

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**ARROWHEAD SCHOOL DISTRICT**

and

**HARTLAND ARROWHEAD SCHOOL DISTRICT EMPLOYEES, LOCAL 3833,  
AFSCME, AFL-CIO**

Case 22  
No. 64463  
MA-12904

(Humblet Grievance)

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**Appearances:**

**Mr. Lee Gierke**, Staff Representative, Wisconsin Council 40, P.O. Box 727, Thiensville, WI 53092, on behalf of Local 3833 and the Grievant.

**Mr. Scott R. Mikesh**, Staff Counsel, Wisconsin Association of School Boards, 122 West Washington Avenue, Madison, WI 53703, on behalf of the District.

**ARBITRATION AWARD**

According to the terms of the 2003-05 collective bargaining agreement between Arrowhead Union High School District (District) and Hartland Arrowhead School District Employees, Local 3833, AFSCME, AFL-CIO (Union), the parties jointly selected Arbitrator Sharon A. Gallagher through the Wisconsin Employment Relations Commission to hear and resolve a dispute between them regarding the District's selection of external candidate Jacob Maroo over long-time District employee Leone Humblet for a full-time custodian opening. Hearing on the matter was held at Hartland, Wisconsin, on May 19, 2005. No stenographic transcript of the proceedings was made. At the close of the hearing, the parties agreed to submit their initial briefs through the Arbitrator for her exchange. The Arbitrator received the parties' initial briefs by July 12, 2005, and she exchanged them. The parties reserved the right to file reply briefs and they did so by August 1, 2005. On September 2, 2005, the District submitted copies of cited cases otherwise unavailable to the Arbitrator, whereupon the record was closed.

## **ISSUES**

The parties stipulated that the following issues should be determined herein:

1. Did the Arrowhead High School District violate the collective bargaining agreement when it denied the Custodian III position to Leone Humblet in 2004?
2. If so, what is the appropriate remedy?

## **RELEVANT CONTRACT PROVISIONS**

### **ARTICLE I – RECOGNITION**

The employer hereby recognizes the Union as the sole and exclusive bargaining agent for all regular full-time and regular part-time teacher aides, clerical, secretaries, food service, drivers, maintenance and custodial employees employed by the Arrowhead Union High School District, excluding confidential, supervisory, managerial, and all other employees, for the purpose of collective bargaining on matters concerning wages, hours, and conditions of employment as certified by the Wisconsin Employment Relations Commission under date of December 12, 1991, Decision No. 27075-A.

Excluded from the bargaining unit are all individuals hired as long term substitutes, summer/student help or temporary or casual employees.

### **ARTICLE II –MANAGEMENT RIGHTS**

The District retains all rights of possession, care, control and management that it has by law, and retains the right to exercise these functions under the terms of the collective bargaining agreement except to the precise extent such functions and rights are explicitly, clearly, and unequivocally restricted by the express terms of this Agreement. The rights included, but are not limited by enumeration to, the following:

- A. To direct all operations of the school district;
- B. To establish and require observances of reasonable work rules and schedules or work;

- C. To hire, promote, transfer, schedule and assign employees in positions within the school district;
- D. To suspend, discharge, and take other disciplinary action against employees;
- E. To layoff employees;
- F. To maintain efficiency of school system operations;
- G. To take whatever action is necessary to comply with state or federal law, or to comply with state or federal agency decisions or orders;
- H. To introduce new or improved methods or facilities, to determine the locations, methods, means and personnel by which school system operations are to be conducted, including the right to determine whether goods and services are to be provided or purchased, as long as bargaining unit employees are not laid off nor suffer a reduction in hours;
- I. To select employees, establish quality standards and evaluate employees performance;
- J. To take whatever action is necessary to carry out the functions of the school system in situations of emergency.

#### **ARTICLE VI – EMPLOYEE DEFINITIONS**

- 6.01 Regular full-year, full-time employee: A regular full-year, full-time maintenance and custodial employee is hereby defined as an employee working at least forty (40) hours per week on a calendar year basis. Any non-custodial or non-maintenance regular full-year, full-time employee is hereby defined as an employee working at least thirty-seven and one-half (37-1/2) hours per week on a calendar year basis.
- 6.02 Regular full-year, part-time employee: A regular full-year, part-time maintenance and custodial employee is hereby defined as an employee working less than forty (40) hours per week, on a calendar year basis. Any non-custodial or non-maintenance regular full-year, part-time employee is hereby defined as an employee working less than thirty-seven and one-half (37-1/2) hours per week on a calendar year basis.

- 6.03 Full-time, school year employee: A school year, full-time employee is hereby defined as an employee working at least thirty-seven and one-half (37-1/2) hours per week for at least thirty-six (36) weeks, but no more than forty-two (42) weeks per year.
- 6.04 Part-time, school year employee: A school year, part-time employee is hereby defined as an employee working less than thirty-seven and one-half (37-1/2) hours per week for at least thirty-six (36) weeks, but no more than forty-two (42) weeks per year.
- 6.05 Temporary employee: A temporary employee is hereby defined as an employee hired to work for a specified period of time, or to perform work on a specific project, not to exceed thirty (30) workdays, and who will be separated from the payroll at the end of such period or project. The District and the Union may mutually agree to employ temporary employees for a period of more than thirty (30) workdays. Temporary employees shall not be used in a serial fashion, and shall be paid no less than the starting wage in the classification in which they are employed.
- 6.06 Seasonal employee: A seasonal employee is defined as an employee working during his or her school (including high school, college or graduate school) summer vacation season. Seasonal employee shall be paid no less than the starting wage in the classification in which they are employed.
- 6.07 No Reduction: The District shall not reduce an employee's hours for the sole purpose of cutting that employee's level of benefits.
- 6.08 Long-term substitute employee: Shall include any employee hired to replace a specific regular bargaining unit employee for the duration of the regular bargaining unit employee's leave of absence.

## **ARTICLE VII – PROBATION**

- 7.01 Probation: All newly hired employees shall serve a probationary period of ninety (90) working days from the date of hire in the bargaining unit. The probationary period may be extended, with the mutual agreement of both the District and the Union, up to an additional ninety (90) working days if the employee receives a negative evaluation during the probationary period. During the probationary period, the employee shall be subject to dismissal for any reason without recourse to the grievance procedure.

. . .

## **ARTICLE X – VACANCIES AND TRANSFERS**

. . .

- 10.02 Vacancies: Whenever a vacancy occurs which the District deems necessary to fill, due to the retirement or termination of the incumbent employee, the creation of a new position, or for whatever reason, the job vacancy shall be known to all employees through job posting.

. . .

- 10.05 Applicants: Any employee interested in such vacancy shall make application to the District Administrator or his/her designee by the date specified on the posting.
- 10.06 Qualified personnel may apply for the vacant positions without resigning their present position in the District and if selected shall retain their individual seniority of District employment.
- 10.07 The District retains the right to select the most qualified applicant for any position. In the event two or more applicant's qualifications are equal, the most senior employee will be awarded the position.
- 10.08 Qualifications: The District retains the right to determine the qualifications needed for any vacant position.

. . .

- 10.12 Union Notification: A copy of each job posting, including a listing of the employees who applied in writing, shall be provided to the President of the Union. The President of the Union shall be notified in writing of the name of the successful applicant when selection is made.

. . .

- 10.14 Trial Period: All jobs applied for through the posting procedure shall carry a twenty (20) work day trial period. If the employee is unable to perform the job during the trial period, the employee shall be returned to his or her former position. In the event that an employee is returned to his or her former position, selection of the employee to fill the vacancy

shall be made from among the remaining applicants who signed the posting. Continued service beyond the trial period shall be deemed evidence of the satisfactory completion of the trial period.

### **BACKGROUND**

The parties' initial labor agreement (1992-95) went to interest arbitration. One provision of the parties' final offers dealt with Job Postings/Vacancies and Transfers. The Union proposed the following language in that interest arbitration case before Arbitrator Byron Yaffe:<sup>1</sup>

### **ARTICLE 9 – JOB POSTINGS**

9.01 **Vacancies:** Whenever any vacancy occurs which the District deems necessary to fill due to the retirement or termination of the incumbent employee, the creation of a new position, or for whatever reason, the job vacancy shall be known to all employees through job posting.

9.02 **Posting:** When a position becomes vacant or a new position is created, notice of such available position shall be posted on the bulletin board(s) for no fewer than six (6) working days. In cases where a vacancy occurs during any school recess period notice of vacancy will be mailed to all school year employees. The employer may temporarily fill vacancies prior to the position be filled by the regular employee for a period not to exceed thirty (30) calendar days. Job postings shall include the date that the posting went up, and the date that the posting is to be taken down. The Union President will be given a copy of all job postings.

