BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SHEBOYGAN FALLS EDUCATIONAL SUPPORT STAFF ASSOCIATION

and

SHEBOYGAN FALLS SCHOOL DISTRICT

Case 41
No. 61229
MA-11859

Appearances:

Mr. Clyde Clauson, UniServ Director, Kettle Moraine UniServ Council, N7778 Rangeline Road, Sheboygan, Wisconsin 53083, appearing on behalf of the Union.

Davis & Kuelthau, S.C., Attorneys at Law, by **Attorney Mary S. Gerbig** and **Attorney Paul C. Hemmer**, 200 South Washington Street, Suite 401, P.O. Box 1534, Green Bay, Wisconsin 54305-1534, appearing on behalf of the District.

ARBITRATION AWARD

Pursuant to the joint request by Sheboygan Falls Educational Support Staff Association, herein "Union", and the subsequent concurrence by Sheboygan Falls School District, herein "District" or "Employer", the undersigned was appointed arbitrator by the Wisconsin Employment Relations Commission on July 22, 2002, pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. Hearing in the matter was conducted by the undersigned on September 5, September 30 and October 28, 2002, at Sheboygan Falls, Wisconsin. The hearing was not transcribed. The parties completed their briefing schedule on January 9, 2003.

After considering the entire record, I issue the following decision and Award.

ISSUES

The parties were unable to stipulate to the issues. The Union frames the issues as follows:

1. Did the District violate the collective bargaining agreement when it laid off Tom Platner?

2. If so, what shall be the remedy?

The District frames the issue in the following manner:

1. Did the District violate the collective bargaining agreement when it placed Tom Platner on layoff because he was not immediately qualified to perform the available work?

Having reviewed the entire record, the Arbitrator adopts the Union's framing of the issues.

FACTUAL BACKGROUND

General Background

The Sheboygan Falls School District ("District") is located at 220 Amherst Avenue, Sheboygan Falls, Wisconsin. Dr. C. Lee Riter ("Riter") is the District Administrator and has held that position since 1995. John Raml ("Raml") is the Supervisor of Buildings and Grounds, a position he has held since 1990. The District hired Tom Platner ("Grievant") in October 1993 to fill the position of "Maintenance W/Emphasis on Fields and Grounds." He was hired primarily as a groundskeeper.

In the past decade, the District hired individuals with specific trade skills into the "Maintenance" positions. Michael O'Donnell ("O'Donnell") was hired because he obtained an apprenticeship level skill in heating and cooling systems and the mechanics of those systems. He is the primary staff member who is trained and authorized to program levels 3 and 4 of the Robert Shaw Environmental System ("System") located in the District buildings. He helped to install the System in the high school saving the District $125,000.00. The Grievant does not have any training or background in the maintenance or programming of the System. He did not have any access to the levels 3 and 4 of the System in order to adjust heating and cooling problems. His experience with the System was primarily limited to pulling and installing Robert Shaw wires in Machine Room 2 in the Gym Area.

The District has a two year-old $1.2 million dollar swimming pool, which requires an individual who is certified and experienced in maintaining the pool's chemical balance. This is essential for the health and safety of individuals, from both the school and the community, who use the pool on an almost around-the-clock basis. O'Donnell has two (2) years of experience maintaining the swimming pool chemical balance as well as the air around the pool. He is certified in maintaining the pool's chemical balance. The Grievant had no such certification or training in pool maintenance. He was and is not currently able to do the maintenance of the swimming pool chemical balance or of the air in the swimming pool area.

The District hired the least senior person in a "Maintenance" position in order to obtain trade skills in the area of electro mechanics, as well as continuing to fill that specific "Maintenance" position with an individual with commercial electrical skills. Randy Lawrence ("Lawrence") has taken courses in the electro-mechanic technical program at Lakeshore Technical College. He got into electro mechanics at Richardson Brothers where he spent seven (7) years. He not only installed the fire protection system, but also maintains it for the District, and is available for maintenance and in-house repair of various electrical systems, A/V equipment, security system (cameras), the System and boiler. He is currently performing electronic repair work that would have to be subcontracted if he was laid off. He does a lot of electrical work for the District. He is assigned the big rewire jobs. Blueprint reading is required in virtually all of the work that he does.

Unlike Lawrence, the Grievant was not assigned the high voltage jobs. Instead, the Grievant did electrical work like running and pulling of wire, replacement of light fixtures with new fixtures, and assisting with the replacement of outlets. He did not do connections, disconnects or terminations. His electrical work was more in the nature of Helper or unskilled worker. He does not know what the National Electrical Code is which is necessary in order to do commercial electrical work. He does not know what the commercial electric service (voltage) is in the District. He has no formal training and minor prior work experience in blueprint reading. He only occasionally read blueprints while carrying out his duties and responsibilities for the District. He was not directly evaluated on his use of blueprints.

Facts Giving Rise to the Instant Dispute

In spring 2002, the District experienced a financial short fall. This prompted a review of all positions in the District in order to stay within budget. The District made a decision to reduce one position in Maintenance in the least critical area, Fields & Grounds.

On or about April 18, 2002, the Grievant was given an official notice of full layoff from his employment with the District that stated:

. . .

> Due to declining enrollment and budget considerations, your position as groundskeeper in the Sheboygan Falls School District has been eliminated. You are hereby laid off from your position at the end of the workday on June 14, 2002. Please review your contract or contact your union representative so you are aware of your rights under the collective bargaining agreement.

. . .

On April 24, 2002, the Grievant submitted a letter to the Business Manager stating: "I wish to exercise my seniority bumping rights according to the contract Section XV. Lay-off-Recall to displace an employee with less seniority.

On April 25, 2002, Riter responded to the Grievant's request as follows:

. . .

> We have received your request to exercise your "bumping rights" in accordance with Section XV of the negotiated agreement. After careful examination of your request, we must inform you that you (sic) request is denied. The reason for this denial is that you are not immediately qualified to perform the available work.

