

BEFORE THE ARBITRATOR

---

In the Matter of the Arbitration of a Dispute Between  
**BOSCOBEL COUNCIL OF AUXILIARY PERSONNEL**  
and  
**BOSCOBEL AREA SCHOOL DISTRICT**

Case 45  
No. 66117  
MA-13433

---

**Appearances:**

**Joyce Bos**, Executive Director, South West Education Association, appearing on behalf of the Association.

**Eileen Brownlee**, Attorney at Law, Kramer & Brownlee, LLC, appearing on behalf of the District.

**ARBITRATION AWARD**

The Union and Employer named above are parties to a 2005-2007 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties asked the Wisconsin Employment Relations Commission to appoint an arbitrator to hear and resolve the grievance of Bernard Faulkner. The undersigned was appointed and held a hearing on October 12, 2006, in Boscobel, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs on December 6, 2006.

**ISSUE**

The issue is:

Did the District violate the collective bargaining agreement when it hired Chuck Owens for the day custodial position? If so, what is the appropriate remedy?

**CONTRACT LANGUAGE**

**ARTICLE VII – SENIORITY, LAYOFF, TRANSFERS**

TRANSFERS

- ...
- A. When a position becomes vacant or a new position is created, employees wishing to transfer to the vacant or new position may apply for transfer within the posted time lines.
  - B. Positions vacant or newly created will be posted internally and advertised externally at the same time for a minimum of ten (10) days. Any employee wishing to transfer must meet the qualifications for the position as established by the Administration (i.e., training, education, etc.) Any employee qualified to fill the position and making application for the transfer will be assigned to the available position. Seniority will be applied if two (2) or more employees are equally qualified.
- ...

**BACKGROUND**

The District posted a notice for a first shift custodian position on May 23, 2006. The posting stated that training and/or experience as a maintenance custodian was preferred. The collective bargaining agreement does not have a job classification such as maintenance/custodian, but refers only to custodians in its classification system. The advertisement for the position also referred to the job as a full-time “maintenance custodian.”

Bernard Faulkner, a night shift custodian for the District for nine years, applied for the day shift position. So did Charles Owens, a part-time day custodian for over three years. Two other custodians, Bill Updike and Bill Geis, also applied. The candidates were all interviewed by a team of four people in management in the District. Owens was awarded the position and Faulkner filed a grievance.

On the job description for the day custodian, there are 26 major duties and responsibilities listed. They are:

1. Clears by shoveling, plowing and/or sanding driveways, parking areas, sidewalks and District owned bus lots and other driving areas as needed.
2. Moves equipment from building to building as required by various activities and as requested by building administrators.

3. Transports new equipment and supplies from storage to needed locations in the District and alerts the Head of Maintenance when supply quantity is low.
4. Maintains and cares for the school lawns, fencing, and outside recreational facilities.
5. Prepares outside athletic facilities for school sponsored events and activities.
6. Prunes trees and trims ledges to promote growth and improve appearances.
7. Assumes minor inside and outside construction tasks as deemed necessary by the Head of Maintenance and/or District Administrator.
8. Monitors and performs preventative maintenance on heating and ventilating systems.
9. Repairs breakdowns in heating and cooling, electrical, and plumbing equipment short of major overhauls requiring expertise of contractors or company trained personnel. Also replaces faulty equipment within the same limitations.
10. Adjusts and maintains such equipment as lawn mowers, hedge sheers, lawn tractors, trucks, sprinklers, snow removal equipment and kitchen appliances.
11. Sharpen blades for all lawn and garden equipment.
12. Changes burned out lights, fluorescent tubes, and ballasts.
13. Cleans exhaust hoods in kitchens.
14. Sets up for and takes down lunch program. Cleans cafeteria after lunch and breakfast.
15. Changes filters in heating and ventilating units and lubricates motors and pumps.
16. Service toilet room paper products as needed during the day.
17. Maintain hand tools and equipment.
18. Assist with school building cleaning duties as needed.
19. Load, unload, and lift supplies and equipment (minimum 50 lbs.).
20. Trouble shoot circuit failures and other electrical breakdowns.
21. Inspect fire extinguishers monthly and log.
22. Inspect playground and tot-lot equipment weekly and log.
23. Set up room or gym areas for school activities as requested.
24. Performs weekly inspection of building conditions and reports areas of concern.
25. Assumes responsibility for the general security of the buildings and grounds.
26. Performs such other tasks and assumes such other duties as may from time to time be assigned.