9.03 **Notice:** The job posting shall set forth the job title, schedule of hours, rate of pay, a brief description of the job requirements, and the qualifications desired.

Vacancies will be posted on a designated bulletin board in each school building. The notice shall include the date of the posting and shall be signed by the District Administrator. A copy of the notice will be sent to the President of the Union.

9.04 **Applicants:** Any employee interested in such vacancy shall make application to the District Administrator by the date specified on the posting.

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<sup>1</sup> The highlighted provisions were agreed to by the parties prior to the submission of the case to Interest Arbitration, the non-highlighted provisions were disputed in that case.

9.05 Job Award: In the event two (2) or more qualified bargaining unit employees apply for a position, the most senior qualified employee shall be selected. However, a junior employee may nevertheless be awarded the position, provided he or she significantly exceeds the senior employee's qualifications.

9.06 Qualifications: The District retains the right to determine the qualifications needed for any vacant position.

9.07 Trial Period: All jobs applied for through the posting procedure shall carry a twenty (20) day trial period. The applicant chosen for the position shall receive a fair trial period. If the employee is unable to perform the job during the trial period, the employee shall be returned to his or her former position, selection of the employee to fill the vacancy shall be made from among the remaining applicants who signed the posting. Selection shall be made in accordance with Section 9.05. Continued service beyond the trial period shall be deemed evidence of the satisfactory completion of the trial period.

The District proposed the following language for Arbitrator Yaffe's consideration:

#### **ARTICLE X – VACANCIES AND TRANSFERS**

10.01 Employees will give written notice of termination of employment at least two weeks prior to the last day of work. If an employee has overused sick leave, the employee will have an amount equal to the value of that overused leave withheld from his or her last paycheck.

10.02 Vacancies: Whenever any vacancy occurs which the District deems necessary to fill due to the retirement or termination of the incumbent employee, the creation of a new position, or for whatever reason, the job vacancy shall be known to all employees through job posting.

10.03 When a position becomes vacant or a new position is created, notice of such available position shall be posted on the bulletin board(s) for no fewer than six (6) working days. In cases where a vacancy occurs during any school recess period exceeding six (6) consecutive work days, notice of vacancy will be sent to the Union President. The employer may temporarily fill vacancies prior to the position be filled by the regular employee for a period not to exceed thirty (30) calendar days. Job postings shall include the date that the posting went up, and the date that the posting is to be taken down. The Union President will be given a copy of all job postings.

- 10.04 Notice: The job posting shall set forth the job title, schedule of hours, rate of pay, a brief description of the job requirements, and the qualifications desired. Vacancies will be posted on a designated bulletin board in each school building. The notice shall include the date of the posting and shall be signed by the District Administrator. A copy of the notice will be sent to the President of the Union.
- 10.05 Applicants: Any employee interested in such vacancy shall make application to the District Administrator by the date specified on the posting.
- 10.06 Qualified personnel may apply for the positions without resigning their present position in the District and if selected shall retain their individual seniority of District employment.
- 10.07 The District retains the right to select the most qualified applicant for any position. In the event two or more applicants qualifications are equal, the most senior employee will be awarded the position.
- 10.08 The District retains the right to determine the qualifications needed for any vacant position.

. . .

In their briefs before Arbitrator Yaffe, the parties did not argue regarding the application or interpretation of their proposals 9.04 and 10.05. The only dispute between the parties was what value seniority should have if two or more “unit employees” applied for a position (Joint Exhs. 8 and 9). In his award, Arbitrator Yaffe made the following observations regarding the parties’ proposals:

. . .

The Board’s position regarding notification of job vacancies is supported by the comparables as well as the merits of the Board’s arguments in that regard.

Comparability evidence does not strongly support either party’s proposal regarding the weight which should be given to seniority and ability by the District when selecting applicants for vacant positions. Though both criteria are legitimate considerations which should be given weight in such situations, absent a clear pattern of arguments in this regard, the undersigned is unwilling to concluded [sic] that either party’s proposal is preferable in this regard,



particularly since the parties have primarily relied upon comparability evidence to support the merits of their respective positions on this issue.

. . .

The parties went to interest arbitration again over the 1995-97 labor agreement. In its preliminary final offer, the Union proposed the following language to change Article X:

. . .

4. Section 10.07 Amend to read **“Job Award: In the event that two (2) or more qualified bargaining unit employees apply for a position, the most senior qualified employee shall be selected. However, a junior employee may nevertheless be awarded the position, provided he or she significantly exceeds the senior employee’s qualifications.**

**The District shall notify all applicant’s and the Union of all applications and who the vacancy was awarded to”.**

. . .

The Union dropped this proposal before the case went to Interest Arbitration before Arbitrator Stanley Michelstetter. No arguments were made by the parties regarding Article X, Vacancies and Transfers, in the 1995-97 contract Interest Arbitration proceeding and the language of Article X has remained unchanged since its insertion into the parties’ initial labor agreement, covering 1992 through 1995.

### FACTS

The Grievant, Leone Humblet has worked for the District for the past 23 years, mostly as a Bus Driver, transporting special needs children using a small wheelchair accessible bus and transporting children involved in extra curricular activities in an 84 passenger bus. Humblet has never received any discipline at the District and she has received praise for her work over the years. Humblet has never been formally or informally evaluated by the District.<sup>2</sup>

In 2001, Humblet applied for a Custodian III position at the District’s North Campus. She was interviewed for the position (after putting in her application) by Principal Bonnie Laugerman and Director of Buildings and Grounds, Bob Johnson. Laugerman and Johnson did

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<sup>2</sup> The District has no evaluation procedures or requirements based upon this record.

not select Humblet for the position, but they advised her that their decision was based upon the fact that Humblet had no custodial experience. They also advised Humblet that she should apply for a part-time custodial position at the District so that she could get the required experience for future full-time custodial openings. Mike Gundrum (currently a Custodian III) was hired to fill the position in September, 2001. On his application, Gundrum had listed no relevant prior custodial work and he failed to list that he had worked as a long-term substitute Custodian III at the District for 13 months prior to his application for the full-time opening.<sup>3</sup> Gundrum did not submit a resume for consideration.

In November, 2002, Johnson asked Humblet if she would like to work as a long-term substitute in a part-time Custodian III position. Humblet agreed and she then began working 5:00 p.m. to 9:00 p.m. as a Custodian III on evenings when she was not needed as an extra curricular Bus Driver. From November, 2002, to May, 2003, Humblet worked a total of 168.26 hours as a Custodial III while she continued to perform her regular Bus Driver duties on the following schedule: 6:00 a.m. to 9:00 a.m., 10:00 a.m. to 12 noon, and 2:00 p.m. to 4:45 p.m. each day and extra curricular bus driving at night, as needed. Humblet worked more than 2000 hours during the 2002-03 school year.

In 2003-04, Humblet was again offered and she accepted a long-term substitute position as a Custodian III. During that school year, Humblet worked her regular Bus Driver schedule and she worked 794.54 hours as a Custodian III, for a total of more than 2,600 hours. Again, in 2004-05, Humblet was offered and accepted a long-term sub position as a Custodian III. That year, she worked her regular Bus Driver hours and 282.93 hours as a Custodian III. Over the three year period, Humblet worked a total of 1,245.73 hours as a Custodian III.

In March, 2004, Humblet applied for an opening due to the announced retirement of Custodian III, Chet Tischer. However, Tischer ultimately decided not to retire and the District never completed the hiring process and withdrew the posting for the position. In August, 2004, Humblet resigned her long-term sub position as a Custodian III but she continued to work her regular Bus Driver hours.

### **The Selection Process for the Disputed Position**

On October 12, 2004, the District posted a full-time Custodian III position, as follows:

. . .

The following support staff position is presently open:

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<sup>3</sup> No evidence was presented to show whether the District had advertised the position to the outside or whether there were any applicants for the job other than Gundrum and Humblet.

**JOB TITLE:** Custodian

**SCHEDULE OF HOURS:** Tuesday – Friday 2:30pm – 11:00pm;  
Saturday (1<sup>st</sup> shift, start time TBD)

**RATE OF PAY:** Class III, \$15.25 per hour, adjustable as  
per experience

**JOB REQUIREMENTS &  
QUALIFICATIONS:** Job Description attached

If interested in applying for this position, submit a written cover letter or application, attached to a copy of this posting, to Shelly O'Brien prior to 3:00pm on October 19, 2004.

. . .