. . .

The Maintenance Positions at Issue

The District has two distinct types of "Maintenance" positions, as found in the position descriptions. One position description is titled "Maintenance W/Emphasis on Fields & Grounds." The second position is titled "Maintenance." The collective bargaining agreement in Appendix A simply refers to "Maint. Assistant."

The Grievant has held the position of "Maintenance W/Emphasis on Fields & Grounds" with the District. He has never held the "Maintenance" position. The person in the "Fields & Grounds" position has primary responsibility for performing the District's grounds keeping services. This includes "all phases of grounds keeping and maintenance including, but not limited to; lawn care, parking lot and sidewalk maintenance and preparation for outdoor athletic events." This also includes snow removal, vehicle and playground equipment care and cleaning services. As such, the person in this position generally spends a great amount of time

working outside, rather than working on projects within the school buildings. The person in this position is required to possess a high school diploma or its equivalent, but has not been required to possess any "trade skills." The Grievant was hired for the "Fields & Grounds" position based, in part, on his experience at Gilson Brothers Company which was a lawn and garden manufacturer.

In contrast to the "Maintenance W/Emphasis on Fields & Grounds" position, the District has hired individuals into the "Maintenance" position who have skills in a particular specialty area such as electrical, HVAC, plumbing, pool maintenance, telephone and computer networking/wiring. Shortly after his hire, Raml encouraged the District to do this type of work "in-house" in order "to save money." The District hires in this manner as an alternative to contracting this skilled work outside of the District. This has produced substantial financial savings for the District.

A person in the "Maintenance" position provides "assistance and support to the Facilities Manager in all facets of the maintenance responsibilities of the district." The "Maintenance" position "is a highly variable position requiring a flexible and skilled individual with the ability to meet the many maintenance needs that arise in an extensive physical plant as represented by the district's buildings and grounds." A person in the "Maintenance" position is sometimes referred to as a "Maintenance Assistant."

The "Maintenance" position is described as "definitely slanted to the individual committed to this type of occupation as a skilled trade." The primary performance responsibilities of this position are being able to "perform any and all general operations on building systems, equipment, vehicles, furniture, instructional equipment and buildings in general as shall be necessary."

The District hires individuals with specific trade skills because this is how it has "defined" the "available work" for each of the "Maintenance" positions. When "Maintenance" positions have opened in the past, the District looked at the specialty area of the last person in the job and filled the position with a person who had comparable trade skill expertise.

For example, Jeff Weber ("Weber") has worked for the District for ten and one-half years. He was first employed as a Custodian 1 and later as a Custodian – Fields & Grounds. While in the grounds-keeper position, he applied for an open "Maintenance" position, but was turned down because the position was focused on electrical trade skills. Ultimately, another "Maintenance" position was established, this time with a focus on telephone networking. The District hired Weber for the new "Maintenance" position because of his experience and knowledge of cable networking (he had worked for a cable company) and telephones.

Training and Experience of the Grievant and Individuals Subject to "Bumping."

Each Maintenance Assistant is required to "have education or experience that evidences an ability to work with blueprints and technical illustrations of equipment that might be encountered in a building maintenance setting." Lawrence has successfully completed a course at Lakeshore Technical College in "Blueprint Reading." He also has successfully completed courses in "DC Fundamentals" and "Computer Systems" at the College. He uses all three of these skills in his electrical and electro mechanic work for the District. His experience and education equates to a journeyman electrician.

O'Donnel has a number of certificates that attest to his formal training and experience related to the installation and ongoing service of the HVAC systems, as well as the pool chemical maintenance.

The Grievant has no formal training in any of the trade skill areas, he has never studied in an apprenticeship of any kind, nor has he taken any classes at Lakeshore Technical College, or any other equivalent institution.

Other District Job Offers to the Grievant after Layoff

Upon receipt of the layoff notice, Riter offered the next available open custodian position to the Grievant. The Grievant turned that offer down. In mid July, 2002, upon the retirement of one of the Custodians, the District again offered a Custodian position to the Grievant "at the slightly higher Custodian 1 rate." He refused. In the beginning of August, 2002, Riter offered the Grievant a combination position consisting of 30% Fields & Grounds, and 70% Custodial 1 rate. The Grievant rejected this offer then and at hearing.

RELEVANT JOB DESCRIPTIONS

SCHOOL DISTRICT OF SHEBOYGAN FALLS
POSITION DESCRIPTION

POSITION TITLE: Maintenance W/Emphasis on Fields & Grounds

REPORTS TO: Facilities Manager

LENGTH OF WORK YEAR: 12 Months

BUILDING ASSIGNMENT: As Assigned

QUALIFICATIONS: As determined

JOB GOAL: This position involves work in all phases of grounds keeping and maintenance including, but not limited to: lawn care, parking lot and sidewalk maintenance and preparation for outdoor athletic events. During the summer vacation period this maintenance person will serve as a lead worker and be assigned a crew of student employees for the purpose of field and grounds care. The individual selected for this maintenance position shall possess a high school diploma or the equivalent. The selected individual shall have a demonstrated record of employment stability and reliability as evidenced by past occupational experience. Additionally, the individual shall evidence an attitude or actual experience that will indicate suitability to work in a child centered environment. This will include, but not limited to: appropriate use of language, respect of property, concern for others, and willingness to assist when needed.

PERFORMANCE RESPONSIBILITIES:

1. Be responsible for preparation of fields, track, courts and grounds for athletic, extra-curricular, and other public events as necessary.

2. Maintain high standards of confidentiality, attendance, and flexibility, while working cooperatively with Supervisors and other employees.

3. Perform maintenance activities within the area of assignment as shall be deemed appropriate by the supervisor and shall be within the scope of the individual's skill level or in the case of maintenance beyond his/her abilities, refer the work to the supervisor.