Faulkner believed he could do most of the tasks listed on the job description for the day custodian. The only one he was unsure of was number nine, regarding heating and cooling repairs. During the summers, he worked day shifts. He helped out with the lines on the football field, did some lawn work, and performed some minor electrical and plumbing

Joseph Adams is a day shift custodian at the elementary school complex and has held that position for over nine years. When he was first hired by the District, he was interviewed for the job. He recalled being asked about changing a Sloan valve, and he said he would read the installation instructions and then ask his supervisor. He did not remember being asked about a motor running backwards, fixing roof vents, or what to do if a steam trap was leaking. When he was working as a custodian, he always asked his supervisor if he needed assistance. He knew that the District hired out jobs above his qualifications, such as serious electrical modifications such as replacing high-amperage breaker panels, or working on water lines coming into the buildings, replacing or fixing valves, working on heat and ventilation systems, installing new boilers, etc. He knew that the District has hired Town & Country Electric, Precision Controls, McCormick Electric, and Al Oman Plumbing. There were tasks on the job description that Adams did not know how to do when he was hired, such as arranging tables for the cafeteria, or doing certain repairs.

Frank Phalin is a night custodian and has worked for the District for 15 years. He worked nights for two years and asked for a transfer to days. He did not have an interview when he was moved to the day shift. On the day shift, he had to be shown how to maintain the heating and ventilation system. He would ask the head of maintenance for help on occasion.

The interview team consisted of four people – District Administrator David U'Ren, Head of Maintenance and Safety Coordinator Stephen Fralick, Attendance and Activities Director Gregory Bell, and High School Principal William Mercer. They asked the same questions of all candidates. The 13 questions were:

1. Describe your experience with operating and maintaining outdoor power equipment such as tractors, mowers, and line trimmers.
2. Describe your experience with athletic field preparation including ball diamonds and football fields.
3. Describe the steps in replacing a faucet washer.
4. What steps would be taken when servicing a power roof vent?
5. Describe your electrical troubleshooting skills.
6. In the winter a classroom is 85 degrees despite the fact the thermostat is set at 70. The unit ventilator is discharging hot air. Will turning the thermostat down most likely help? If not what may be problem?
7. During your morning checks you discover a large amount of steam leaking from a hallway heater. You are unable to close the shutoff valve. Your supervisor is not scheduled to be in for another hour. What would you do?
8. Describe your experience with plumbing repairs.
9. You replace a 3-phase motor in an air-handling unit. When you turn it on, it runs the opposite direction it should. What would you do?
10. How would you feel about replacing lamps in a gym on a man lift 25 feet high?
11. A power floor scrubber will not pick up the water. What would you check?

12. You are outside, busily preparing for an athletic event; the principal reaches you on the radio asking you to come in right away to take care of something. As you enter the building, a teacher requests some work from you. How do you handle and respond and handle all of these tasks at one time?
13. Do you have any questions or additional statements regarding your candidacy?

Faulkner recalled telling the interview team that he had done some minor plumbing in the past. When working at night, the custodians would change some of the Sloan valves. Regarding the steam trap, he replied that most of the steam leaks are in a confined space. He would try to shut them off, and if he couldn't, he would call his supervisor. Faulkner testified that his supervisor said that was the best answer he had all day. Faulkner changed the lights because neither Owens nor Phalin liked heights.

U'Ren was retired from the District at the time of the hearing, but had been the District Administrator at the time of the job interviews and when the position was filled. He noted that during the interviews, the team worked off a script of the questions (see above). The questions were based on the job description. Applicants were scored on a scale of five. U'Ren ranked Owens higher than Faulkner because Owens was able to answer the questions more accurately or in more detail. U'Ren did not believe that Owens responded that he did not know how to do something, although Faulkner did. He decided that Owens was the more highly qualified candidate. U'Ren was familiar with Owens' work and described him as a maintenance person, a trouble shooter, and an all-around person.

Fralick supervises the custodians. In setting up the interview questions, he looked at an old interview set of questions, modified them slightly, and added a couple of his own. He asked the other panel members if they had any questions to add and added some of theirs. Fralick rated Owens higher than Faulkner in the interviews based on the answers to the questions.