The following position description was also posted, along with the physical requirements for the job (not relevant herein):

. . .

#### **GENERAL FUNCTION**

Perform general housekeeping.

#### **ESSENTIAL FUNCTIONS:**

1. Perform general housekeeping in areas assigned. This includes, but is not limited to:
  - Clean bathrooms and drinking fountains (replace paper products) several times a day
  - Maintain floors (Sweep, dry mop and wet mop or machine clean)
  - Cleaning table tops
  - Set-up and take down of folding cafeteria tables
  - Wash windows (including door windows)
  - Vacuum carpeted areas
  - Clean and maintain lockers
2. Removal of waste material in areas assigned.
3. Room reconditioning. (Straightening furniture, dusting, etc.)
4. Move furniture as required.
5. Secure building and building checks as assigned.
6. Assist in special set ups for school activities.
7. Assist in emergency situations.

8. Assist with deliveries and unloading of freight.
9. Promote and maintain a flexible, cooperative, positive, team-oriented attitude.
10. Perform other duties as assigned.

**POSITION REQUIREMENTS/SKILLS:** Must have a High School Diploma and possess a valid WI Drivers License. Experience in related field preferred. Must be able to work with minimal supervision and be a self-starter.

**EQUIPMENT/TOOLS OPERATED:** Proficient skills with cleaning equipment.

**PHYSICAL/ENVIRONMENTAL FACTORS:** See physical/environmental sheet attached.

. . .

At approximately the same time, the District also put an ad in the newspaper regarding the position, which read as follows:

### Custodian

Arrowhead Union High school has a full-time, benefit eligible custodian position available. Scheduled work hours are: Tues-Fri (2:30pm – 11:00pm); Saturday: (First shift)

Experience preferred. Must be able to work with minimal supervision. General housekeeping, room conditioning, floor maintenance, lift/carry between 50-80 lbs, unload freight, move furniture, etc.

To apply, stop in or visit [arrowheadschoools.org](http://arrowheadschoools.org) for an application form.

. . .

Steve Kopecky, District Business Manager for the past 15 years stated that the task of selecting the candidate to fill the open Custodian III position was given to Kevin Lipscomb (Director of Buildings and Grounds since his hire on September 7, 2004), Gregg Wieczorek (Principal at the South Campus for the past 12 years)<sup>4</sup> and Lead Custodian on second shift at South Campus, Greg Stapleton (a unit employee).<sup>5</sup> According to this record, neither Lipscomb nor Stapleton had any experience interviewing applicants. In addition, neither Wieczorek nor Lipscomb had observed Humblet on the job in any capacity.

Humblet applied for the position by submitting an application; she was the only internal applicant for the job. There were thirty-three outside applicants for the position. Lipscomb reviewed all of the application materials for the position and he selected the top 12 candidates for the job and then passed all of the applications on to Wieczorek with his top 12 flagged. Wieczorek reviewed all of the applications but admitted that he only gave the ones Lipscomb had flagged close scrutiny.<sup>6</sup>

Lipscomb and Wieczorek met and agreed upon the top 5 candidates to be interviewed.<sup>7</sup> Thereafter, in a private conversation with Greg Stapleton, Lipscomb gave Stapleton the top 5 candidates' applications he and Wieczorek had selected as well as Humblet's application. Lipscomb then stated that he was new to the District and was not familiar with Humblet's work; that there were 5 really good external applicants and one internal applicant and Lipscomb needed Stapleton's input to decide whether to interview Humblet. Stapleton took approximately one hour to look over the six applications and answered Lipscomb's question.

Stapleton then told Lipscomb that Humblet was very good at cleaning but that she had no experience running cleaning machines compared to the 5 outside applicants.<sup>8</sup> Lipscomb stated that he relied solely upon Stapleton's assessment of Humblet and her application in deciding not to interview Humblet. Wieczorek never spoke to Stapleton regarding Humblet's skill/ability; he relied solely upon Lipscomb's judgment that Humblet should not receive and interview.<sup>9</sup> Neither Lipscomb nor Wieczorek questioned Stapleton or any other custodial employees regarding Humblet's work, her experience or her skills and abilities as a Custodian III. The District never notified Humblet that she had not made the interview cut.

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<sup>4</sup> Although Wieczorek stated that he had interviewed over one thousand applicants for openings, only three of those interviews (including those for the opening at issue here) were for custodial openings at the South Campus (Jt. Exh. 29). No other evidence of prior applications was placed in this record.

<sup>5</sup> Greg Stapleton was hired by the District on September 17, 2001. He stated herein that he had been a volunteer firefighter and had done some cleaning in that position prior to his hire by the District but he did not state that he had had any actual custodial experience prior to his hire by the District. Stapleton's application did not list any relevant custodial experience.

<sup>6</sup> Humblet was not in Lipscomb's top 12 candidates.

<sup>7</sup> No evidence was submitted to show what criteria Lipscomb and Wieczorek used to select the top 5 candidates.

<sup>8</sup> Stapleton denied recommending against interviewing Humblet. He stated that he thought Lipscomb had asked him if Humblet was a good worker.

<sup>9</sup> Wieczorek stated that he normally left work before Humblet began her second shift duties as a long-term substitute Custodian III at South Campus.

Lipscomb, Wieczorek and Stapleton interviewed the top 5 candidates in November, 2004: Jacob Maroo, Robert Fischer, Brian Carroll, Jeff Stache and Dave Lischka. The interview team asked all of the applicants the following questions:

. . .

1. Please tell us about your previous work experience and how it relates to this position?
2. What qualities and experiences do you feel are necessary to be successful as a custodian?
3. What types of cleaning and maintenance equipment have you operated?
4. During the school year this position requires that you work Tuesday through Friday, 2:30 pm – 11:00 pm and Saturdays from 6:00 am – 2:30 pm. Summer hours are 1<sup>st</sup> shift. Do these conditions give you any concern or problem?

Because you will work alone on Saturdays, can you tell us about a time when you worked independently with little or no supervision?

5. Do you have any experience working with or around students?
6. You and co-worker get into a dispute about how to perform a duty assigned by you [sic] supervisor. How would you resolve the dispute?
7. What would your past supervisors say about you and your attendance record?
8. As you end your shift on a Saturday, you are securing the facility and find that there are unsupervised students still here. What would you do under this scenario?
9. When there are more tasks to do in a day than you have time for, how would you prioritize them?
10. When you are performing your assigned duties on a Saturday, you notice that an area of the building is unusually cold or warm. What would you do?

. . .

Lipscomb, Wieczorek and Stapleton agreed that Maroo was the best candidate for the job. However, the interviewers created no objective rating system to judge and rank the candidates' interviews or their applications and there is no record of their deliberations except their testimony herein.

Stapleton stated herein that he thought the top 5 candidates were more qualified than Humblet because of the machinery they could operate and their experience. However, Stapleton admitted that only the Lead Custodian at the South Campus operates the riding floor cleaning machine and that the Lead performs all of the building checks and security duties. Stapleton admitted that he never assigned Humblet to perform these duties and that she was never trained to perform them. Stapleton noted that Maroo had experience with cleaning machines at Oconomowoc High School and he had performed security duties in the past; that three of those interviewed had performed maintenance duties and their probable ability to fix machines that had broken down would be valuable on Saturdays in the Custodian III position. Repairing machinery and performing security work were not listed as desired experience on the Custodian III job description, on the posting or on the ad for the job.

Stapleton admitted that he took no notes during Stache's interview;<sup>10</sup> and that he could not recall whether Stache and Carroll stated in their interviews that they had had experience operating cleaning machines. Stapleton also admitted upon referring to the record evidence that Lischke, Carroll, Stache and Fischer's applications did not mention that they had any experience operating cleaning machines.

Lipscomb stated herein that the Custodian III job description does not accurately state some of the duties needed on the second shift at the South Campus, such as Saturday work that cannot be done during the regular work week, and light maintenance work that may be necessary.<sup>11</sup> Regarding the qualifications of those interviewed compared to Humblet, Lipscomb stated that he was impressed by Lischke's certificate in custodial services, his experience cleaning at MATC (from 1990 to 2000), his general mechanical experience in metal fabrication, his experience loading and unloading freight and the fact that Lischke had submitted a resume along with his application. Groundskeeping is not listed as a duty/responsibility on the job description of the Custodian III, and it was not listed on the job posting or ad for the position.

Lipscomb stated that he was also impressed by Carroll's maintenance and groundskeeping work. A certificate in custodial services, fabrication experience, loading freight and the submission of a resume is neither required by the Custodian III job description nor was it listed on the relevant posting or advertisement. Lischke was not offered the disputed

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<sup>10</sup> Stapleton took no notes on the interview questions sheets (as did Wieczorek and Lipscomb) for any of the candidates interviewed.