4. Monitor and maintain in safe condition all playground equipment, vehicles, grounds equipment within the scope of item 2 above.

5. Report all incidents of damage or vandalism to the supervisor.

6. Perform grounds keeping services including, but not limited to mowing, edging, trimming, weed control, fertilization, trimming, pruning regular trash pick up. Clean and maintain pavements and parking areas including sweeping, trash pick-up, minor chuck hole repairs, crack filling and other similar services.

7. Perform snow removal services as warranted and as shall be assigned by the supervisor. In addition, monitor and maintain walkways and parking areas in as snow and ice free a condition as reasonably possible on a daily basis.

8. Serve as part of cleaning or maintenance crews during school vacation periods and holiday periods as assigned by the supervisor. During the summer vacation period, serve as the lead worker and be assigned student helpers for fields, courts, and grounds maintenance and other work as shall be assigned by the supervisor.

9. Report all unsafe and/or unhealthy conditions in his/her area to the facilities manager.

10. Provide services as a substitute custodian as assigned by the supervisor in the absence of other custodial personnel.

11. Shall be able to lift 50 lbs. in a repetitive situation and work from stepladder at a height of 10 ft as well as from aerial lifts or scaffolding.

12. Other responsibilities related to the position as shall be assigned by the employee's supervisor.

. . .

POSITION TITLE: Maintenance

REPORTS TO: Facilities Manager

LENGTH OF WORK YEAR: 12 Months

BUILDING ASSIGNMENT: As Assigned

QUALIFICATIONS: As determined

JOB GOAL: The maintenance position in the district involves providing assistance and support to the Facilities Manager in all facets of the maintenance responsibilities of the district. As such, the position is a highly variable position requiring a flexible and skilled individual with the ability to meet the many maintenance needs that arise in an extensive physical

plant as represented by the district's buildings and grounds. The individual in this position must possess a wide range of skills necessary as a building maintenance generalist. Working under varied conditions with time pressures and high work load is a regular part of this job. The individual selected for this position shall possess a high school diploma or the equivalent. The selected individual shall have a demonstrated record of employment stability and reliability as evidenced by past occupational experience. Additionally, the individual shall evidence an attitude or actual experience that will indicate suitability to work in a child centered environment. This will include, but not limited to: appropriate use of language, respect of property, concern for others, and willingness to assist when needed. This position is definitely slanted to the individual committed to this type of occupation as a skilled trade.

PERFORMANCE RESPONSIBILITIES:

1. Perform any and all general maintenance operations on building systems, equipment, vehicles, furniture, instructional equipment and buildings in general as shall be necessary. Such work shall be performed in cooperation with the Facilities Manager or singularly as the situation and demands warrant. The limits of responsibility shall be governed by the individual's demonstrated skills.

2. Maintain high standards of confidentiality, attendance and flexibility, while working cooperatively with Supervisors and other employees.

3. The person selected should have education and or experience that evidences an ability to work with blueprints and technical illustrations of equipment that might be encountered in a building maintenance setting.

4. Participate in snow removal activities as the situation shall warrant and as he/she shall be assigned.

5. Maintain tools and equipment as shall be utilized in the maintenance functions of the district.

6. Participate in and/or perform preventative maintenance activities on any and all district building systems and equipment as shall be necessary under the direction of the Facilities Manager.

7. Function as a substitute custodian when a regular custodian is unavailable and needs warrants. This shall be at the discretion of the Facilities Manager.

8. Shall report all unsafe/unhealthy conditions observed on the buildings and grounds of the district to his/her respective supervisor.

9. Shall be able to lift 50 lbs. in a repetitive situation and work from stepladder at a height of 10 ft as well as from aerial lifts or scaffolding.

10. All other maintenance functions and tasks as shall be assigned by his/her supervisor.

11. Other responsibilities related to the position as shall be assigned by the employee's supervisor.

PERTINENT CONTRACTUAL PROVISIONS

I. AGREEMENT

This agreement is made and entered into by and between the Sheboygan Falls School District, hereinafter referred to as the "Employer" and the Sheboygan Falls Educational Support Staff Association, hereinafter known as the "Association" for the purpose of maintaining harmonious labor relations; to establish a uniform scale of wages, hours, and working conditions; to assure the efficient and economical operations of the District; to secure and sustain maximum productivity of each employee; to facilitate a peaceful adjustment of all grievances and disputes which may arise between the employer, employees, and the association; and further to set forth the entire agreement between the employer, the association, and the employees covered by this agreement.

Any previously adopted policy, rule or regulation of the parties which is in conflict with a provision of this agreement shall be superseded by this agreement. Furthermore, unless specifically set forth herein, past practices of any kind whatsoever, are hereby discontinued.

Whenever this agreement requires the District Administrator to take any action, said District Administrator, upon notice to the Association, may designate another to take such required action.

. . .

IV. BOARD OF EDUCATION MANAGEMENT RIGHTS

The Board of Education possesses the sole right to operate the School District and all management rights repose in it. These rights include, but are not limited to, direction of all operations of the School District; establishing of work rules and schedules of work; the creation, combination, modification, and elimination of positions within the School District; hiring, promoting, transferring, scheduling, and assigning of employees in positions within the School District; the right to suspend, demote, discharge and/or take other disciplinary action against employees; to layoff employees; maintaining the efficiency of School District operations; taking whatever action is necessary to comply with Federal or State law; introduction of new or improved methods or facilities; changing of existing methods or facilities; determining the kinds and amounts of services to be performed as pertains to School District operations, and the number and kind of classifications to perform such services; contracting out for goods and services; determining the methods, means, and personnel by which School District operations are to be conducted; and to take whatever action is necessary to carry out the functions of the School District in situations of emergency.

In the execution of the powers, rights, authority, duties and responsibilities of the Board, the use of judgment and discretion in connection therewith shall not be exercised in an arbitrary or capricious manner nor in violation of the terms of this agreement, section 111.70 of Wisconsin Statutes nor in violation of the Constitution of the State of Wisconsin and the United States.