The third member of the interview team was Gregory Bell. He found Owens to be the most qualified based on the answers to the questions. Bell has had some experience in other jobs with maintaining equipment and doing some custodial work. The fourth member of the team, William Mercer, gave Owens a perfect score. He described both Faulkner and Owens as being quality employees.

### **THE PARTIES' POSITIONS**

#### **The Association**

The Association asserts that the District violated Article VII because of its assessment that the Grievant was not equally qualified as the junior candidate. An inordinate number of

perform. There is no maintenance classification in the collective bargaining agreement. Fralick formulated the questions based on his knowledge and experience as a maintenance employee. Also, the interview questions reflected jobs currently being done by the junior applicant, such as striping athletic fields, replacing faucet washers, and working on roof vents. The interview questions went beyond the scope of the position and did not relate to the day-to-day duties of a day custodian. There are 26 duties listed on the job description, and the 12 questions used in the interview related to duties a maintenance employee would be expected to perform. Only 3 of the 12 questions were not related to maintenance. The District cannot just alter the questions to better fit an applicant it would like to see do well at the interview. The job description had not been altered from the past but the interview questions had been altered. The Grievant met the qualifications as the job posting stated. The Grievant was only asking to transfer from one custodian job to another custodian job. He was not asking to transfer to a totally different job classification.

The Association contends that the District cannot create a new classification of maintenance and still call it a custodian. Maintenance employees have different responsibilities than custodial employees. U'Ren knew that the junior applicant had performed repairs and maintenance jobs while working part time for the District. The interview questions were rewritten to identify the junior applicant as the District's choice for the job. The decision was made in an arbitrary and capricious manner.

The Association asserts that this is a relative ability type of provision. When the word "equal" is used, most arbitrators have concluded that no two people are really alike in terms of experience and qualifications, and there must be a real and clear differentiation because voiding out seniority is a serious matter. The contract states that applicants transferring to a new position must meet the qualifications for the position as established by the Administration, with seniority to govern where applicants are equal.

The Grievant's evaluations show that he is qualified to be a custodian, and he has been a custodian for over nine years. The District stipulated that it hired out jobs that it did not expect custodians to perform. The Association notes that the District did not ask Phalin any interview questions before allowing him to transfer from nights to days. The District simply allowed a current employee to change his hours.

The Association argues that past evaluations of employees should be considered. The Employer chose to use only the highly subjective method of interviewing applicants to determine qualifications without considering evaluations or annual appraisals. The Grievant's evaluations showed that he received points for being clearly outstanding, exceeding expectations, and satisfactory performance without ever being rated unsatisfactory or below performance expectations or needing attention. The junior applicant's evaluations were not submitted so no comparisons can be made to the Grievant. Moreover, the Grievant has worked the day custodian job every summer and did many of the duties of the day custodian

### **The District**

The District asserts that the Union bears the burden of proof in this case which involves contract interpretation. Under the transfer clause of the collective bargaining agreement, if more than one bargaining unit member applies to transfer to a vacant position, the District retains the right to transfer the internal applicant it deems to be the most qualified. This right is limited only by language that requires the District to transfer a more senior employee to the vacant position if that employee is as qualified for the position than a less senior applicant. Where contract language permits the employer to select the most qualified applicant, the burden of proof is on the Union to show that the District's decision as to the most qualified applicant was discriminatory, arbitrary, unreasonable or capricious.

The District notes that the scores between Faulkner and Owens were not even close. U'Ren gave a score of 60 to Owens and 39 to Faulkner. He testified that Owen was able to answer the questions more accurately, more definitely, in more detail. He noted that Faulkner said he did not know how to do some of the tasks or had never done them before. Fralick gave a score of 57 to Owens and a score of 38 to Faulkner. Bell gave a score of 60 to Owens and 52 to Faulkner. Mercer gave a score of 65 to Owens and 57 to Faulkner.

The District argues that the Union is asking for an entitlement for the most senior employee to be awarded a vacant position whether or not the employee is the most qualified applicant. This is in contradiction of the grievance arbitration provisions, which disallows additions or modifications to the contract through the use of the grievance procedure. The language is clear. The District is entitled to hire the most qualified bargaining unit member for any vacant position irrespective of seniority. The District is obligated to hire the most senior applicant only if two or more bargaining unit employees apply and are equally qualified.

