

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**CUSTODIAL-MAINTENANCE-FOOD SERVICE EMPLOYEES'
LOCAL 1750, AFSCME, AFL-CIO**

and

SHEBOYGAN AREA SCHOOL DISTRICT

Case 126
No. 67824
MA-14031

(Zerger grievance)

Appearances:

Mr. Samuel Gieryn, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 187 Maple Drive, Plymouth, Wisconsin 53073, on behalf of the Union.

Davis & Kuelthau, S.C., by **Attorney Paul C. Hemmer**, 605 North 8th Street, Suite 610, Sheboygan, Wisconsin 53081, on behalf of the District.

ARBITRATION AWARD

Custodial-Maintenance-Food Service Employees' Local 1750, AFSCME, AFL-CIO (herein the Union) and the Sheboygan Area School District (herein the District) have been parties to a collective bargaining relationship for many years. At the time of the events chronicled herein there was a collective bargaining agreement in effect covering the period from July 1, 2007 through June 30, 2012. On March 4, 2008, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over an alleged violation of the collective bargaining agreement in the District's failure to offer the position of Head Custodian at North High School to Dave Zerger, (herein the Grievant). The undersigned was appointed to hear the dispute and a hearing was conducted on May 19, 2008 and June 3, 2008. The proceedings were not transcribed. The parties filed briefs by July 21, 2008 and reply briefs by August 10, 2008, whereupon the record was closed.

ISSUES

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

Did the District violate Article V, Section 3 of the collective bargaining agreement when it failed to select David Zerger for the position of Head Custodian at North High School?

If so, what is the appropriate remedy?

The District would frame the issues as follows:

Did the Employer violate the collective bargaining agreement when it declined to appoint David Zerger to the vacant C-7 head custodian position at the Sheboygan North High School on the basis of his failure to demonstrate all minimum qualifications for the position?

If so, what is the appropriate remedy?

The Arbitrator adopts the statement of the issues proposed by the Union.

PERTINENT CONTRACT LANGUAGE

ARTICLE V – SENIORITY – JOB POSTING

Section 3 – **Job posting** – Notice of promotional vacancies or new vacancies shall be posted on the bulletin boards for five (5) work days, and in the staff bulletin when, and if published, stating the area of work, shift, wage rate and qualifications. Employees interested shall indicate their interest, in writing, to the Assistant Superintendent, Human Resources and Administrative Services or Coordinator of Human Resources. A new employee may not bid for any posted position during the first year of employment.

When a position becomes vacant and additional minimum qualifications are added or minimum qualifications are deleted from a previous posted position in that classification, the posting will first be reviewed by the union-management committee, which will be convened on an as needed basis for this particular issue.

For positions open in the district, the administration shall select the most senior applicant in the bargaining unit who meets all of the minimum qualifications. The employer may select an outside applicant who meets all of the minimum qualifications. If internal and external applicants do not meet the minimum qualifications, the position will be reposted. The employee receiving such promotion shall serve a four (4) month trial period. If the employee has a less than one-year old letter of suspension in their file, they shall serve a one-year trial period. However, if the employee fails at any time during the trial period, he/she may be returned to his/her former classification before the four (4)

month/one-year trial period is over. At the completion of two months, there will be a written review by the supervisor. If said employee feels dissatisfied, he/she may appeal the decision through the grievance procedure. An employee, who after having been promoted to a new position, desires to return to his/her former position, may do so by so stating in writing to the appropriate department head within the first thirty (30) working days after starting in the new position. However, the trial period will be 20 working days if there is a mid-point (10-day) written review by the supervisor.

The Employer shall fill the posted vacancy within forty-five (45) working days of the closing of the posting.

ARTICLE XIV – MANAGEMENT RIGHTS

Except as herein provided, the management of the work and the direction of the work forces, including the right to hire, promote, transfer, or demote or suspend or discharge for just cause, and the right to relieve employees from duty because of lack of work or other legitimate reason is vested in the Employer.

The Board of Education reserves the right to subcontract for work or services provided that such subcontracting does not result in the layoff of employees or the reduction in regular hours of bargaining unit employees. This restriction shall not apply to the layoff of temporary employees.

The Employer has the right to transfer the least senior custodial employee(s) to implement the subcontracting provisions of this Article. In addition, the Employer has the right to utilize temporary employees to implement the subcontracting provisions of this Article; however, it will be the intention of the Employer to designate a particular building for subcontracting and to utilize temporary employees, to the extent possible, in the designated building.