. . .

XIII. SENIORITY

Seniority shall be accrued by classification. Classification shall be defined as: secretarial/clerical employees; food service employees; instructional and clerical aides; maintenance employees; and, custodial employees. Separate seniority lists within classifications shall be maintained for full year and school year employees. Employees transferring to a new classification shall retain seniority in the former classification and will begin to accrue seniority in the new classification. No seniority shall accrue until an employee completes the designated probationary period. Upon satisfactory completion of the probationary period the employee shall be credited with seniority from the date of most recent hire. Seniority for part-time full year and school year employees

shall accrue on a prorated basis according to the number of normally scheduled hours worked using the actual percentage as compared to full time, full year employment.

. . .

XV. LAYOFF-RECALL

A. LAYOFF: When laying off employees, the last person hired in a classification shall be the first person laid off, provided that those retained are immediately qualified to perform the available work. An employee who has transferred from one classification to another and who is laid off in the current classification has the right to displace an employee with less seniority in his/her original classification, provided he/she is qualified to perform the duties.

. . .

POSITIONS OF THE PARTIES

Union's Position

The Grievant was not the least senior Maintenance Assistant on the date he received his layoff notice.

The Grievant is immediately qualified for the remaining available work based upon existing job descriptions and his prior work experience.

The Grievant had bumping rights that should have been honored by the District. This dispute is really over what is meant by the words "immediately qualified." The District's interpretation of "immediately qualified" to mean "exactly qualified" is in error and at odds with its past practice of not requiring an employee to have the exact qualifications for a position that he/she is filling.

The language in Article XV contains a "sufficient ability" modified seniority clause. The only analysis needed for such language is to determine whether the Grievant meets the minimum qualifications necessary for a Maintenance Assistant.

The bumping language relied upon by the District in J & J BURNING CO., 111 LA 665, 667 (Kelman, 1998), "ability to perform the work operation in question," is very different from the disputed language "immediately qualified." It is a very objective standard; can the

work be performed or not. The disputed language in the instant case is very subjective. J & J BURNING CO. cannot be used to justify a subjective decision in this case.

The "Maintenance" job description states that the person employed must be a "maintenance generalist" and "perform any and all general maintenance operations." Nowhere does it say they must hold specialized trade skills. These employees have not been evaluated on their "trade skills."

Bargaining history supports the Union's interpretation of the disputed contract language. In the first place, the bargaining history relied upon by the District has nothing to do with Article XV. Secondly, the layoff language (Article XV) has not changed since the initial collective bargaining agreement was negotiated in 1983. If the District believes that the parties to the agreement have accepted the "practice" of hiring individuals with trade skills for "Maintenance" positions, why hasn't this practice been codified through changes in either the job description or the agreement.

The Union is not attempting to expand the scope of the language in this proceeding. It only seeks a determination as to whether the District violated the contract by its actions.

The Grievant has no duty to mitigate his damages because he is entitled to an answer to the question raised in his grievance as to whether the District violated the agreement.

The Grievant should be reinstated and made whole for all lost wages and benefits.

District's Position

The Arbitrator should enforce the clear and unambiguous contract language. The collective bargaining agreement establishes that the District retains the exclusive right to determine the size and make up of the workforce, including the right to determine the number of employees for each classification required for the work available, and the kinds and amounts of services to be performed.

The agreement also contains a clear layoff provision providing that those retained must be "immediately qualified" to perform the available work. The Grievant was not "immediately qualified" for the disputed position(s) because he was not able to perform the available work at the time of layoff.

Both bargaining history and past practice regarding the process of promotion from "Maintenance W/Emphasis on Fields and Grounds" to "Maintenance" confirm the clear meaning of the contract. In this regard, the District points out that it rejected a bargaining proposal that it perceived would weaken the "immediately qualified" language. The District

also notes that at least one other District employee in the "Maintenance W/Emphasis on Fields and Grounds" has been rejected for an open "Maintenance" position based upon lack of a specific trade skill. There is no past practice that negates the "immediately qualified" language.

The Union should not be able to gain through arbitration what it was unable to gain in negotiations between the parties.

Case law supports the District's interpretation of the disputed contract language. None of the cases cited by the Union are applicable to the instant dispute.

The Grievant has a duty to mitigate his damages, but failed to do so.

Accordingly, the instant grievance must be denied.

DISCUSSION

At issue is whether the District violated the collective bargaining agreement when it laid off the Grievant.

The District argues that the Arbitrator should enforce the specific contract language that controls the parties actions in the event of a layoff. For the reasons discussed below, the Arbitrator agrees.

Article **XV. LAYOFF-RECALL**, provides: "A. LAYOFF: When laying off employees, the last person hired in a classification shall be the first person laid off, *provided that those retained are immediately qualified to perform the available work*." (Emphasis in the Original). According to this language, layoff occurs by seniority in classification, except that the District has the right to retain a less senior individual who is immediately qualified to perform the available work, when a more senior employee is not. A question arises as to what is meant by the words "immediately qualified."

The District argues that the "immediately qualified" contract language is clear and unambiguous and requires that the Grievant be able to perform the job in its entirety at the time of layoff. The Union, on the other hand, argues that the District's interpretation of these two words is in error. According to the Union, the only analysis needed for such language is to determine whether the Grievant meets the minimum qualifications necessary for a Maintenance Assistant.

Arbitrators give words their ordinary and popularly accepted meaning in the absence of anything indicating that they were used in a different sense or that the parties intended some special colloquial meaning. Elkouri and Elkouri, *How Arbitration Works*, (BNA, 5th Ed., 1997), p. 488. In the Arbitrator's opinion, immediately is ordinarily understood to mean "right away." "Qualified" means the ability to do a job.