The District contends that the collective bargaining agreement permits it to establish criteria to determine which employee is the most qualified for any position. Only when the employees being considered for transfer are deemed equal does seniority control. The contract does not say "substantially equal" or "relatively equal" and there is no relative seniority clause. To qualify "equal" would be to modify the collective bargaining agreement, which is outside the arbitrator's authority under the bargaining agreement. The Union has not presented any evidence that the decision to hire Owens was arbitrary, capricious, discriminatory or unreasonable. The Union has consistently characterized the District as having violated the agreement by virtue of failing to transfer the more senior employee. The invitation by the Union to substitute arbitral judgment for employer judgment must be declined.

### **In Reply, the Association**

The Association takes issue with several points in the District's brief, such as the District's statement that the questions reflected the duties of the position identified in the job

description which has been in effect since 1997. The Association agrees that the job

Page 8  
MA-13433

description has not been modified, but the questions were modified from the past in order to select Owens. Also, the Association did not show who was more qualified because that concept was not at issue. The Association objects to the District's statement that an objective scoring system was used, as it was purely subjective.

The Association further disagrees that the District is entitled to hire the most qualified bargaining unit member irrespective of seniority. The contract language allows the District to determine if the applicant is minimally qualified and then allow the most senior transferred employee a probationary period to qualify and remain in the position. Seniority is not to be ignored. Finally, the District did not evaluate each employee in light of the day custodian position, but read 12 questions that focused on 5 of the 24 areas found in the job description and ignored the rest of the job description.

### **In Reply, the District**

The District objects to the Association's argument that the contract contains a hybrid seniority clause in which an employer must consider seniority as one of the criteria for determining qualifications for a position. The contract states that seniority will only be considered after qualifications for the position have been determined, and then only becomes a factor when two candidates for a position are deemed equal in their qualifications. While the Association challenges the choice of interview questions, there are differences between the duties that must be performed by day custodians and night custodians. The District asked interview questions related to duties described in the day custodial position that are not found in both job descriptions. Moreover, the District had no need to question internal candidates about duties it knew each was capable of performing.

While the Union argued that the District has contracted out for some of its HVAC work, that does not prove anything. It does not indicate that the types of jobs listed in the job description were performed by anyone other than day custodians. Although Faulkner testified he believed he could do the job, that is not the issue. The issue is whether he was the best qualified person to perform the job. At the time of this hire, there was a well qualified candidate for the position. The Association strives to have the arbitrator eliminate the best qualified language from the bargaining agreement.

### **DISCUSSION**

The language at issue in Article VII, Section B is:

Any employee wishing to transfer must meet the qualifications for the position as established by the Administration (i.e., training, education, etc.). Any employee qualified to fill the position and making application for the transfer will be assigned to the available position. Seniority will be applied if



two (2) or more employees are equally qualified.

Both parties appear to have different ideas of what type of seniority clause they have in their collective bargaining agreement. At one point, the District claimed that this is not a “relative ability” clause because the word “equal” is not modified by “relatively” or “substantially” and the clause should not be read to add any adjectives. And the Association suggests at one point that this is a hybrid clause which demands some consideration of seniority.

However, this clause is a “relative ability” clause and not a hybrid clause. The seniority clauses are generally broken down into three types – a relative ability clause, a sufficient ability clause, and a hybrid clause. As stated in ELKOURI & ELKOURI, HOW ARBITRATION WORKS, 6<sup>TH</sup> EDITION, PP. 873-876:

The first category contains those clauses that provide in essence that the senior employee shall be given preference if he or she possesses fitness and ability equal to that of junior employees. (Footnote citations omitted) This type of clause might be termed a “relative ability” clause, because here comparisons between qualifications of employees bidding for the job are necessary and proper, and seniority becomes a determining factor only if the qualifications of the bidders are equal.

The wording of these relative ability clauses varies. The contract may provide that seniority shall govern unless there is a marked difference in ability, or unless a junior employee has greater ability. Some clauses provide that seniority shall govern if ability (or other qualifying factors such as physical fitness, competence, etc.) is “relatively equal,” or “substantially equal,” or, simply, “equal.” “Relatively” equal ability does not mean “exactly” equal ability. Even the term “equal” does not mean exact equality, but only substantial equality. (Emphasis added)

...