BACKGROUND

David Zerger has been employed by the Sheboygan School District since 1999. During that period of time he has held various positions in the custodial department. Initially, he worked as a second shift Custodian at Longfellow Elementary School. Shortly thereafter he was promoted to Night Foreman at Sheboygan South High School. In these positions he performed basic custodial and maintenance duties and, as Night Foreman, he was also responsible for supervision of other employees. In 2001, he transferred to the position of Store Clerk. In this position he was responsible for unloading food trucks at the District's central facility, putting away food, some cleaning and maintenance and responding to orders from the food service.

In 2002, the parties negotiated new language into their contract changing the basis for awarding vacant positions within the bargaining unit. The previous provision had been a relative ability clause, which provided for the awarding of vacant positions to the senior applicant where the employees were relatively equal in ability. The new language was a sufficient ability clause, which required the awarding of positions to the most senior applicant who met the minimum qualifications for the position. In 2007, the parties added language which provided for the review of newly added job qualifications by a joint labor-management committee.

In May 2007, Helen Morbacher, the Head Custodian at Sheboygan North High School, had surgery and went on an extended leave of absence. While the Head Custodian was on leave, the District appointed the Night Foreman at North High, Don Dudek, to fill in as interim Head Custodian until her return. Under the contract, the District has discretion to fill temporary vacancies without posting or reference to seniority. In January 2008, Morbacher unexpectedly applied for, and was subsequently awarded, the Head Custodian position at Urban Middle School, which meant that the Head Custodian position at North High then was vacant. The District posted the position on January 7, 2008 listing the minimum qualifications, as follows:

**HEAD CUSTODIAN (C-7)
NORTH HIGH SCHOOL**

QUALIFICATIONS:

(Only applicants who meet all of the minimum qualifications will be considered.)

1. High School diploma or equivalent.
2. Performance of and demonstrate the head custodian duty of developing the annual custodial supply budget.
3. Performance of Head Custodian duty of directing a summer cleaning schedule in cooperation with contract cleaning. One or more years of experience in developing and coordinating of employee schedules (including designing employee schedules, extra assignments, organizing work assignments, and prioritizing needs.)
4. Experience and ability to solve conflicts.
5. Experience training staff in building maintenance and cleaning procedures and the development of a continual work improvement program.
6. Ability to demonstrate and identify the key components of a hot water and steam boiler system and trouble shoot a heating system or have completed a boiler class.
7. Ability to identify the proper preventive maintenance procedures, perform minor servicing and troubleshooting of building HVAC systems pneumatic and/or DDC or completion of HVAC training courses.

8. Ability to demonstrate the proper day/night setting as per the Sheboygan Area School District's Energy Policy using time clocks and the Automatic Logic Control System.
9. Ability to demonstrate understanding of the key components of the Work Order System and the process used to monitor the status of submitted work orders.
10. Experience and demonstrate knowledge of fire alarm systems and procedures associated with drills and minor troubleshooting.
11. Experience with and the ability to identify cleaning procedures for classrooms, offices, bathrooms, carpet, synthetic and hard floors.
12. Knowledge of pool equipment, chemicals, cleaning, and operation.
13. Experience with and the ability to demonstrate operation and troubleshooting of all custodial equipment including automatic scrubber, rotary scrubber, and vacuum cleaner carpet extractor.
14. Experience with and the ability to demonstrate the operational and trouble shooting of grounds equipment to include mowers and snow blowers.
15. Ability to demonstrate and perform the seasonal maintenance of grounds to include cutting of grass, maintaining shrubs, trees and flowerbeds, shoveling snow/snow removal, and the sanding and salting of sidewalks and drives.
16. Ability to demonstrate and perform minimal servicing skills in trouble shooting of electrical systems and ability to identify replacement of correct bulbs.
17. Ability to demonstrate and perform minimal servicing skills in troubleshooting plumbing systems.
18. Ability to use hand and power tools.
19. Custodial/maintenance experience including minor building repair.
20. Ability to identify prioritizing of identified needs in a high school.
21. Ability to demonstrate the development and maintenance of schedules for school and community programs.
22. Demonstration of being reliable and dependable based on attendance.
23. Proven experience and ability to communicate and work well as a team member with the building principals, all staff, students, contract cleaners, and the public in a positive manner.
24. Experience related to working with minimal supervision, being a self-starter and taking initiative.
25. Must be able to lift forty (40) pound weight overhead, unassisted.