This is consistent with the dictionary definition of the terms. Immediately is defined as "directly" or "without delay." *The American Heritage Dictionary*, Second College Edition, p. 643 (1985). Qualified is defined as "competent, suited, or having met the requirements for a specific position or task." *The American Heritage Dictionary*, *supra*, p. 1013. Therefore, a person who is retained must immediately and without delay be competent and qualified to perform the available work. This definition of "immediately qualified" is closer to the definition submitted by the District than the one put forward by the Union.

The District argues that the language interpreted by the arbitrator in J & J BURNING CO., 111 LA 665, 667 (Kelman, 1998), "ability to perform the work in question," is similar to the disputed language "immediately qualified." In J & J BURNING CO., *supra,* Arbitrator Kelman reviewed the aforesaid language in the context of an employee attempting to bump upward in a layoff situation. In finding that the employee could not immediately perform the disputed work, Arbitrator Kelman stated as follows:

> The central question, then, is whether Mr. Burns was qualified to perform as an inspector. Ability to perform the work in question' refers to the candidate's *current* ability to handle all phases of the job. In a bumping situation it is not enough that the senior employee has the potential to master the job with further training or close and continuous supervision or lengthy hands-on experience. He must be able to step in at once and handle the job in its entirety. *Id*.

In reaching this conclusion, Arbitrator Kelman found that "there is a distinction between upward bumping and promotion obtained by job bidding." Arbitrator Kelman noted that under the contract "a *promoted* employee enters the higher classification under a six months probation period during which he can be returned to his previous classification at the Company's unfettered discretion" and without recourse to the grievance procedure. On the other hand, no employees who bumped upward into the inspector position were "assigned probationary or trainee status. It was assumed they could hit the ground running."

There is a similar contractual distinction in the instant case. Article **XV. LAYOFF-RECALL** provides that during a layoff "that those retained are immediately qualified to perform the available work." (Emphasis added). In other words, any employee retained in a layoff situation must have the *current* ability to perform the available work. (Emphasis added).

Article **XIII. SENIORITY** provides, on the other hand, for employees transferring to a new classification that "no seniority shall accrue until an employee completes the designated probationary period."

Contrary to the Union's assertion, the words "immediately qualified" provide a very objective standard upon which to judge an employee's ability to do a job. Like the standard in J & J BURNING CO., *supra*, it means the *current* "ability to perform the work operation in question." Such an interpretation is consistent with the District's practice of requiring an employee who bumps in lieu of layoff "to hit the ground running" in his or her new job. It is also consistent with the District's practice of requiring persons who fill "Maintenance" positions to have some trade skills and to be "immediately" able to perform the available work.

The Union rejects the District's reliance on the bumping language in J & J BURNING CO. to interpret the disputed language "immediately qualified." Instead, the Union maintains that the language in Article XV contains a "sufficient ability" modified seniority clause. The Union opines that the only analysis needed for such language is to determine whether the Grievant meets the minimum qualifications necessary for a Maintenance Assistant.

The Arbitrator agrees with the Union that the bumping language in question is more like a "sufficient ability" modified seniority clause than a "relative ability" or a "hybrid" modified seniority clause. Elkouri and Elkouri, *How Arbitration Works*, *supra*, pp.838-841. It is also true that minimum qualifications are usually enough under a "sufficient ability" clause. Elkouri and Elkouri, *How Arbitration Works*, *supra*, p. 839. This type of clause may state that preference will be given to the senior qualified bidder, or to the senior employee provided he or she is qualified or has the "necessary" ability for the job. *Id*. Under this type of provision, "it is necessary to determine only whether the employee with the greater seniority can in fact do the job." *Id*.

However, even if the Arbitrator applies the above standard, for the reasons discussed below, the Union has not shown that the Grievant can perform the disputed work.

In addition, the parties did not include this type of language in the agreement. They did not agree that an employee could bump another employee in lieu of layoff if he or she was "qualified" or had the "necessary" ability for the job. Instead, they agreed that the employees retained during a layoff must be "immediately qualified to perform the available work." (Emphasis added). This is a much higher and more demanding standard than the usual "sufficient ability" clause.

If the parties had intended that employees who are retained during a layoff meet only the minimum qualifications necessary to perform the duties of the work in question, the parties could have clearly stated so in the contract. (Emphasis added). In fact, the parties have shown that they are able to use the word "qualified" when they want to. The second sentence of Article XV, Section A. provides:

> An employee who has transferred from one classification to another and who is laid off in the current classification has the right to displace an employee with less seniority in his/her original classification provided he/she is qualified to perform the duties. (Emphasis added).

The fact that the word "immediately" was used before the word "qualified" in the first sentence of Article XV, Section A indicates that the parties intended the phrase to have some meaning other than just "qualified." Elkouri and Elkouri, *supra*, p. 495. It should not be declared surplusage if a reasonable meaning can be given to it consistent with the rest of the agreement. Id. The District's interpretation of "immediately qualified" gives meaning to all words in the layoff clause and is consistent with the rest of the contract. As noted above, it is also consistent with the District's practice of filling unit positions during layoff and of filling the "Maintenance" position itself.

The Arbitrator rejects the Union's reliance on a number of cases it cites to "demonstrate how 'sufficient ability' clauses must be applied."

In KINGSBURY HOMES CORP., 53 LA 1347 (Rauch, 1969), Arbitrator Rauch stated:

> . . . the phrase, 'if qualified', . . . does not necessarily permit the Company to select the *most qualified* bidder regardless of seniority . . . . (T)he phrase must be construed to mean that the senior employee must have a background of such training, experience, or demonstrated aptitude . . . as to give a reasonable person cause to believe that this person can be expected to perform the job competently within a reasonable time.

However, KINGSBURY HOMES CORP., involved a promotional opportunity and based on the analysis of the arbitrator in J & J BURNING CO., is not applicable to the instant dispute.

