 than the evaluation in December 1997.

Finally, the Union argues that the Arbitrator should consider only the Employer’s stated findings of May 10, 2001 (Jt. 5) as the express and explicit reasons the Grievant did not receive the Van Driver position. The Arbitrator should not consider any embellishment of those findings by the District after the fact in preparation for the Grievant’s appeals and/or arbitration. Greater weight should be given to Union Exhibit 1, the November 13, 2001 evaluation of the Grievant, which covered the period of the Van Driver job posting and application process, as it represented for Grievant a satisfactory work performance for a significant period immediately preceding the promotion in question. The Union submits that great weight should be given to Jasinski’s testimony that the relative qualifications between Johnson and Grievant were equal.

Based upon the record as a whole, the Union requests that the Arbitrator sustain the grievance and promote the Grievant to Van Driver with appropriate back pay.

District

The District takes the position that under Section 10.04(A), which both parties agree is the contractual standard for resolving this dispute in this matter, the sole question in the arbitration is whether the “skills, ability and other qualifications of the Grievant and Johnson were relatively equal.” The District submits that the record in the case makes it clear that the applicants were not relatively equal and that Johnson was far more qualified for the Van Driver position and therefore seniority could not be a factor in the promotion.

The District submits that it used a fair and an impartial procedure for determining whether the candidates were relatively equal in their skills, abilities and qualifications. District argues that the assessment tools used by the District (interviews, personnel file review, recommendations of supervisors, and work history) are accepted criteria by arbitrators. The District takes the position that both employees were treated equally and that based on upon the information obtained from the applicants' personnel files, the May 7, 2001 interviews and the May 16, 2001 candidate questionnaire and consultation with the applicants' building level supervisor (Shanahan), Harris and Krause properly recommended to Cantwell that the District should promote Johnson for the Van Driver position. Based upon this information and in order to comply with the specific conditions and terms of Section 10.04(A) of the collective bargaining agreement, Cantwell promoted Johnson as the employee who possessed superior ability, skills and qualifications and therefore seniority was not and should not have been a factor. The District argues that both Johnson and Grievant were given a fair and equal opportunity to be evaluated for the position of Van Driver; therefore, the District's determination that Johnson was significantly more qualified for the position of Van Driver than the Grievant was neither arbitrary nor capricious.

The District submits that Harris and Kraus reviewed personnel files and spoke with Principal Shanahan about the Grievant's level of performance and based on this information Harris and Kraus filled out a qualification checklist (Jt. 5) to determine whether Grievant's past performance as a custodian indicated that he met, exceeded or needed improvement in areas that would qualify him for the Van Driver position. The result of this exercise (Jt. 5) was that the Grievant received a score of negative 6 out of a possible score ranging from negative 9 to positive 9 with a score of zero being "qualified." Based on the minus 6 score the District argues it is clear the Grievant was not qualified for the Van Driver position. The District takes the position that the negative scores were supported by documented evidence related to Grievant's past performance including a December 1997 evaluation, disciplinary letters in Grievant's personnel file from January 1998, March 1998 and January 2001. The District submits that all of the evaluation scores were predicated upon file documentation which had never been grieved or challenged in any way by the Grievant.

The District argues that in contrast to Grievant's record, the record of Johnson showed an employee with no documented disciplinary problems. Johnson's most recent 1997 evaluation indicated that Johnson was an exemplary employee who met or exceeded all job expectations. Harris and later Cantwell spoke with Shanahan, the Building principal who supervised Johnson and Grievant. Shanahan was in a position to directly evaluate both Grievant and Johnson's present level of performance and Shanahan testified that of the two he would have hired Johnson for the position. The District takes the position that Grievant's past record revealed a pattern of poor work performance and disciplinary referrals, all of which were significantly uncontested until the grievance subject to this hearing. In contrast, Johnson's employment record revealed an employee who met or exceeded expectation and was considered by his supervisors as a "good performer." The District posits that considerable

weight should be given to the conclusions of supervisors when supported by factual evidence which the District argues was present in this case from the testimony of Shanahan and Kraus the two individuals who had supervisory authority over both Grievant and Johnson and whose testimony was supported by the documentary evidence in Grievant's personnel record of inadequate performance and discipline.