26. Must be able to work in confined spaces, elevated positions (scaffold, power lifts, extension ladders), and work outdoors in all seasons.

Both Dudek and Zerger applied for the position and, since Zerger was senior to Dudek he was interviewed for the position first. He was not offered the position based on management's determination that he did not have three of the qualifications for the position. Specifically, he was determined not to have basic knowledge of the building's Auto Logic Control System, he was not conversant with the computerized Work Order System, and he did not successfully demonstrate proper knowledge of the fire alarm and fire drill systems and procedures. Subsequently, Dudek was interviewed and was determined to be qualified for the position. Dudek was awarded the position and this grievance was filed on Zerger's behalf. The grievance proceeded through the contractual process resulting in this arbitration. Additional facts will be referenced, as necessary, in the DISCUSSION section of this award.

POSITIONS OF THE PARTIES

The Union

The Union argues that Zerger is qualified for the position. He has most of the listed minimum qualifications for the position. He has performed most of the duties while working as a Custodian and Night Foreman and has received considerable training. He has received favorable performance evaluations and has reputation for high quality work and a cooperative attitude. His supervisors have recognized his organizational skills and creativity in problem solving. He has extensive experience, which arbitrators recognize is an important factor in assessing fitness and ability. Many of his skills take time and ability to master. That he has done so is evidence that he would have little difficulty in mastering the three areas the District found deficient.

The only reason Zerger was not selected was that the District had already decided it wanted Dudek in the position. Dudek had already been filling the position on an interim basis and needed no orientation or training. While working in that capacity, he received training from Phil Hubing on the ALS system as well as being able to learn the work order system and fire drill procedure, which are the skills the District found that Zerger did not have. Thus, it was easier for the District to simply award the position to him than to provide the additional training and orientation to Zerger. Dudek's access to this training and orientation gave him an unfair advantage in seeking the position. Arbitrators have held that, where seniority is a factor in posting, employers may not provide training to junior employees while arbitrarily denying them to senior employees and then promote the junior employees based on that training.

The three qualifications used to disqualify Zerger were also unreasonable. Qualification #7 required the employee to be able to demonstrate the proper day/night settings under the District energy policy using the District's Auto Logic System (ALS).. Not all schools have the ALS and some are only partially controlled by ALS. While it may be simple to learn and use

in the elementary schools, it is more complicated in the middle and high schools, which have more rooms and which schedule more evening activities. Typically, operation of the ALS falls to the Head Custodian who is, in turn, trained by Phil Hubing. Each Head Custodian is trained in use of the ALS by Hubing, including the previous Head Custodian at North High, Helen Morbacher, and Dudek. All the other Head Custodians had little or no experience with ALS when they were awarded their positions and there is no evidence that they were hampered in handling their duties by that lack of initial knowledge. The evidence also indicates that the necessary training is quickly and easily obtained. Had Zerger received the training, there is no reason to believe that he would have any difficulty with the ALS system. The fact that he did not know the proper temperature settings should also not disqualify him. Other Head Custodians do not have to memorize this information, but have the information available to them for reference.

Qualification #8 requires knowledge of the computerized work order procedure. Zerger testified that he had no opportunity to learn the system while working as a Store Clerk. However, Head Custodian Jeff Timm testified that the procedure could be learned in an hour. Both Dudek and Diane Kiley confirmed the brief amount of time necessary to learn the system. Where the amount of time to learn the system is so short, the question is not whether he has the knowledge, but whether he can quickly learn it. There is no reason to think he could not, so he should not have been disqualified.

Likewise, knowledge of the fire drill procedure is easily obtained and lack of that knowledge should not disqualify Zerger. He demonstrated basic knowledge of the procedure and its key components. He was disqualified for not indicating that he would obtain the Principal's approval for holding a fire drill, because in his previous custodial position the fire drills were authorized by the Assistant Principal. He demonstrated he knew what to do in the event of an alarm. The basis for his disqualification in this area was insignificant and does not fairly reflect his competence in this area.