CITY SCHOOL DISTRICT OF CITY OF NEW YORK, 68 LA 271 (Nicolau, 1976) involved the layoff of school neighborhood workers due to budget concerns. In that case, the School Board improperly failed to consider the qualifications of laid off senior school neighborhood workers when it retained less senior employees during layoff because they had "exceptional qualities" for the jobs in question. CITY SCHOOL DISTRICT OF CITY OF NEW YORK, *supra,*

p. 275. The arbitrator found that these "exceptional qualities" or abilities that fell outside the job description could not be used as a basis for retention out of seniority, and "ability" alone was contractually irrelevant if a more senior employee could also do the job. CITY SCHOOL DISTRICT OF CITY OF NEW YORK, *supra*, pp. 275-276. However, in the instant case, the District did consider the qualifications of the Grievant when it determined that he could not perform the duties of the jobs in question. (Testimony of Raml and Riter). For example, the District required skills in blueprint reading and the skilled trades areas for the Maintenance position not only in the job description but in practice. (Testimony of Raml and Riter; Joint Exhibit No. 4). These were skills the Grievant lacked. For these reasons, the Arbitrator rejects the Union's reliance on CITY SCHOOL DISTRICT OF CITY OF NEW YORK, *supra*.

The Arbitrator also rejects the Union's reliance on several Wisconsin cases.

In SHEBOYGAN COUNTY, Case 231, No. 50495, MA-8271 (Gallagher, 10/94), the arbitrator reviewed a case where the collective bargaining agreement required a vacant position to be posted internally before external applicants were sought, and required the employer to award the posted position to the senior "qualified" applicant. SHEBOYGAN COUNTY, *supra*, p. 2.

The arbitrator found that the grievant "was minimally qualified for the Secretary II position and therefore she should have been awarded the position." SHEBOYGAN COUNTY, *supra,* p. 9. She concluded that the language was mandatory in nature because it required that a vacant "position shall then be offered to the most senior qualified bargaining unit employee before filling the position with a non-bargaining unit employee." (Emphasis in the Original). She determined that said language was "clear and unambiguous" and required that the successful internal applicant be the most senior and "be minimally qualified before he/she is entitled to placement in the vacant position, with a new six month probationary period."

However, SHEBOYGAN COUNTY is not applicable to the instant dispute based on the reasoning in J & J BURNING CO. This is not a posting or promotional opportunity like SHEBOYGAN COUNTY. It is a layoff and bumping dispute. The employee who is retained in lieu of layoff must be able to perform the job in question at the time of layoff. Unlike SHEBOYGAN COUNTY, there is no probationary period involved during which the employee can learn the job. As noted above, the standard of "immediately qualified" is a higher standard to meet than simply "qualified" as interpreted by Arbitrator Gallagher in SHEBOYGAN COUNTY.

For the same reasons, the Arbitrator rejects the Union's reliance on CITY OF RACINE, Case 514, No. 54826, MA-9803 (Houlihan, 3/98) and LAKE HOLCOMBE SCHOOL DISTRICT, Case 47, No. 45838, MA-6775 (McGilligan, 2/92). CITY OF RACINE involved a promotional opportunity. The question underlying the dispute in CITY OF RACINE was whether or not the

grievant was capable of performing the duties of the job in question. The arbitrator found that the grievant was arguably "qualified" for the position particularly since "historically individuals promoted have had meaningful training and an opportunity to learn facets of the job while on the job." CITY OF RACINE, *supra*, p. 10. The arbitrator added that this was "not a situation where an employee lacking the fundamental job-required skills has applied for the promotion." *Id*.

That is not true in the instant case. The District requires certain skills in blueprint reading and the skilled trades in these positions that the Grievant simply does not possess. These are vital to the health and safety and the economic welfare of the District. (Testimony of O'Donnell, Lawrence, Raml, and Riter). In addition, an employee bumping into one of these positions is expected "to hit the ground running." He does not have time to learn the job. (Testimony of Timothy Sass, Weber, O'Donnell, Raml and Riter).

Likewise, the Arbitrator rejects the Union's reliance on LAKE HOLCOMBE SCHOOL DISTRICT. That case involved a dispute over a partial layoff. The collective bargaining agreement provided:

> A teacher whose position is eliminated shall either be transferred to a vacant position for which he/she is qualified and certified, or replace the teacher with the lowest seniority anywhere within the school system in the area in which the teacher whose position is eliminated is qualified and certified at the time of the layoff notice.

The arbitrator concluded that the grievant had a right to bump into a Distance Learning Class in order to avoid a partial layoff because she was both "qualified and certified for the position at the time of the layoff notice." (Emphasis added). The Union, however, misstates the Arbitrator's rationale in arriving at that conclusion.

The agreement defined "qualified" as "having taught at least one course for one semester within the past five years in the area of certification in the Lake Holcombe School District." LAKE HOLCOMBE SCHOOL DISTRICT, *supra*.

The District there argued that when the definition of "qualified" was applied to the dispute, it was apparent that the parties did not intend to provide bumping rights for positions where no specific certification was required. (Emphasis added). Based on the above contract language defining "qualified," and the record evidence, the arbitrator found "no persuasive evidence that the 'qualification' test becomes inoperable when dealing with areas where specific certification is not required." LAKE HOLCOMBE SCHOOL DISTRICT, *supra*. The position in question did not require any specific certification but it did require, contrary to this

Union's assertion that there were no specific requirements for the disputed position, that a certified teacher perform its duties. The arbitrator concluded since there is "no specific certification requirements in this area, it follows that all teachers who are certified in any area and have taught in any area in the last five years for the District would be qualified to teach the distance learning class." (Emphasis added). In reaching this conclusion, the Arbitrator simply applied the definition of "qualified" contained in the agreement (and noted above) to the record evidence to obtain the result.