Further, the District submits that the Grievant's prior work experience before coming to the Mukwonago School District did not match the job requirements and duties of the Van Driver position. In contrast, the District argues that Johnson's previous work experience was directly related to the Van Driver position and that Johnson's skills, abilities and other qualifications more closely matched the Van Driver position duties prepared by the District and gave further support for the ultimate selection of Johnson for promotion to Van Driver.

The District takes the position that a comparison of the candidates' interview responses reasonably led the District to conclude that Johnson was more qualified than the Grievant. The District argues that the Grievant's interview answers indicated that he was not well-suited for the Van Driver position; the Grievant's answers to interview questions did not show an ability to problem solve and act independently and he did not have the personal flexibility to react to changes in schedule, a critical component of the Van Driver position. Further, Grievant's interview responses indicated that he preferred a highly structured work environment and did things in a routine manner which did not match the nature of the challenges faced by the Van Driver position, which has a constantly shifting job demand. The Grievant's interview raised legitimate concern about his ability to do the job, and, in contrast to the Grievant, the interview responses provided by Johnson indicated there was a "fairly dramatic contrast" between Johnson's and Grievant's interview as testified to by Harris. Johnson was able to give more complete answers to the questions asked of him, indicated that he was flexible and liked variety in his daily schedule and enjoyed the challenge of making independent decisions which led to a favorable impression of Johnson's ability to perform the job. The District avers that both Grievant and Johnson received an interview in which they were asked the same questions. Contemporaneous notes were taken of the May 7, 2001 interview by Harris and Kraus and both formed subsequent opinions supporting Johnson as the better candidate. The District argues that management's assessment of the employees through the interview process should be given deference so long as the interviews were not conducted unfairly. While interviews are subjective, that does not make them unreasonable, suspect or inappropriate and subjective interviews are probably the only way to judge intangible qualities of a candidate for a certain position.

In its reply brief, the District submits that the District was entitled to and did in fact consider more than the contents of Joint Exhibits 5 and 7, and argues that the Union's position is based on gross misrepresentation of the testimony and of the exhibits. The District submits that the Union's argument that only Joint Exhibits 5 and 7 could be used is misguided since

there were multiple factors considered in making the hiring decision, and it is wholly appropriate for employers to consider past performance in promotional circumstances. The results of the hiring procedure revealed a pronounced real and significant difference between the skills, ability and qualifications of Johnson and the Grievant.

The District argues that virtually all matters considered by the District in this promotion reveal that the Grievant's previous work experience and Grievant's qualifications were vastly inferior to the qualifications demonstrated by Johnson using the same set of criteria. The District repeats that it created a fair and impartial multiple step procedure for determining the relative skills, abilities and qualifications of the applicants. The District objects to the Union's attempt to minimize the importance of the prior work history, interviews and discussions with the two employees' supervisors by speciously attempting to reduce the entire decision to the information contained in Joint Exhibits 5 and 7 and then attempting to ignore the Grievant's deplorable and inferior "minus 6" rating. The District argues that it is incredible that the Union would have the Arbitrator believe that Harris and Kraus conducted interviews, spent extensive time reviewing personnel files, spent time reviewing the candidates' work history and consulting with the candidates' supervisor, but then did not consider any of the information gleaned from this process except as contained in Joint Exhibits 5 and 7; this allegation, the District argues, is simply not plausible. The District submits that Joint Exhibits 5 and 7 were appropriate tools for reviewing the candidates' level of performance and were properly used by the District in making the final decision to hire Johnson for the position. The District posits that Joint 5 and 6 merely confirmed other information gathered by Harris and Kraus in the application process.

The District argues that it was a fair and equitable means of evaluation to review the personnel records of Grievant and Johnson; the Union argument that the prior discipline and poor performance should not be considered in considering future promotions has been summarily rejected in prior arbitration case law. The District submits that it would have been negligent not to have reviewed and considered personnel records, particularly in view of the Grievant's extensive documented record of poor performance, failure to follow supervisory directives and negative attitude toward his work.