The Union does not dispute that it is the District's prerogative to determine the minimum qualifications for a position, nor that an employee must have all reasonable minimum qualifications. However, the District may not rely on unreasonable qualifications to disqualify an employee, nor may it pick and choose which qualifications it will require and which it will not. Don Schmidt was awarded a Night Custodian position in 2007 which had the same qualifications as those which Zerger was disqualified for not demonstrating, yet Schmidt was not required to demonstrate competence in those areas. If the District can create qualifications and then enforce them selectively, it can undercut the concept of seniority by tailoring the qualifications to benefit its preferred candidates. The current language was adopted specifically to remove arbitrariness from the selection process. If the District can apply it in this way, it will nullify the purpose for the change.

The training Zerger required could have been obtained in one day, mostly working with the ALS. Every other Head Custodian has received this training from Hubing after having been awarded the position. To disqualify him on this basis is unreasonable and undermines the

concept of seniority. Management apparently disqualified him purely on the basis of not passing these tests, but arbitrators have held that testing alone, without reference to other factors, such as experience and other qualifications, should not be the basis for disqualification. Had Zerger's past training, experience and education, along with his having the great majority of the other qualifications, been given appropriate weight, he should have been awarded the position.

The District

The District asserts that it has the right to determine qualifications for positions and that the qualifications cannot be grieved. The contract calls for qualifications to be reviewed by the union-management committee, but there is no requirement for agreement. Union Steward Jeff Timm conceded that the Union did not challenge qualifications 8-10 because he felt the Union had no basis for a grievance. Management's right to determine qualifications is unilateral and is not subject to the grievance procedure.

New language was added to the contract in 2002 which changed the qualification requirements in the posting provision. Previously, the language provided that if qualifications were relatively equal, positions would be awarded to the senior applicant. The Union objected to the language so the current language was negotiated providing that positions would be awarded to the senior employee who met the minimum qualifications for the position. During the negotiations, there was no discussion of an employee being provided training to obtain the minimum qualifications, nor for a training period to demonstrate that he is qualified, nor that anything less than all qualifications would be sufficient.

The particular qualifications at issue are also not unreasonable. Qualification 8 requires that an employee demonstrate the ability to set the day and night temperature settings in the school using the District's Auto Logic System (ALS). The ALS system allows computerized programming of the proper temperatures for the individual rooms in each building. This is important in as much as the District's energy policy exists to help control the rising cost of heating and cooling the buildings. It is essential that a Head Custodian be able to articulate the appropriate temperature settings for the rooms and set the temperature schedule in order to effectuate the policy. The knowledge was easily obtainable and all the Grievant was asked was to provide rudimentary awareness. The requirement was not unreasonable. Qualification 9 requires an employee to demonstrate understanding of the computerized work order system. The system was introduced in 2004 to cut down on costs and to save time. Nearly all the work orders are handled by the Head Custodian, so it is essential that he have a working knowledge of the system. The Head Custodian must be able to handle these duties at the outset, so a requirement that an applicant have a working knowledge is not unreasonable. Qualification 10 calls for knowledge of the fire drill and alarm procedure. There are two questions each calling for knowledge of a four step procedure to be used in conducting a fire drill or responding to a fire alarm. Safety of students and staff is of paramount importance. The expectation that the Head Custodian would be conversant with the basic requirements of fire safety is inherently reasonable.

The Union also previously agreed to the adoption of qualifications 8-10. When the job description was updated in April 2007, the District proposed the addition of qualification 6-9, 19 and 22. Qualifications 7-9 are the ones at issue here. The Union objected to qualification 6, which was removed, but not to 7-9, which were then added. In November 2007 the District met with Union representatives, including the Grievant, regarding the job posting for the Head Custodian position at South High School. Again, no objections were raised as to requirements 7-9. The Union is now attempting to challenge the reasonableness of the requirements, but, after having accepted them during two previous consultations, it should not be permitted to do so. Further, there have been five occasions since 2002 when senior applicants have been passed over for positions on the grounds that they were not qualified. Only one of these instances was grieved, and the grievance was later withdrawn, indicating the Union's acknowledgement that the District's interpretation and application of the language was correct.