The Union opines that LAKE HOLCOMBE SCHOOL DISTRICT "supports the idea that in this case the Arbitrator should give meaning to the employee protections included in the layoff/bumping rights clause where an employee subject to layoff possesses the minimum qualifications for an available position." However, the arbitrator in LAKE HOLCOMBE SCHOOL DISTRICT reached his decision based on the contract language that expressly defined what was meant by the term "qualified," and the record evidence. The language in dispute herein does not provide that a senior employee who is qualified or has "the minimum qualifications" for a job may avoid layoff. It requires that said employee be "immediately qualified" to perform the available work. The Arbitrator's decision in LAKE HOLCOMBE SCHOOL DISTRICT was based on very different contract language and is inapplicable to the instant dispute.

The Union argues, however, that the Grievant was "immediately qualified to perform the available work."

Contrary to the Union's assertion, Union Exhibit No. 3 is the official seniority list. (Testimony of Julie Metz). It states that Lawrence is the least senior "Maintenance" person. Lawrence has had specific training and experience in electronics and Commercial Electrical service. The majority of his time is spent on electrical service maintenance related to the security system, the System and repair of A/V equipment. (District Exhibit No. 2; testimony of Lawrence). When Riter and Raml looked at whether or not the Grievant was *immediately* qualified to perform the work that Lawrence was doing, they concluded he was not "immediately qualified" to perform the "available work." (Emphasis supplied). The record evidence supports this conclusion. For example, Union Exhibit No. 1 indicates that the majority of the Grievant's work with electrical systems is of the unskilled or low-skilled variety like running or pulling wire and the replacement of light fixtures. The Grievant admitted that his electrical work involved a lot of Helper-type work. In contrast, Lawrence does most of the skilled and high voltage electrical work in the District. (Testimony of Lawrence and Raml). He uses his blueprint reading skills in much of his electrical work. Id. The Grievant's blueprint reading skills are minimal. (Testimony of the Grievant, Union Exhibit Nos. 1 and 2). The District would not be able to assign the Grievant Lawrence's electrical work for fear that it would put students and staff at risk. (Testimony of Raml and Riter). Unlike Lawrence, the Grievant did not have any formal training or experience in

Audio/Visual Electronic Repair or specific training in the commercial electrical wiring, including service of the security system. (Testimony of Raml). The Union argues that because the contract with CESA to provide audiovisual equipment was terminated on July 1, 2002, ten weeks after the Grievant was given his layoff notice, the task of audiovisual equipment repair is irrelevant to the determination of whether he was "immediately" qualified. Lawrence testified that he started doing audiovisual equipment repair at the end of the school year. The Union raises a good point that the Grievant's ability, or lack thereof, to do repair of audiovisual equipment was not relevant at the time of his layoff. It would be relevant, however, if the Arbitrator decided to reinstate him.

Union witness Timothy Sass ("Sass") testified that he thought the Grievant could "learn some of the jobs that needed to be done" but that there was certain work, like HVAC, that the Grievant could "not immediately do." The Grievant also couldn't "immediately" do certain work on the fire protection or security system or the higher level electrical work. (Testimony of Lawrence and Sass). However, the contract language in question requires that the person retained (through the layoff process as well as through bumping) be *immediately* qualified. (Emphasis supplied). The Grievant could not "immediately" step into Lawrence's job and perform many of its essential duties.

The Union opines that O'Donnell has less seniority than the Grievant. As pointed out by the District, assuming *arguendo* the Grievant could bump O'Donnell, he is not immediately qualified for that position either.

O'Donnell has considerable training and experience (formal apprenticeship level training) in both the installation and servicing of heating, ventilating, and air conditioning (HVAC) systems. (District Exhibit 1, Testimony of O'Donnell and Raml). His skill allowed him to supervise the installation of the System in the District. (Testimony of Raml). He is the main individual who has access to the upper levels of the System for ongoing programming/service. (Testimony of Sass and O'Donnell). The Grievant does not, and did not at the time of the layoff, possess the qualifications or experience required to perform the ongoing programming and services maintenance required for the upper levels of the System. (Testimony of the Grievant). O'Donnell spends a substantial portion of the workday in the ongoing maintenance of the HVAC systems.

In addition to the HVAC maintenance, O'Donnell performs chemical maintenance for the District's two year old swimming pool. O'Donnell has the proper training through a certification process and ongoing experience to successfully maintain the proper chemical balance in the pool. (Testimony of O'Donnell). This is necessary for public health reasons. *Id*. The "Grievant was not now or in June qualified to do maintenance on the pool or the Robert Shaw system," but he could learn to do that type of work. *Id*.

Based on the above, the Arbitrator finds that the Grievant could not "immediately" step into O'Donnell's job and perform its essential duties.

The Union argues, contrary to the above result, that the "Maintenance" job description only states that the person employed must be a "maintenance generalist" and "perform any and all general maintenance operations." The Union adds that there is no mention that they must hold specialized trade skills. However, the position description states that "This position is definitely slanted to the individual committed to this type of occupation as a skilled trade." (Joint Exhibit No. 4). There is no such reference in the "Maintenace W/Emphasis on Fields & Grounds" job description. The "Maintenance" job description also makes several references in its "JOB GOAL" section to the fact that this "is a highly variable position requiring a flexible and skilled individual" and "the individual in this position must possess a wide range of skills necessary as a building maintenance generalist." (Emphasis added). The "Maintenance W/Emphasis on Fields & Grounds" job description contains no such references. Finally, the "Maintenance" job description also states that a person selected for this position "should have education and or experience that evidences an ability to work with blueprints and technical illustrations of equipment that might be encountered in a building maintenance setting." There is no such performance responsibility in the "Maintenance W/Emphasis on Fields & Grounds" job description. Contrary to the Union's assertion, there are major differences between the two job descriptions. Based on these different job descriptions, employees in the "Maintenance" and "Maintenance W/Emphasis on Fields & Grounds" job descriptions are assigned different types and skill levels of work, normally work in different areas (inside and outside) and are evaluated on these differences as well. (Testimony of the Grievant, Weber, Raml and Riter).