The District rejects Grievant's argument for not grieving or placing rebuttals in his personnel record for the March 3, 1998 warning that there was a conspiracy between the Union President and Kraus. Rejecting this argument of the Grievant, the District argues that the more credible explanation is that the Union President agreed with the decision to extend the Grievant's probation and that the Grievant never went to the Union because Grievant knew that his performance was below acceptable standards.

The District responds to the Union's position that the District failed to consult Jasinski by stating that the Union puts too much stock in the evaluation of Jasinski a fellow bargaining unit member who did not have the authority to evaluate the performance of her fellow

employees. The District points out that the records show that Jasinski is not a person who customarily evaluates employees. The District submits that while Jasinski was entitled to her opinion of Johnson and the Grievant, it was Kraus and Shanahan, the two individuals who had supervisory authority over the two employees at the time of the promotion decision, who were most properly consulted by Harris as to their opinions on the respective performance of the two employees. The District notes that Jasinski wrote the most relevant contribution to the record of the Grievant by her January 16, 2001 memorandum to Grievant in which she advised him that his use of a walkman while on duty was a violation of management directives and was unacceptable.

The District takes the position that Union exhibit 1, the November 1, 2001 evaluation of the Grievant, could not have an impact on the promotion decision made in May of 2001 and therefore should not be considered. The District notes that Kraus testified, reviewing Union Exhibit 1, that in over half the evaluated areas the Grievant still needed improvement.

Lastly, the District rejects the Union's claim that Joint Exhibit 11 is proof that the District abandoned any argument it might otherwise have made regarding Kraus's evaluation of the Grievant's performance. Joint 11 was Cantwell's response to the grievance. The District submits that the Union has an unjustified expectation that at each step of the grievance process the District must make a disclosure of every reason for denying the grievance. The District takes the position that the District produced a response which was sufficient to justify its position in Joint Exhibits 11 and 12, and the District was not required to justify its position by including every reason and every detail in its initial response to a grievance. The District argues that under the contractual grievance procedure the District need not have responded at all since if it did not respond within the time limits set forth in the grievance procedure, the grievance simply moved to the next step of the procedure. The District takes the position that absent a contract requirement to the contrary, the District is not obligated to lay out every piece of evidence relied upon in making a decision in the initial steps of the grievance procedure but rather is only required to respond in writing to allow the grievance to proceed to the next step. The District argues that the testimony of Cantwell, Harris and Kraus and the exhibits provided in support thereof merely expound upon the reasons set forth in Joint Exhibits 11 and 12 and justify the conclusion that Johnson possessed superior skills, abilities and other qualifications.

In conclusion, the District takes the position that based on an extensive review of the information available to the decision-makers, the District reasonably concluded that Grievant was not relatively equal to Johnson in skills, ability and other qualifications.

Based upon the foregoing arguments, the District asks that the grievance be denied.

DISCUSSION

This is a contract interpretation case. The Union alleges that the District violated the parties' labor agreement when it failed to promote the Grievant to the position of Van Driver even though he was senior to the employee promoted to the position. Both parties agree that the critical contract provision is section 10.04(A) cited above. The issue is whether Grievant's skills, abilities and qualifications were relatively equal at the time of the job posting to Johnson, the employee awarded the job.

A relative ability clause is a modified seniority clause; seniority wins only if the employees bidding for the position are relatively equal. The Union argues that the employees will be relatively equal unless the junior in seniority employee is "head and shoulders" 1/ above the senior employee in skill, ability and qualification. The District submits that "In relative ability clauses seniority is determinative if the senior and junior employees' abilities and qualifications are substantially equal". 2/ Whatever standard is used and more could be cited, for the junior employee, in this case Johnson, to be awarded the job, the differences between the two employees must be substantial enough so that a decision by the District, is not arbitrary or capricious. It is also true that by the parties' willingness to negotiate a relative ability clause, the District was granted more flexibility to not resort to seniority as the determining factor. The real question therefore is whether the District arbitrarily awarded the job to Johnson rather than Grievant, the more senior employee.