The second basic type of modified seniority clause provides in general that the senior employee will be given preference if he or she possesses sufficient ability to perform the job. Minimum qualifications are enough under these sufficient ability clauses.

...

The third basic type of modified seniority provision, which may be called a “hybrid” clause, requires consideration and comparison in the first instance of both seniority and relative ability.

It is clear from the above explanation that the clause in this contract is the first type of clause, a relative ability clause. Despite the use of the words “equally qualified” in Article VII, the parties would have recognized that no two people are identical in qualifications, and the intent

in qualifications. Otherwise, the sentence would have no meaning at all, and the Arbitrator should not delete the sentence or give it no effect just because no two candidates would ever be exactly equally qualified.

In analyzing such relative ability clauses, it is common for arbitrators to demand to see that the junior employee has significantly greater ability to perform the work than does the senior employee. Many arbitrators use a “head and shoulders” test – that the junior employee must be head and shoulders above the senior employee in order to be awarded the job. All in all, arbitrators generally agree that there must be a definite, distinct, substantial, and significant difference between the competing employees when a junior employee is selected for a job.

The only evidence of a significant difference between Faulkner and Owens is the scores of a rather subjective interview test. The scores alone tell the story of great subjectivity. U’Ren and Fralick gave Faulkner a lower score by 21 and 19 points respectively. However, both Bell and Mercer found a point score difference of only 8 points. That creates an 11 and 13 point spread between the 2 halves of the interview team. While the interview questions may have been somewhat skewed to favor Owens, as the Association contends, the more disturbing point is how some people scored the answers. U’Ren testified that Owens was more accurate or gave more detail in his answers. The fact that Owens may have been a better talker is irrelevant in the custodial position. U’Ren did not write down some notes regarding Faulkner’s answers to questions, such as questions #5 and #10, while other interviewers showed notes that Faulkner indeed answered those questions.

Question #10 shows the subjectivity of this test. The question asked was – how would you feel about replacing lamps in a gym on a man lift 25 feet high? The fact is that Faulkner did this work where others did not care for it. He had worked on silos in the past and was not afraid of the height. Owens expressed some nervousness about the task. He was willing to try it but not excited about it. On scoring the answers to this question, U’Ren gave both candidates a score of 5, as did Mercer. Bell gave Faulkner a score of 5 and Owens a score of 4. Fralick gave Faulkner a score of 5 and Owens a score of 3. Fralick’s scoring on this question is the better score if these interviewers were truly judging qualifications. It does not make sense to score these two candidates equally when one person had done it, was used to working high up, and did it regularly, and where the other candidate was nervous about doing it. One could pick apart the scoring in other areas, but the point here was to show that this test was subjective and judged that way.

The District could have and should have taken other matters into account, such as the work records of the candidates. It is not clear that they did that. Faulkner’s evaluations are excellent, and there are no evaluations of Owens in the record. Faulkner has nine years of experience with the District and Owens has three and a half years at part time.

In most of these types of cases, employees are vying for different positions than they already hold. Usually those positions are in higher classifications or grades of pay, and they mean more money to the applicant. Here, the Grievant is not seeking a different position or even more money – he would actually lose the shift differential.

It would be difficult to say that these people would not be equally qualified for the positions they already hold – that of a custodian. These applicants are not seeking a different position -- the senior person is seeking a different shift, and the junior person is seeking more hours than he previously worked. So it's almost impossible for the District to prove that one is significantly better qualified than the other, where they are both successful custodians applying for a custodian position. There may be some differences in tasks that can be done during the day or night, such as preparing the athletic fields, but the contract has one classification of custodian. When two internal candidates apply for a classification they already hold, it would be difficult to say one is substantially more qualified than the other without evidence that one candidate performs well and the other performs rather poorly. Faulkner is an excellent custodian. Owens is an excellent custodian. Both of these candidates are equally qualified or substantially equal in qualifications for the custodian position. Therefore, the more senior person should have been awarded the day shift opening.

### AWARD

The grievance is sustained.

The District is ordered to give the Grievant, Bernard Faulkner, the position of day custodian immediately or as soon as feasible.

Dated at Elkhorn, Wisconsin this 2<sup>nd</sup> day of February, 2007.

Karen J. Mawhinney /s/

---

Karen J. Mawhinney, Arbitrator