<sup>11</sup> No evidence was submitted to show that the Custodian III position actually required light maintenance or that there was work that could not be completed during the week that this position would be expected to perform

job. After the interviews were completed, Lipscomb stated that all of the interviewers were comfortable with Maroo as the choice for the job.

Wieczorek was not asked any questions regarding his observations of those interviewed or his thought process in deciding that Maroo was the best choice for the job. Wieczorek stated that long-term substitute custodians at South Campus are not trained or assigned to do building checks/security or to operate cleaning machines as it is not known when/if they will become full-time custodians.

Regarding the September, 2003 first shift Custodian-Maintenance opening ultimately given to Ed Stapleton, Wieczorek confirmed that employees Mary Senflenben, and Ed and Greg Stapleton spoke to him and indicated their interest in the position early on and because of this, the District did not advertise the opening to the outside. Wieczorek stated that there is no Board policy regarding advertising openings.

#### **DOCUMENTARY EVIDENCE REGARDING THE CANDIDATES**

The documentary evidence showed that Maroo graduated from Oconomowoc High School in 2003; that he held a security job from March, 2003, to December, 2003, (9 months) at Oconomowoc Memorial Hospital; that he was a grocery store stocker from December, 2003, to April, 2004, (4 months) at Sentry Foods, where he did some cleaning work. In October, 2003, Maroo was hired by Oconomowoc High School as a "substitute custodian." In the Summer of 2004, Maroo worked as a full-time seasonal custodian at Oconomowoc High School; during the 2004-05 school year, Maroo continued to work 20 hours per week at the Oconomowoc High School. For a three week period in the 2004-05, Maroo worked as a groundskeeper for Oconomowoc High School. From September, 2004 to the date of his application on October 25, 2004 (approximately one month), Maroo worked as a clerk at the Kwik Trip gas station, where he ran the cash register, made food and did some cleaning (Jt. Exh. 46). Maroo specifically mentioned having operated "scrubbers, riding scrubbers, TNF cleaners and waxing" on his application (Jt. Exh. 48). Maroo did not submit a resume.

The record documents showed that David Lischka had worked as a "part-time night custodian" at Madison Area Technical College but that the rest of his work experience (from 1984 to the date of his application on October 16, 2004) involved operating grinders or doing steel fabrication and freight loading and unloading in a factory setting. In his resume submitted with his application, Lischka indicated that he had stripped and waxed floors and secured the building at the end of the night at MATC; that he had received a certificate in custodial services in 1995; that he had experience in home remodeling and repair, electrical wiring plumbing and drywall, replacing windows and roofing, painting and staining.

Regarding Brian Carroll, the record showed that he submitted a resume and application and that he stated thereon that he had a CDL and "many years experience with maintenance



and grounds. I know how to use all floor and carpet cleaning equipment.” Carroll also listed “seasonal” cleaning work at Richmond Grade School from February, 2002, to June, 2003 (4 months), work from 1987 to 1998 at Dorner Mfg., Co., in building maintenance and groundskeeping and factory work, and his current work for Century 21 in maintenance and groundskeeping (1999 to the date of his application). In his interview, Carroll indicated that his experience working with students was through his leadership in the Boy Scouts.

Jeff Stache submitted a resume and application. On his application, Stache listed that he was a certified teacher, that he had experience with “cleaning machines, light maintenance skills.” From July, 2004, to the date of his application, Stache was employed part-time at the YMCA doing cleaning and maintenance work and part-time at Maid Easy, doing cleaning work in a new construction setting. Stache characterized the latter position as “not steady” and from September, 2004, to the date of his application, Stache took another part-time job as a “warehouser” at SR Sales. Stache had no other relevant experience.

Robert Fischer submitted a resume, a reference letter and an application for the position. On his application, Fischer stated he had “floor care expertise, window washing proficient.” Fischer listed part-time custodian work at Lowell School from April, 1994, to December, 1996; part-time maintenance/custodial work at David and Goliath Builders from 1989 to the present and part-time custodial/maintenance/grounds/cleaning work at Brookfield Lutheran Church from 1994 to the present. On his resume Fischer listed his skills as follows:

. . .

- Experienced in custodial responsibilities
- Skilled in indoor and outdoor painting/staining
- Replaced and restored cabinets
- Extensive experience in boiler and pump assembly
- Proficient in drywall and tile repair
- Experienced in minor plumbing and electrical repairs
- Proficient in window repair and restoration of stained glass
- Completed outside structural repairs such as porches and decks
- Experienced in minor roofing repairs
- Some experience with cement work
- Skilled in welding and the use of an Oxyacetylene Torch
- Extensive experience in brazing of exotic metals
- Proficient in reading blueprints
- Experienced fork lift operator

. . .

The Grievant submitted an application for the position and stated thereon "I have worked as a custodian part-time for 1 ½ yr. here." She did not list any employment other than her current job as a District Bus Driver for the past 23 years. Humblet was not interviewed for the opening, she was not sent a rejection letter and she was never told why she was not interviewed or selected for the job.

Humblet filed a grievance challenging the District's decision to hire Maroo. On January 14, 2005, the District sent the following letter stating that the Board of Education had denied Humblet's grievance on January 12<sup>th</sup> and adding:

. . .

In the decision making, I submit for your consideration the following:

- The position was posted internally and externally. Sherry Brown was notified of the job posting.
- 34 applicants applied for this position, including 1 internal candidate. Some applicants were highly qualified, some were minimally qualified, and some were not qualified.
- 5 highly qualified applicants were interviewed by Kevin Lipscomb, Gregg Wiczorek, and Greg Stapleton. The District followed the past practice, in that only candidates selected for an interview are acknowledged with the hiring decision.
- The applicant selected was considered highly qualified. In addition to meeting minimum requirements, this candidate offered security experience and work experience working in an unsupervised environment.
- Sherry was notified of the selected candidate via e-mail, and the District maintains that in accordance with Article 10.07, "The District retains the right to select the most qualified applicant for any position."

. . .

Humblet stated herein that she performed all of the duties listed under number 1 on the Custodian III job description except she was never trained and never assigned to operate the riding floor cleaning machine; that although she never set up the cafeteria tables she did take them down; that she performed all of the duties listed in numbers 2 through 4 and 9 and 10 on the job description but she was never assigned or trained to perform the duties listed in numbers 5 through 8 on the job description. No emergencies occurred during her employment as a long-term sub; deliveries were normally made during regular business hours which occurred prior to her 5:00 p.m. start time; only the Lead Custodian (or Lubbert acting in his absence) performed building checks and operated the riding floor cleaner. Humblet was never

evaluated in her position as long-term substitute Custodian III. Stapleton stated that he observed Humblet's work during the Summer of 2004 when she worked more custodial hours and he found no problems with her work.

Although Greg Stapleton stated that he trained Humblet, Diane Lubbert stated that she trained Humblet in her long-term sub position, including how to operate the small scrubbing machine in the Art Room at the South Campus.<sup>12</sup> No one at the District asked Lubbert to evaluate Humblet's work or her skills and abilities prior to the District's selection of Maroo to fill the disputed position.

### **PAST HIRING HISTORY**

Business Manager Kopecky stated that in the past, the District has always hired the most qualified applicant for bargaining unit positions. However, Kopecky also stated that if District managers know that there are good, qualified internal applicants interested in an opening, the District has not advertised the open position and the position has been offered to one of the internal applicants who posted for it. Kopecky explained that the District has not sought external applicants in these situations because District managers have seen the applicants' work, they know their qualifications and experience and their work ethic as well as the internal applicants' ability to work with the public served by the District. Kopecky also stated that the District has not sought outside applicants or advertised open unit positions when a District manager has a friend or he/she has someone in mind for an opening. In these circumstances the known outside applicant has been selected.

Although the District hired from the outside for nine unit aide positions that were open from August, 2002, to October, 2004, there were no internal applicants for any of those positions. In addition, the District did not advertise for outside applicants for four of the nine aide openings. In July, 2004, a Study Hall Supervisor position was posted and Humblet signed the posting; she was the only internal applicant for the position. There were 26 outside applicants for that position. The successful candidate for the opening was certified teacher, Jill Storm. Humblet stated herein that she did not grieve her denial of the position as she had no experience working as an aide or Study Hall Supervisor.