1/ *Hill & Sinicropi, Management Rights: A Legal Analysis (1986) BNA pp. 354-355.*

2/ *WOLF CREEK NUCLEAR OPERATING CORP., 111 LA 801, 806 & 807 ERBS (1998).*

One of the Union's main arguments, if not the key one, is that the District was limited in proving its case to the information given in a letter from Cantwell to the Grievant and Union spelling out the reasons the Grievant did not receive the Van Driver job. In other words, any information or reasons that Grievant was not selected that are not expressed in that letter cannot be offered in proof or considered by the Arbitrator. The referenced letter is a response to the Grievant by Cantwell at the second step of the grievance procedure. (Jt. 11) I disagree with the Union that the District was limited in its proof to what was contained in this grievance response and in the School Board's response. (Jt. 12)

In a perfect collective bargaining relationship, each party would reveal or submit all their evidence during the course of the grievance procedure before reaching arbitration; that rarely ever happens. There are many reasons for this; the parties hope to resolve the grievance quickly and as painlessly as possible, the relationship between the parties inhibits forthright

discussions of the grievance and, as often happens, a detailed analysis of each side's position and the development of the case does not happen until the experienced litigators for each party become involved. At that point, the sharing of information, evidence and proof is usually over. And it is not unusual for grievance procedures to contain a clause, similar to a clause in the grievance procedure of this agreement, that provides that if the District does not respond at all during the grievance procedure, the grievance simply moves to the next step and to arbitration. Cantwell need not have replied at all. To limit the District, as the Union argues, could result in future cases of the District and the Union making no attempt to submit evidence during grievance discussions. The use of the word "summary" in Cantwell's letter to Grievant is also an indication that he did not intend Joint 11 to cover every reason that Grievant did not receive the Van Driver position. I also note that Cantwell offered to answer questions from the Grievant and the Union.

Within the determination of arbitrariness, is whether the District analyzed the skills, abilities and qualifications of the two applicants in a fair, non-discriminatory and equitable manner. The determination of whether the two custodians were qualified for the position and relatively equal was led by Harris, the supervisor of the food service program. Harris' employment background made her well qualified for the task. Harris had worked for several large private employers and had supervised significant numbers of employees managing the food service programs of those employers. One of those employers was Abbott Laboratories where Harris managed a food service staff of 40 and an annual budget of \$6 million. (D. 7) This and other experience in supervising and hiring employees made Harris knowledgeable of a proper hiring and promotion process. (Tr. 293-294) Joining Harris in the decision making process was Kraus, the supervisor of building and grounds, the ultimate supervisor of the two custodian applicants who had been in his position 19 years and had been involved in the hiring and promotion of employees. (Tr. 375)

The District, through Harris and Kraus, analyzed the personnel records of the employees. They considered their pre-District employment background and conducted personal interviews using the same set of questions for each employee and taking separate contemporaneous notes. They developed a Food Service Qualification form for the position and rated Grievant and Johnson. Harris talked with Shanahan, Principal of the school building in which both employees worked. (Jt. 4, 5, 6, 7, 8, 9 & D. 10, 11, 13 & 14) These determination methods were applied equally to Grievant and Johnson. The methods are typical and management has significant flexibility in developing its promotion determination process as long as employee applicants are treated fairly. In this case, both employees were treated fairly as to the procedure used by the District to determine whether, under the applicable contract language, they were relatively equal. It is also significant to note that Harris did not know the two employees before she became involved in filling the Van Driver position.

I also find that the requirements of the Van Driver position were reasonable and not in any way developed so that Grievant would not have an equal opportunity to be considered for

the position. (Jt. 3, the job posting) The Union did not argue any unfairness as to the original job posting. Further, the contract does not limit District management as to the methods it may use in evaluating employees for promotional opportunities.