The District hires qualified individuals with trade backgrounds in order to perform duties like pool maintenance, ongoing HVAC maintenance/service, or general boiler maintenance (O'Donnell's job) and commercial electrical wiring service or the electronics repair of the audio visual equipment, security equipment and computer equipment (Lawrence's job) in a safe and cost effective manner. For over a decade, the District has hired individuals with these specific trade skills for each of the "Maintenance" positions. Article IV of the agreement provides that the District expressly retains the exclusive right to determine the methods, means, and personnel by which School District operations are to be conducted; to determine the kinds and amounts of services to be performed as pertains to School District operations; and the number and kind of classifications to perform such services. There is no contractual or other restriction on the District's ability to define the parameters of the "Maintenance" position.

The Union also argues that in the past the District has not required an employee who bumped a less senior employee or was recalled from layoff to possess all the skills required of

the new job. The Union points out that in the spring of 2001 laid off Clerical Aide Rae Ellen Weber had more seniority than an Instructional Aide who was not laid off. She was allowed to bump the Instructional Aide if she could obtain her license from the DPI. (Testimony of Sass) According to the Union, she was not "exactly qualified" for the position she bumped into at the time of bumping. However, Sass did not testify regarding what was necessary in order for Weber to obtain her license from DPI, i.e. was obtaining proper certification a mere formality or was something more involved. Nor did he testify that Weber was not "immediately qualified" to perform the available work at the time that she bumped an Instructional Aide. The District asserts that the individuals who have bumped in the past have been "immediately qualified" to perform the available work at the time of the bumping. The District further asserts that Aides like Weber may be "qualified" before obtaining certification, in the sense that they have demonstrated the ability to perform educational aide duties in the classroom. The record does not provide a clear answer as to how Weber was able to satisfy the "immediately qualified" standard in Article XV, Section A and bump into an Instructional Aide position. Therefore, the Union has not established a past practice with the Weber bumping that would allow the Grievant to negate the "immediately qualified" language.

A similar situation arose in 2002. The District eliminated most Library Clerk positions within the schools. Library Clerks and Secretaries share the same job classifications. One of the Library Clerks who was laid off was recalled to a secretarial position when it became available, as provided by Article XV. The Union claims that she was recalled even though she was not "exactly qualified" for the secretarial position, having never worked in an office setting and not knowing the office routine. However, Riter testified that she had the necessary skills for the job including a good phone voice, greeting demeanor and had accounts payable experience, all helpful for that position. According to Riter, she could "immediately" step into the job and perform its duties unlike the Grievant herein. If the Grievant was put into Lawrence's position and "immediately" expected to perform his duties, this would pose an "unacceptable risk to staff and children." (Testimony of Riter).

The Union asks: if the District believes that the parties to the agreement have accepted the "practice" of hiring individuals with trade skills for "Maintenance" positions, why hasn't this practice been codified through changes in either the job description or the collective bargaining agreement? In fact, Article I, paragraph two provides that "unless specifically set forth herein, past practices of any kind whatsoever, are hereby discontinued." The Union correctly points out that if a past practice exists with respect to the specific manner in which the District fills "Maintenance" positions that practice ought to be formally recognized in the agreement or it runs the risk of being in violation of Article I, paragraph two.

Past practice is not the issue herein. A past practice, to be binding on the parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a

reasonable period of time as a fixed and established practice accepted by both parties. Elkouri and Elkouri, *supra*, p. 732. The Union correctly points out that it has never accepted the District's "practice" of filling "Maintenance" positions with individuals having a skilled trade background.

The District's method of filling "Maintenance" positions does not rise to the level of a past practice enforceable by mutual agreement, but instead simply is an exercise of its managerial discretion. The difference between past practice and this kind of managerial decision-making is explained by Arbitrator Harry Shulman, FORD MOTOR CO.- UNITED AUTOMOBILE WORKERS, Opinion A-278, September 4, 1952; reported at 19 LA 237 (1952). Shulman explained the difference in these words:

> A practice, whether or not fully stated in writing, may be the result of an agreement or mutual understanding. And in some industries there are contractual provisions requiring the continuance of unnamed practices in existence at the execution of the collective agreement. (There are no such provisions in the Ford Agreement or in those of the automobile industry generally.) A practice thus based on mutual agreement may be subject to change only by mutual agreement. Its binding quality is due, however, not to the fact that it is past practice but rather to the agreement in which it is based.
>
> But there are other practices which are not the result of joint determination at all. They may be mere happenstance, that is, methods that developed without design or deliberation. Or they may be choices by Management in the exercise of managerial discretion as to convenient methods at the time. In such cases there is no thought of obligation or commitment for the future. Such practices are merely present ways, not prescribed ways, of doing things. The relevant item of significance is not the nature of the particular method but the managerial freedom with respect to it. Being the product of managerial determination in its permitted discretion, such practices are, in the absence of contractual provisions to the contrary, subject to change in the same discretion. . . . But there is no requirement of mutual agreement as a condition precedent to a change of a practice of this character. FORD MOTOR CO., supra, pp. 241-242.

As noted above, the District is not contractually prohibited from filling the "Maintenance" positions in the manner that it has chosen. Nor is there any evidence that the District acted in an arbitrary or capricious manner when it decided that the Grievant was not "immediately qualified" to perform the remaining available work.

Based on all of the above, the Arbitrator finds that the answer to the issue as framed by the Union is NO, the District did not violate the collective bargaining agreement when it laid off Tom Platner.

In reaching the above conclusion, the Arbitrator has addressed the major arguments of the parties. All other arguments, although not specifically discussed above, have been considered in reaching the Arbitrator's decision.

Based on all of the foregoing, and the entire record, it is my

AWARD

That the grievance filed in the instant matter is denied and the matter is dismissed.

Dated at Madison, Wisconsin, this 3rd day of March, 2003.

Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator

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