In August, 2004, two unit secretary positions opened and the District advertised both of them. One was the Guidance Secretary position and the other was for a Principal's Secretary. For the former opening, there were 44 outside applicants and no internal applicants. One of the 44 external applicants was selected for the position. For the latter opening, there were no external applicants, only 3 internal applicants, and one of those employees (the least senior applicant, Jan Wenzler) was selected for the position.

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<sup>12</sup> Lubbert stated that it is not difficult to learn how to operate the riding floor machine.

Only four custodial openings have occurred since 2002 (including the disputed position): A first shift Custodian/Maintenance position at South Campus, a second shift Custodian Lead position at South Campus and two Custodian III positions. The District did not advertise the first shift Custodian/Maintenance position or the second shift Lead position. For the former opening there were three internal applicants, Mary Senflenben, Greg Stapleton and Ed Stapleton and one outside applicant. Ed Stapleton was the most senior employee who applied and he received the position.

After Ed Stapleton was awarded the Custodian/Maintenance position, the District assigned Greg Stapleton and Diane Lubbert to take turns filling the position vacated by Ed Stapleton (Lead Custodian on second shift) one week at a time. When that position opened, Lubbert and Greg Stapleton and fellow employee James Griggs applied for it. No outside applicants applied for the job. Greg Stapleton was selected for the opening although he was not the most senior applicant. Diane Lubbert stated herein that she was told by District managers that she did not receive the position because she had used too much accumulated sick leave and she did not know how to operate a snow blower. Lubbert did not file a grievance.

The applications of other custodial employees hired by the District were placed in the record and they revealed the following information. All of these employees were hired as Custodian III's and none of them submitted a resume. Diane Lubbert was hired by the District in 1978 with no prior custodial experience. According to his testimony herein, Greg Stapleton was hired without prior custodial/cleaning experience. Troy Meinecke and James Griggs were hired by the District in 1999. Meinecke listed 8 months of custodial experience at Shorewood High School and one year and 9 months of janitorial experience at Johnson Controls on his application. Griggs listed 1 year and 11 months of general cleaning at Oconomowoc High School on his application. Chet Tischer was hired by the District in 2000. On his application, he listed only 6 months of recent work for Sparkle Maintenance and office cleaning for UPS for an unknown period in 1969. David Bangle and Kristine Pieper were hired in 2001 as was Gundrum. On his application, Bangle listed 13 years part-time cleaning experience at St. Luke's Church and 5 years part-time cleaner work for the City of Brookfield. Pieper had no custodial experience prior to her 1999 application for employment with the District although; she had done some cleaning as part of her factory duties as a machine operator since 1989. Gundrum listed no custodial/cleaning experience on his application.

### **POSITIONS OF THE PARTIES**

#### **The Union**

The Union argued that the contract language is clear and specific that only "District employees" can be "applicants" for bargaining unit openings pursuant to Section 10.05. As outside applicants have no unit seniority they cannot be among those considered under the second sentence of Section 10.07 which requires the District to select the "most senior"

qualified applicant for a position. Quoting from Arbitrator Rice's award in FOND DU LAC SCHOOL DISTRICT, CASE NO. A/P M-97-198 (RICE, 8/97), the Union argued that the contract language herein, like that in FOND DU LAC, does not provide for outside applicants to be considered for openings so long as a qualified employee has posted for the opening.

Here, Humblet was qualified for the Custodian III position because she had worked part-time in that position for 1.5 years and she should have been awarded that position. In any event, as the contract provides for a twenty-day trial period in the position, Humblet should have been allowed to demonstrate her ability in the position. The Union noted that after Humblet applied, was interviewed, and was rejected for an open Custodian III position in 2001, she took the District's advice and accepted part-time Custodian III work in order to obtain Custodial experience for consideration for future Custodian III openings; and that Humblet then worked part-time as a long-term substitute in a Custodian III position from 2002 to 2005 in addition to her demanding schedule as a District Bus Driver (6:00 a.m. to 9:00 p.m. daily).

The word "employee" as used in the labor agreement covers only individuals who have been hired by the District. Section 10.05 specifically limits the definition of an "applicant" to "any employee" interested in a vacancy. According to the entry level Custodian III job description, Humblet performed all of the work listed except for tasks she was never assigned or trained to perform (floor buffing by machine, securing the building/building checks) and, as an emergency never arose and deliveries were made prior to 5:00 p.m., those duties never arose on Humblet's Custodian III shifts. The Union observed that the evidence was clear that Humblet's work was excellent throughout her tenure. The Union asserted Humblet would have no difficulty learning the riding floor buffing machine as she regularly drove a four-ton eighty-passenger bus for the District without incident. Other applicants for District entry level Custodian III positions had little or no custodial experience prior to their hire, according to the record evidence, and even those that had experience had experience similar to Humblet's.

In addition, the Union asserted that the evidence of bargaining history placed in this record does not support the District's arguments that the issue before this Arbitrator was ever addressed by the parties or their interest arbitrators. Furthermore, only if the contract language were ambiguous would evidence of past practice be relevant. No past practice exists which supports the District's claims herein that the District has always hired the most qualified applicant for every position.

In this regard, the Union noted that the District's exhibit (Joint 29) concerning applicant selections from 2002 to the date of hearing contained no examples that were similar to Humblet's case. In 10 of 16 positions there were only external applicants; in six situations the District never advertised the positions to the outside. One job was never filled and another was awarded to an external applicant when the internal applicant was admittedly unqualified. Therefore, in 40% of the cases the District never sought outside applicants and the instant case

was the only one reported wherein an internal qualified applicant was bypassed in favor of an external applicant.

Also, there was no evidence that the Union accepted a District “practice” of bypassing qualified unit employees in favor of outside applicants. The District’s argument that Article II, Management Rights, allowed it to bypass Humblet misconstrues Article II: Article II is a general provision which by its own terms is made subordinate to the specific and express terms of provisions such as Article X.

The Union also contended that the District’s selection process which resulted in Maroo’s hire was arbitrary. Here, the District managers involved in the hiring decision had no first-hand knowledge of Humblet’s work and Greg Stapleton had never been involved in interviewing or assessing applicants before, yet his opinion was relied upon to refuse Humblet an interview. The Union observed on page 27 of its Brief:

. . .

**a. District was arbitrary in selection process**

Mr. Kevin Lipscomb, the Manager of Maintenance Services, had just recently been hired (started on July 7, 2004) and was unfamiliar with the hiring process as well as the District personnel and functions of the job in question. Mr. Greg Wieczorek, the principal, was unfamiliar with the functions of the Custodial Class III position and had no first hand knowledge of the work of Ms. Humblet. These two were given a stack of job resumes including the one internal applicant, Leone Humblet. After examining this paperwork, they pared down the potential candidates to five outside candidates.

Mr. Lipscomb testified as to why the five outside candidates were singled out:

Mr. Greg Maroo – “based on his experience at the high school.” (Mr. Lipscomb testimony) Resume and accompanying “Summary of Work History” with approximately one year of work history as a part time substitute and seasonal employee at Oconomowoc High School. (Jt-47)

Mr. David Lischke – “certificate in custodial and experience at MATC along with unloading of freight.” (Mr. Lipscomb testimony) Mr. Lipscomb did clarify his testimony that he had no idea how important freight loading was to the job in question. (JT-54)

Mr. Brian Carrol – “general maintenance and groundskeeping.” (Mr. Lipscomb testimony) Once again Mr. Lipscomb clarified that groundskeeping is not part of the job in question. Mr. Carrol’s resume showed a maintenance/groundskeeping for a realtor and prior to that a seasonal employee doing some maintenance. (JT-60)

Mr. Jeffrey Stache – “I liked his willingness to submit a resume. His experience at YMCA at Pabst Farms.” (Mr. Lipscomb testimony) The resume showed 23 years of experience in the psychology field. The job application listed two part time custodial jobs that were started in July of 2004 – 3 months prior to this. (JT 63 &64)

. . .

The Union urged that Humblet’s qualifications were at least as extensive as the successful applicant’s. It noted that Maroo had worked for one year as a part-time substitute custodian and in the Summer as a seasonal custodian at Oconomowoc High School while Humblet had been a valued employee of the District working with students on a daily basis, whose work had been excellent for 23 years and who had worked part-time for 1.5 years in the open position doing 95% of the job description duties with no problems. Humblet’s previous postings for this and the aide position were entirely distinguishable. The Union urged that the trial period language of Article X supports the Union’s argument that the job promotion provision of the Contract was designed to provide employees like Humblet who had performed 95% of the required duties of a position a short trial period to determine whether they could be successful, long term, in a different position.

In these circumstances the Union sought an order sustaining the grievance and placing Humblet in the Custodian III position with full backpay and benefits.