I now turn to the specifics of the Grievant's and Johnson's applications for the Van Driver position to determine if the District was arbitrary in finding that the two employees were not relatively equal. Grievant was hired by the District in August of 1995 and assigned to the Clarendon Avenue School as a custodian and was given a 90 day probationary period. (Jt. 18) Johnson was hired by the District in October of 1997 to start as a custodian. Johnson was transferred to the same school as Grievant in August of 2000 and was informed that he would serve a 60 day probation period. (Jt. 20 & D. 6) Grievant had problems during his probation period fulfilling his duties as custodian and received several advisory memorandum regarding inadequacies in his job performance resulting from meetings with the school principal, Shanahan, and from Kraus. (D. 2, 3 & 4) These continued problems resulted in Grievant's probation period being extended for another 30 days. (D. 5) Kraus testified that he had never before had to extend a probation period and there is nothing in the record to indicate that Johnson had any problem in completing his probation period. (Tr. 385)

Harris and Kraus also considered the 1997 District biennial employee evaluation of Grievant and Johnson (Jt. 15 & D. 6) A fair reading of these two evaluations can only lead to a conclusion that at that time Johnson was the better employee. His evaluation showed that he met or exceeded all requirements; Grievant met some requirements but failed to meet others. Kraus wrote a strong condemnation of Grievant's job performance on the evaluation both as to cleanliness of school areas for which Grievant was responsible, as well as a lack of communication skills and not listening to his supervisors. Kraus indicated on the 1997 evaluation that while Grievant's work had been improving of late, the quality for an unknown reason had fallen off. (Jt. 15) With Johnson, Kraus indicated his work areas were exceptionally clean; Kraus also indicated that Johnson needed to work on his communication skills. (D. 6)

Harris and Kraus also considered other documents in Grievant's personnel record. The December 18, 1995 memo to Grievant from Kraus was not only a notice of deficiencies in his work but was a warning letter for a violation of District work rules. (D.4) Grievant received a warning letter from his immediate supervisor, Caren Jasinski, on January 16, 2001 for wearing a walkman while working, in violation of a December 1999 memo from Kraus to all employees prohibiting the use of a walkman while working. (Jt. 11) Grievant testified that he needed to occasionally wear the walkman for medical reasons but had never informed any District representative of this need and did not provide a physician's excuse until June of 2001. (Jt. 11 & Jt. 14) On January 3, 1998, Grievant received memorandum regarding inadequate cleaning from his then foreman Gaszak. (Jt. 16) On March 6, 1998, Grievant received a reprimand from Kraus following an inspection by Kraus of Grievant's work areas at the request of

Principal Shanahan. (Jt. 17) (Tr. 247-250) The Union argues that much of this reprimand detailing areas of cleanliness where Grievant was deficient were not the responsibility of the Grievant. What the Union at the hearing and in its post hearing brief tried to do is to re-litigate this damaging reprimand. But this reprimand was never grieved and the time is past for determining whether the District had cause for the reprimand. Grievant himself testified that some of the 37 areas of deficiency detailed in the reprimand were his responsibility. (Tr. 458) No evidence was introduced into the record of any disciplinary action or performance memorandums involving Johnson. And Kraus testified that there were none. (Tr. 396 & D. 6)

After the job posting was taken down and Grievant and Johnson were recognized as the only two candidates for the Van Driver position, each was asked to prepare a Skills and Experience Record form provided by the District. (Jt. 6 & 8) For Grievant, the record highlighted the following:

Pabst Brewing Co. General Maintenance and Laborer. Most of Grievant's work was, as indicated by his job title, involved maintenance and not custodial work, though given the nature of the operation, cleanliness had to be maintained when performing his repair or maintenance work. Grievant also on an irregular basis made special deliveries. Grievant was involved in food activities through his church. (Jt. 6)

Johnson's Record highlighted the following:

Custodian for a Senior Center and delivered food. School maintenance work. Heating specialist in Air Force having worked on boilers. Supply clerk and mess cook for Montana Army National Guard. (Jt. 8)

These employment records were taken into consideration by Harris and Kraus. (Tr. 316-320, 407-410)

Harris and Kraus conducted personal interviews with Grievant and Johnson. The two employees were asked the same prepared questions that Harris developed based on the requirements of the Van Driver position and what she thought would be good indicators of their ability to do the job. (Tr. 321) (Jt. 9) Harris and Kraus took contemporaneous notes of the interviews. (D. 10, 11, 13 & 14) The results of these interviews from the testimony of Harris and Kraus supported Johnson for the position. Harris noted that Grievant seemed inflexible and was routine oriented for a job that required the Van Driver to be able to make changes to his schedule with no input from supervision. Grievant to Harris seemed to lack the

initiative to make a decision unless there was a set District procedure for him to follow, noting again that the Van Driver needs to deal with emergencies and situations for which there might not be a procedure. Harris was also concerned whether Grievant could deal with two supervisors, she and Kraus. (Tr. 326-328) As for Johnson, Harris testified that she had a positive feeling about the Johnson interview in that he communicated well, was direct and diplomatic, noting that the Van Driver deals with different people with different demands all day in his job. (Tr. 330) Harris also felt that Johnson indicated that he liked variety where he could productively use his initiative, which Harris considered a positive aspect for a job where the driver has virtually no immediate supervision. (Tr. 331-332) Kraus's summation of the interviews closely paralleled the views of Harris. (Tr. 404-406) While these views are subjective, for this type of position subjective analysis, supported by other evidence of skills, abilities and qualifications is acceptable in a promotion situation.

Harris and Kraus used the information discussed above to develop a form entitled Food Service Qualifications - Van Driver to summarize how they viewed each applicant based on information developed from the applicants' employment history, interviews and personnel records. The qualifications were as follows:

...

2. Ability to do sustained lifting (50-75#)
3. Demonstrated ability to work without immediate supervision
4. Demonstrated ability to do minor maintenance of delivery vehicle
5. Demonstrated ability to plan, schedule & establish priorities in emergencies
6. Ability to work/relate with staff, students & public
7. Demonstrated knowledge of materials, equipment, boiler & methods commonly used
8. Demonstrated ability to perform general cleaning, maintenance work, warehouse receiving & inventory
9. Ability to plan & schedule cleaning and maintenance projects
10. Demonstrated ability to use computer systems

(Jt. 5 & 7)

The rating system used (developed by Harris) was +1 exceeds requirements, 0 meets requirements and - 1 improvement needed. Harris and Kraus rated the Grievant at a - 6 and Johnson as a 0. In each of the -1 categories for Grievant were listed the reasons, most of which were supported by written records from Grievant's personnel file discussed above. Johnson had no -1 for any category. Harris relied on Kraus, who indicated on Joint 5 that while Grievant may have improved since his employment, he had not improved enough to classify Grievant as a "good performer. " (Jt. 5)

The Union argues that most of the documentation used in Joint 5 was old and that Grievant should not be judged on memos and warnings that were not current. The Union also argues that Kraus did not directly supervise Grievant and could not know how Grievant was doing on a daily basis. Union also points out that Harris and Kraus never interviewed Jasinski, Grievant's immediate supervisor. And lastly, the Union argues that no current evaluation was done at the time of the job bid in April of 2001. As to a current evaluation, at the time of the job bid, Cantwell testified that evaluations are not done at the time of promotion consideration.

I agree that a 1997 evaluation, the last formal one done for the two employees by the District, is dated. The District and Kraus explained that the reason a more up-to-date one had not been done is that a remodeling project was going on at the school where Grievant and Johnson worked and Kraus had not had time to do one. (Tr. 418) I also agree that it might have been beneficial to talk to Jasinski. However, Jasinski, as she testified, knew nothing about the Van Driver position and the custodial work of the two employees which she supervised, is only a small part of the Driver position. (Tr. 60 & 61) Despite the Union's arguments, both employees were treated the same. In other words, the same evaluations, backgrounds, interviews, personnel records, were considered and used for both Grievant and Johnson. If there were failings in the procedure (lack of a current evaluation) the failings were the same for both applicants to the position.