### **The District**

The District argued that its selection of the top five qualified applicants was supported by the clear and unambiguous contract language of Sections 10.05-10.08. The District detailed the bargaining history of Article X, urging that this evidence showed that the parties were aware that the District had consistently reserved its right to select the “most qualified applicant for any position.” The District pointed specifically to the Union’s brief in the interest arbitration case over the initial parties’ (1992-95) labor agreement (Jt. 8 at p. 61) as support for its argument that the Union was aware that the first sentence of Section 10.07 meant the District could select the most qualified applicant and was not bound to select the successful applicant by unit seniority. As the language of Article X has not changed since it was placed in the 1992-95 agreement, the clear meaning of that language must be applied in this case to require that the grievance be denied and dismissed.

The District analyzed the applications of the Grievant and the top five applicants for the disputed position in detail. Significantly, the District found fault with Humblet’s application in that 1) she failed to submit a resume and cover letter; 2) she had no education beyond high school except a six-week computer class at the local technical college; 3) she failed to indicate

that she had worked for the District as a part-time long-term substitute custodian in the “employment history” section of her application; 4) although she listed him as a supervisor she failed to list Greg Stapleton as a reference on her application; 5) she wrongly stated the dates of her employment as a long-term substitute at the District; and 6) she had no security guard experience. Regarding the successful applicant, Jacob Maroo, the District noted that he stated on his application that he had done everything the District position required “many times”; that his work history showed that from October of 2003 to the Summer of 2004, Maroo worked as a substitute custodian at Oconomowoc High School; that Maroo worked full-time for OHS during the Summer of 2004; for three weeks at the start of the 2004-05 school year, Maroo worked twenty hours per week at OHS as a substitute custodian and twenty hours per week as a groundskeeper at the Oconomowoc Middle School; and during the remainder of 2004-05 Maroo worked twenty hours per week as a custodian at OHS. The District also noted, “In addition to his custodial work in the Oconomowoc School District, Mr. Maroo had “six months combined experience cleaning at a local Kwik Trip and Sentry Foods Store” (Er Br. p. 19).

Finally, the District noted Maroo’s eight months work as a security guard for Oconomowoc Memorial Hospital gave Maroo experience in the essential functions of the disputed position in securing the building and performing building checks. In his interview, the District observed that Maroo stated he had had experience operating cleaning machines and that he had done building checks and assisted in locking the OHS. Although the District chose not to interview Humblet, it concluded that based upon her application she had had none of the experiences recounted by Maroo in his interview.

The District further noted that in her testimony herein, Humblet admitted that she never assisted during an emergency situation; that she had not assisted in setting up for school activities; that she had never assisted with deliveries; and that she had never secured the building or taken part in building checks as a part-time long-term substitute Custodian III. The District argued that the evidence (testimony of Kopecky) showed that the Custodian III position covering Tuesday through Saturday on second shift “is fundamentally different from the Monday through Friday position . . .” because the former requires “lockdowns and building security checks” which make a security background “valuable for any applicant” (Er Br. p. 28). The District asserted that Greg Stapleton “was not a forthcoming witness and did not voluntarily testify, but was required to testify by the District” (Er Br. p. 28).<sup>13</sup> Regarding the testimony of District witnesses Greg Stapleton and Kevin Lipscomb, the District made the following observations:

. . .

When pressed by the Union regarding the differences in application materials between the five most qualified applicants and Grievant, Mr. Stapleton

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<sup>13</sup> The District did not request a subpoena for Stapleton from this Arbitrator. Therefore, there is no support on this record for the District’s assertion.



testified that Grievant mentioned nothing in her application about any abilities to operate machinery. Mr. Stapleton testified that Grievant “could have put that on her application.” When pressed further by the Union regarding the differences in application materials between the five most qualified applicants and Grievant, Mr. Stapleton pointed out that on Mr. Lischka’s application (Joint Exhibit 53), he indicated he was previously a mechanic. Mr. Stapleton noted that on Mr. Stache’s application (Joint Exhibit 64), he indicated he had special skills in cleaning machines and light maintenance skills. Mr. Stapleton noted that on Mr. Maroo’s application, he indicated work experience at Oconomowoc High School. In addition, Mr. Stapleton pointed out that Mr. Maroo’s application listed his security experience. Mr. Stapleton testified that based on Mr. Maroo’s position at Oconomowoc High school along with his application statement that Mr. Maroo “had done everything you require many times” (Joint Exhibit 47), Mr. Stapleton interpreted Mr. Maroo’s application to mean he had run all machinery and stripped floors. In addition, Mr. Stapleton noted that Mr. Carroll was a machine operator (Joint Exhibit 60). Mr. Stapleton also pointed out to the Union that several different applicants had indicated maintenance experience. Mr. Stapleton testified that maintenance experience indicates a higher level of custodial understanding and abilities, such as being able to fix a machine that has broken, an asset that could be important for a custodian working unsupervised on a Saturday.

Mr. Stapleton testified that he took part in the interviews of all five of the most qualified applicants, Mr. Lischka, Mr. Stache, Mr. Fisher, Mr. Maroo and Mr. Carroll. Mr. Stapleton testified that all three of the interviewers agreed that Mr. Maroo was more qualified than the other four most qualified applicants. Finally, Mr. Stapleton testified again that Mr. Maroo was more qualified than the Grievant.

As its fourth witness, the District called Kevin Lipscomb, the District’s Director of Buildings and Grounds, to testify. Mr. Lipscomb testified that he started working at the District in September 2004. He indicated that because he was new to the District he had no prior experience with Grievant. Mr. Lipscomb testified that one of his primary job duties was to review applications, recommend a candidate and hire that candidate based upon the District’s needs.

. . .

When pressed to compare qualifications of the five most qualified applicants, as listed in their application materials, against Grievant’s application, Mr. Lipscomb pointed out that Mr. Lischka had a custodial certificate from WCTC along with work experience at MATC. In addition, Mr. Lipscomb pointed out that, unlike Grievant, Mr. Lischka took the time to create a resume highlighting his experiences and accomplishments. In addition, Mr. Lipscomb

noted that Mr. Stache's application and supporting materials indicated experience with cleaning and maintenance along with significant academic achievements such as a Masters Degree. Furthermore, Mr. Lipscomb pointed out that Mr. Fisher's application and supporting materials showed that he had past welding experience along with maintenance skills. In addition, Mr. Lipscomb noted that Mr. Maroo's application and supporting materials showed that Mr. Maroo had experience working as a security guard along with custodial experience at the Oconomowoc High School and other general cleaning experience. Finally, Mr. Lipscomb pointed out that Mr. Carroll's application and supporting materials showed that Mr. Carroll had maintenance work experience and cleaning experience at the Richmond School.

. . .

In regard to the proper interpretation of Article X, the District argued as follows:

. . .

The language in this case is plain and clear. The provisions found in Article X – Vacancies and Transfers convey a distinct idea and are subject to only one interpretation. First, a vacancy must occur within the District. Second, a bargaining unit employee must make application to the District Administrator prior to the date specified on the job posting. Third, the District retains the right to determine the qualifications needed for any vacant position. Fourth, the District retains the right to select the most qualified applicant for any position. Fifth, if the District determines that the qualifications of two applicants are *equal*, the District will award the position to the one of those two applicants who is the most senior employee. (Er Br. p. 36)

. . .

The District argued that the effective labor agreement contains no explicit provisions and no implied provisions limiting the District's right to hire the most qualified candidate (Maroo) over a lesser-qualified internal candidate; and the contract does not state a preference for the hire of unit employees over external applicants "unless the qualifications of each of the applicants are equal" (Er Br. p. 38).

The District therefore relied on the first sentence of Section 10.07 to support its assertion herein that it had reserved the uninhibited right to "select the most qualified applicant" for any opening. The use of the verb "select" (that is, to choose from a number or group) in the provision is further evidence of the depth of the District's discretion. To deny the District the right to make a free choice would abrogate the language of Section 10.07. Furthermore, the District noted that its interpretation and application herein of Section 10.07

included the use of the ordinary meanings of the terms “most qualified,” “qualifications,” “applicant,” and “equal.” Thus, the District argued, that only if the applicants’ qualifications were identical in value would the District be required to give the position to the most senior applicant. Here, the applicants’ qualifications were far from identical in value — the five applicants interviewed “had additional experience or additional qualifications above and beyond Grievant’s” and Maroo was the most qualified applicant. In addition, Article II of the labor agreement supports the District’s discretion to select, as the District’s power of selection in Section 10.07 is not restricted by any term of the agreement.