Harris also interviewed the building principal where Grievant and Johnson worked and gave great weight to his opinion. (Tr.348) Principal Shanahan was involved in the supervision of the Grievant from the start of his employment and in the supervision of Johnson from the time he was transferred to his school. Shanahan testified creditably to the problems he had with Grievant, much of which was detailed in the documents discussed above. Shanahan further stated that these writings did not document all the meetings involving the Grievant which occurred through May of 2001. (Tr. 262) Shanahan stated that while he considered Grievant qualified for the Van Driver position, his opinion expressed to Harris was that Johnson was the better candidate as he needed minimal supervision, was a good communicator and gave attention to detail, all of which was lacking in Grievant's performance. (Tr. 263 & 257-260) Shanahan testified that Johnson's skills, abilities and qualifications were higher and he so advised Harris and Cantwell. (Tr. 281 & 282)

Grievant testified that he never grieved the warning letters or memorandums and never responded to any of the writings criticizing his work by putting something in his personnel file, as the labor agreement allowed him to do, because his first immediate supervisor, Gazak, discriminated against him because of his religion. (Tr. 124) Grievant also testified that he never complained to his Union Local president because that individual was friends with Kraus and Grievant thought he would only get in further trouble if he complained. (Tr. 115) While this may be what Grievant believed, there is no credible evidence in the record to support this belief. As Grievant acknowledged, the District, by Cantwell, accommodated his religion,

modifying his hours of work. (Tr. 154 & 194) Nothing in the testimony of Cantwell or Kraus gave any indication that they would not have considered and done something about any legitimate complaint of religious harassment or discrimination. This excuse of Grievant leaves unchallenged his personnel record.

The Union introduced over the objection of the District a biannual evaluation done in November of 2001, approximately six months after the events leading to the Van Driver job posting, and consideration of Johnson's and Grievant's application for the job. (U. 1) The Union argues that this evaluation covered the period before the awarding of the Van Driver position and represents a truer picture of Grievant's qualifications. I agree, however, with the District that I cannot or should not consider information that was not available to the District when it was making the decision to whom to award the Driver position. To do so would not give either party a finite time line as to what should be considered in making a promotion decision. I again emphasize that the same evidence of skills, abilities and qualifications was considered for both Grievant and Johnson. Grievant is no more disadvantaged than is Johnson by my not considering evidence of job qualifications after the May 16, 2001 memo awarding Johnson the job. (Jt. 10) Grievant clearly felt he was as qualified as Johnson, and I would not expect him to testify or believe otherwise.

I find that the testimony of the witnesses for both parties was creditable. Judging the relative abilities of two applicants is not an exact science. The Van Driver position allows little direct supervision, demands initiative in trying to maintain a food delivery schedule while fitting in other demands on the driver's time and efforts. The position interacts with many different classifications of school district personnel necessitating good communication skills. The position requires the driver to determine priorities and handle different situations that arise that are not covered by any District policy or procedure. (D. 8 & 9) While cleanliness of the food preparation kitchen is critical, it is the least time consuming part of the job leading to an appropriate consideration of the qualifications of Grievant and Johnson other than their skill as a custodian.

The procedure used by the District in their decision making process was the same and fair for both employees. While some of the records against Grievant were two or three years old, this is not an unreasonably long time and again there was nothing negative in Johnson's record. Importantly, the decision making process was led by a skilled supervisor, Harris, who had no prior knowledge of either employee. And, as importantly, the individual who saw the employees and their work on a daily basis, Shanahan, recommended Johnson. Cantwell followed the recommendation of Harris and did not substitute his own perceptions. There is also little difference, less than a year, in the seniority of the two employees.

It is not for me to make a determination which employee was the better for the job under section 10.04(A) of the labor agreement. My job is limited by the parties' labor agreement to determine whether the District violated the agreement.

I find that the District met its burden based on the entire relevant and material record that it did not act arbitrarily or capriciously in violation of Section 10.04(A) of the parties' labor agreement in awarding the Van Driver position to Johnson.

Based on the record as a whole, I issue the following

AWARD

The District did not violate the collective bargaining agreement when it failed to promote the Grievant to the Van Driver position. The Grievance is denied.

Dated at Madison, Wisconsin, this 30th day of January, 2003.

Paul A. Hahn /s/

Paul A. Hahn, Arbitrator