The District also urged that its selection of Maroo as the most qualified applicant was supported by past practice and the bargaining history surrounding Article X. Although the District’s main argument rested upon its assertion that the language of Article X is clear and unambiguous, the District argued that even if it is not found to be so, the bargaining history showed that the Union has failed on several occasions in interest arbitration and bargaining to place language in the agreement which would restrict the District’s right to select the most qualified applicant. The Union should not be allowed to gain through grievance arbitration what it was unable or unwilling to acquire through interest arbitration. Furthermore, the District’s past selections are evidence of a clear, mutually agreed upon past practice which supports the District’s assertions herein. The District contended that this evidence showed that it has always selected the most qualified applicant for every job. Particularly instructive is the example of Jill Storm, the outside applicant hired over the Grievant to fill an open study hall supervisor position.

The District further asserted that its selection of the top five applicants for an interview was not arbitrary, capricious or discriminatory. The District contended that its selection team used “unbiased and neutral criteria” to narrow those considered for the position from 37 to 12 and then to the top five applicants and that Greg Stapleton made an “unbiased and neutral recommendation” that Humblet was not as qualified as the five most qualified applicants. No evidence was proffered to show that the assessments of Lipscomb, Wieczorek and Stapleton were in any way biased or non-neutral. The District asserted that Lipscomb and Wieczorek were “trained experts whose job duties require them to evaluate employees and establish standards of performance to justify their actions” (Er Br. p. 53), who used their experience and expertise to select the top five candidates herein.

Finally, the District contended that its selection of the successful applicant was appropriate. The District contended that Lipscomb, Wieczorek and Stapleton used unbiased and neutral criteria in determining that Jacob Maroo was the most qualified applicant for the opening, based upon Maroo’s application and his interview answers to questions asked of all interviewees. Therefore, the District urged the Arbitrator to deny and dismiss the grievance.

### **Reply Briefs**

### **The Union**

The Union urged that its interpretation of Article X gives effect to all of the clear and unambiguous language of that Article, while the District's interpretation emphasizes and defines undisputed language and overlooks determinative language, essentially reading Section 10.07 in isolation. Furthermore, the Union noted that the PRAIRIE DU CHIEN SCHOOL DISTRICT case cited by the District is distinguishable as Arbitrator Kessler's decision hinged upon the use of the verb "may" in finding the District had discretion to bypass a qualified unit employee for an outside applicant to fill an open position. In the ELROY-KENDALL-WINSTON SCHOOL DISTRICT and WISCONSIN INDIANHEAD VTAE cases cited by the District, the contracts contained no definition limiting applicants to employees as in the instant case. The Union argued that the definition of applicants as employees only, contained in Section 10.05, was never disputed in negotiations or interest arbitration by the parties.

The Union urged that the District's selection process was flawed. Although there was no requirement ever stated for applicants to submit a cover letter and resume, the District made much of Humblet's failure to submit same herein. The Union contended that the qualifications/experience of the interviewed applicants which the District selection team found compelling were not listed in the Custodian III job description or on the posting and they had no relationship to the open position. Humblet actually had more time worked as a part-time custodian at the District than Maroo had in a similar position at Oconomowoc School District yet Humblet was not even interviewed.

The Union also disputed the District's assertion that Lipscomb and Wieczorek were "trained experts." Neither knew Humblet or her District work and they relied on Stapleton's comparison of Humblet with the top five candidates which was based upon unjustified assumptions of the top five candidates. Notably, Stapleton had never been involved in selecting job applicants before this instance so he was no expert. The Union observed that Humblet received no credit or advantage for having actually worked 1.5 years in the open position and she had actually performed all duties therein listed in the Custodian III job description that were assigned to her and/or that arose during her 1.5 years in that job. The Union further noted that only one question in the interviews related to the operation of cleaning machines. Humblet's resignation from her part-time long-term substitute Custodian III position is not relevant to this case. The Union urged the Arbitrator to sustain the grievance, place Humblet in the position and make her whole.

### **The District**

In its Reply Brief, the District purported to list, detail and argue regarding 34 separate "inaccuracies" in the Union's initial brief. However, the District essentially reiterated the arguments made in its initial brief in its Reply Brief. The following constitute new assertions made by the District in its Reply:

1. Assuming Maroo was never absent, he had 1432 hours' experience as a substitute/seasonal custodian prior to November of 2004.
2. The Grievant was never classified as a Custodian III — she was classified and paid as a long-term substitute custodian.
3. The Burdick Corp. case cited by the Union is forty years old and the contract language therein was different from that in this case. The management rights clause in this case is stronger than that in Burdick.
4. The "duties as assigned" contained in the Custodian III job description should include light maintenance work, tasks that could not be completed during the workweek, fixing machines that break down and working unsupervised on Saturdays.
5. Wiczorek and Lipscomb had already eliminated Humblet from the top five candidates when Lipscomb asked Stapleton's opinion of the Grievant and the top five candidates' qualifications.
6. Stache received an interview when Humblet did not because he "had a bachelor's degree in Elementary Education and . . . a master's degree in Educational Psychology . . . an extremely high level of academic accomplishment and intelligence . . ." (Er Reply, p. 13).
7. The fact that Section 10.05 is entitled "Applicants" does not mean that that term is defined by the language that follows the title; throughout the contract the parties used more specific language for definitions, such as "hereby defined as," "shall include," or "is defined as."
8. The use of "applicant" in some instances and "employee" in others in Article X requires a conclusion that the parties intended the term "applicant" to encompass a broader group, more than just employees. The use of the word "employee" in the second sentence of Section 10.07 is "surplusage" if an applicant can only be an employee.
9. The other cases cited by the Union (ELROY and FOND DU LAC) are either distinguishable or support the District's case herein.

The District again urged the Arbitrator to deny and dismiss the grievance.

### **DISCUSSION**

Several undisputed facts should be noted initially. The Custodian III position description states that the job's "general function" is "general housekeeping;" that "experience in related field is preferred;" and that the position's "essential functions" include "secure building and building checks as assigned" and "maintain floors (sweep, dry mop and wet mop, or machine clean), " (emphasis supplied). The position requirements/skills include possession of a valid Wisconsin driver's license and a high school diploma and ". . . to work with minimal supervision and be a self-starter." Prior experience working as a security guard is not required for the position. The position description states under the category "Equipment/Tools Operated," a need for "proficient skills with cleaning equipment." It is significant that the

position description does not require that the incumbent of the position have had experience operating a riding floor scrubber before hire. Neither the job posting nor the newspaper advertisement for the position required applicants to submit a resume or cover letter.

The District has no evaluation procedure for its employees so there were no records Wierczorek and Lipscomb could refer to determine Humblet's work performance across her 23 years of District employment. Indeed, there is no evidence on this record that Wierczorek and Lipscomb ever looked at Humblet's District personnel file. Lipscomb and Wierczorek admitted herein that they knew nothing about Humblet's District work. Although the District called Lipscomb and Wierczorek "experts" in hiring employees, I note that no evidence was proffered to show that Lipscomb had ever been involved in hiring any employees before his involvement with the disputed position. Also, although Wierczorek stated he had interviewed over 1,000 applicants prior to this case, only three of them in the past four years were for custodial openings based upon this record. No evidence was submitted to show that Lipscomb, Wierczorek and Stapleton had any written standard or that they applied an objective rating system to judge either the applications they saw in this case or the interviews they conducted of the top five candidates.

During the instant hearing, Stapleton and Lipscomb admitted being impressed by qualities/experience/education of candidates that were clearly irrelevant based on the Custodian III position description. It is also significant that Stapleton had never been involved in selecting an employee for hire before his involvement here; that Lipscomb relied solely upon Stapleton's opinion of Humblet in deciding not to interview her for the position and that Wierczorek did not question this approach. In addition, I note that Stapleton stated herein he thought Lipscomb had asked him whether Humblet was a good worker, and that he was unaware that Lipscomb's questions would result in Humblet not being considered further for the opening.

In the District's letter denying Humblet's grievance it cited the reasons why Humblet did not receive the Custodian III position were because Jacob Maroo was highly qualified and because Maroo had experience as a security guard and doing work in an unsupervised setting. The District did not mention Maroo's experience operating floor scrubbing equipment as a reason for Maroo's selection as the best-qualified applicant in its answer to the grievance. I note that at the interviews, only one questions concerned the use of machinery.

Based upon the above-noted facts, the District's selection process was arbitrary, capricious and discriminatory on its face. Indeed, a close analysis of the District's selection of prior applicants merely supports a conclusion that the District has also been at least inconsistent if not arbitrary in making past selections. Here, the evidence showed that the District has relied upon personal contacts and friendships of managers in seeking applicants from which to fill the majority of open positions, making it highly unlikely that the District selected the "best-qualified" applicant for all positions as its witnesses baldly claimed. In this regard, I note that regarding past Custodian III openings, in four cases the selected applicants

listed no housekeeping experience on their applications (Gundrum, Lubbert, Greg Stapleton and Pieper); in one case, the selected applicant had six months' housekeeping experience (Tischler); in one case the applicant had fewer than two years' housekeeping experience (Griggs); in one case, the successful applicant had more than two years' relevant experience (Meinecke) and one had more than five years' such experience (Bangle). Thus, for more than 57% of the prior Custodian III openings the successful applicants had less housekeeping experience listed on their applications than Humblet had at the time she applied for the disputed position. Even if one credits Gundrum with 13 months as a substitute District Custodian, (which Gundrum failed to list in any way on his application), when considered in light of Humblet's having taken prior District managers' advice to heart that she get experience through subbing, this evidence simply serves to further demonstrate the arbitrary treatment the District gave Humblet in this case.

The evidence proffered regarding the nine aide position openings is not relevant as there were no internal applicants for those openings. For the July, 2004 Study Hall aide opening for which Humblet applied, I note that Humblet did not grieve the District's hire of a certified teacher for the opening because she (Humblet) had no prior aide experience. The District has argued that Humblet's failure to grieve the denial of the aide position somehow constituted a waiver or an admission by Humblet and/or the Union that the District's interpretation of Article X was correct. I disagree. The record evidence falls far short of the proof necessary on this point. Indeed, given the circumstances of the Study Hall aide opening, I find it was not relevant to this case and it does not stand as a waiver or admission concerning the issues in this case.

The evidence regarding the two secretary openings of record was mixed and not particularly helpful here. I note that only outside applicants applied for one opening and for the other opening only internal applicants applied. In the latter case, the least senior employee received the position. Again, as no one filed a grievance, we do not have the Union's formal position on this selection.

In the area of custodial openings, I note that in one case the District selected the most senior employee (Ed Stapleton) from among a group of internal applicants only. But for the Lead Custodian position, the District passed over senior Custodian Lubbert and selected less senior custodian Gregg Stapleton. Although this selection is disturbing, because Lubbert (not a Union officer at any time) chose not to grieve Stapleton's selection apparently based upon the District's explanation that she could not operate a snow blower and because she had used too much sick leave, in the circumstances proved here, I am not inclined to find a Union waiver/admission regarding the proper reading of Article X. As the Lead Custodian position description was not placed in this record, it is possible that Lubbert concluded that she was not qualified for the Lead position or that she simply chose not to pursue a grievance.

The District has argued that in the interest arbitration case over the parties' initial (1992-95) labor agreement, the Union's proposal and arguments to Arbitrator Yaffe, Yaffe's

award and the Union's proposal and later withdrawal of its offer regarding Job Awards demonstrated that the Union has long conceded that the District reserved the right to select "the most qualified applicant for any position" in the 1992-95 agreement. The difficulty with the District's argument is that at no point prior to this case have the parties contested the meaning of the language contained in Section 10.05 which clearly and unambiguously defines who may apply for openings. Therefore, the District's argument takes the above-quoted phrase regarding "the most qualified applicant" entirely out of context, essentially abrogating Section 10.05.

In my view, the evidence in this case fully supports a conclusion that Section 10.05 specifically limits "applicants" to "any employee." Reading this section together with Section 10.07 requires the District to offer openings internally to "qualified personnel" who apply for them and to give the opening to the "most qualified" internal applicant or to the "most senior employee if two or more "applicants' qualifications are equal." In contrast, the District's reading of Article X would not give full effect to all the language therein.

The question arises what effect does Section 10.05 have if there are no internal applicants for a position. As the District has done in many past cases when this has occurred, the District would be free to select the "most qualified" outside applicant for the position under sentence one of Section 10.07 and sentence two of that section, and Section 10.05 would not be applicable to that case.

In the instant case, the District has made much of various alleged shortcomings of Humblet ranging from her failure to properly fill out her application, to her failure to submit a resume or cover letter, to her alleged lack of education or experience as compared to other applicants. As shown above, virtually all of the faults found by the District were not relevant to the Custodian III position.<sup>14</sup> Humblet's work as a long-term substitute from November, 2002, to August, 2004, and her 23 years of excellent service to the District as a Bus Driver received short shrift here. The fact that Lipscomb and Wierczorek never even attempted to talk to Humblet's supervisor in her Bus Driver position about her reliability, whether she was a "self-starter" and her ability to work unsupervised (as all school Bus Drivers must do), and her work with students over her 23 years with the District was so neglectful as to constitute arbitrary conduct in itself.

The District has made much of the fact that as a substitute Humblet never performed some of the duties listed on the position description. As noted above, the Custodian III position description does not require prior experience in building security/checks or in using riding floor scrubber machines. Regarding the latter duty, the Custodian III position

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<sup>14</sup> Taken to its logical extreme the District's approach herein would mean, for example, that no internal applicant could be deemed good enough to be awarded a position for which there were outside candidates with better educational backgrounds even if that level of education was not required for the position. (See Er Reply Brief p. 13)



description states that the incumbent would be expected to perform wet mopping *or* machine cleaning (implying one or the other, not both). Regarding the former, building security/checks “as assigned” would be expected, implying that such may not be assigned. Regarding deliveries, emergencies, and cafeteria set up, I note that none of these duties occurred during Humblet’s tenure as a Custodian III substitute but that she could easily learn all of the duties she had not previously performed during her contractual trial period in the job.<sup>15</sup> It is not her fault that Humblet was never assigned/trained to perform certain work as a long-term substitute. This was up to the District and it chose not to assign/train her to perform certain work.

The District’s Reply Brief argument that Humblet was never classified as a Custodian III while she served as a long-term substitute was never raised at the instant hearing and was not supported by any evidence submitted into this record. As such, it must, in fairness be rejected. The District’s Reply Brief argument that the “duties as assigned” listed in the Custodian III position description should include light maintenance work, repairing broken down machinery and tasks that could not be completed during the regular work week is also rejected. Such additions to the Custodian III position description would substantively change the position from one requiring “general housekeeping” with a preference for experience “in a related field” to a more skilled position. In fairness, the District should have changed the PD of the job before posting it to reflect these changes. As the District failed to do so, its arguments on this point are too little, too late.<sup>16</sup>

Finally, the District’s Reply Brief arguments regarding the use of terms such as “hereby defined as”, “shall include”, or “is defined as” although interesting was not supported by any evidence of past practice or bargaining history showing the parties’ intent by use of these phrases was as the District has claimed. Also, the District’s Reply Brief argument that “employee” as used in sentence two of Section 10.07 is surplusage if applicants must be employees simply makes no sense. I have found the language of Section 10.05 to be clear and unambiguous and the second sentence of Section 10.07 simply supports that conclusion.

In all of the circumstances of this case, the District violated Article X by failing to select Humblet as “qualified personnel” for the open position, as required by the express terms of the labor agreement, and it acted arbitrarily and capriciously in selecting Maroo over Humblet.<sup>17</sup> I, therefore, issue the following

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<sup>15</sup> There is absolutely no reason to believe Humblet could not quickly learn to do the tasks at issue. Custodial work is not rocket science. Humblet has worked for 23 years as a District Bus Driver with a demanding schedule and important responsibilities and she has never been disciplined in all her years at the District. The contract language herein does not require Humblet to prove that she was more qualified than all other applicants as the District has argued.

<sup>16</sup> Section 6.08 shows that long-term substitutes are hired to “replace a specific regular bargaining unit employee.”

<sup>17</sup> The cases cited by the District are distinguishable on their facts. In this regard, I note that none of the cases cited had a clause like Section 10.05 defining “applicants.”

**AWARD**<sup>18</sup>

Arrowhead School District violated the collective bargaining agreement when it denied the Custodian III position to Leone Humblet in 2004. The District shall immediately place Humblet in the position on the twenty-day trial period described in Section 10.14. Should Humblet successfully complete her trial period, the District shall pay her backpay from the date Jacob Maroo was wrongly placed in the position and it shall make her whole from that date forward, including crediting her with all full-time benefits.

Dated at Oshkosh, Wisconsin, this 21<sup>st</sup> day of October, 2005.

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Sharon A. Gallagher, Arbitrator

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<sup>18</sup> I shall retain jurisdiction over the remedy only for sixty (60) days from the date of this Award should the parties have difficulty determining the remedy herein.