The contract states that "all minimum qualifications" must be present. Arbitral precedent supports the view that these words must be given their ordinary meaning and effect. The Union wants to interpret the language to mean "most" or "some" qualifications must be present. In fact, what it wants is for no qualifications to be required and for positions to be awarded based on strict seniority. If the Union's position is adopted it will render the contract language meaningless, so it should be rejected. If the Union wishes for a strict seniority position it should be required to bargain for it. This position has long been supported by arbitrators addressing comparable facts situations and contract language. [See: CAMPBELL SOUP CO., 113 LA 21 (Allen, 1999); PEABODY COAL CO. 87 LA 758 (Volz, 1985); CENTER FOR REHABILITATION AND TRAINING, 85 LA 107 (Seidman, 1985)]

The Grievant also bears responsibility because, unlike other employees, he failed to obtain the necessary information prior to his interview for the job. The testimony shows that numerous employees have taken the initiative to obtain the necessary training on their own. Jeff Timm sought training from Dave Albright and Phil Hubing on the ALS system. Other employees who took initiative to get training on ALS or the work order system from Timm, Albright, Hubing, or others, include Jenny Franzen, Joy Franzen, Don Schmitt, Diane Kiley, Don Dudek, Joseph Perez and Mike Gruenwald. By comparison, Zerger did not show initiative or otherwise make an effort to obtain the necessary training on the ALS or work order systems. Zerger was aware that he could have gotten training from Albright, Timm, or Wayne Kolzow on the ALS and work order systems, but asserted that it was inconvenient. Other than a thirty minute orientation with Albright on the ALS, he made no effort to obtain training. He did not even borrow a tutorial DVD, which was available to him, to study on his own time, despite the fact that he was aware beforehand what information he would be required to know. This is consistent with his performance evaluations, which show that taking initiative and wise use of time have been issues for him in the past. The Union asserts that it requires daily access to the ALS and work order system in order to learn how to use them. A minimum amount of training, combined with practice, is sufficient, but Zerger chose not to and instead chose to rely on his seniority alone to obtain the position.

The Union contended that Dudek was pre-selected for the position, but offered no evidence to support its position. In fact, Dudek was temporarily assigned to the position while Helen Morbacher was recovering from surgery. The District expected her to return up to the point in January 2008 when she posted for a different position. Only then did the District post the position and all the evidence indicates there was no pre-determined plan to award the position to Dudek.

Finally, the Union asserts that Zerger should have been allowed to demonstrate his minimum qualifications during the four month trial period. This is not what the contract provides. An employee is only entitled to a trial period after they have been awarded the position, which, in turn, only follows demonstrating the minimum qualifications. As previously stated, to award the position to an employee before he establishes his minimum qualifications violates the language of the contract. The arbitrator cannot rewrite the contract to provide the interpretation the Union desires. The grievance must be denied.

Union Reply

The Union asserts that the District's discretion to determine minimum qualifications is not absolute, but is subject to a standard of reasonableness. The qualifications must bear a reasonable relationship to the job and the Union is entitled to grieve if they do not. Jeff Timm did not grieve the qualifications at the time they were added because he felt the contract language did not require Union approval, but that is not an admission that the qualifications were reasonable. Further, the unreasonableness of the qualifications did not come to light until they were applied to the Grievant, so the Union's failure to grieve them previously should not preclude them from grieving now.

The Union does not dispute that all minimum requirements must be met, but they must be reasonable and the District cannot give an unfair advantage to one employee over another. The evidence, however, is not conclusive that all employees have been required to demonstrate all minimum qualifications since the new language was added. Don Schmitt testified that when he applied for the position of Central Facility Night Foreman he was not required to demonstrate all the minimum qualifications for the position. The key is not whether every employee has been required to meet all minimum qualifications, but whether the particular qualifications challenged here are reasonable.

Here, the qualifications in question are unreasonable. Zerger had no need to be up to date on the District's energy policy while working as a Stockroom Clerk, but several witnesses testified that the information is readily available. He could obtain this knowledge quickly and easily and should not have been required to know it prior to obtaining the position. Likewise, he had little background on the ALS system, but evidence indicates that most custodians receive tutoring from Phil Hubing after starting in their new positions and are able to learn it in a short time. The District would have lost little by appointing Zerger who was, at most, only slightly behind Dudek in these areas. Likewise, with the work order system and fire drill procedures, the District asked for rudimentary knowledge that was not a valid predictor of

future performance, while it ignored Zerger's significant training, experience and past performance in other areas. This case is comparable to DODGE COUNTY, MA-11418 (Burns, 7/3/02), wherein the arbitrator held that "skill and ability" are not synonymous with having previously done the work. Prior ability to demonstrate rudimentary proficiency with ALS should not be a determining factor. All witnesses testified that the necessary learning and skills could have been obtained quickly and easily after Zerger began the position without undue cost to the District.

Contrary to the District's position, the Union did object to the three qualifications at the time they were added in 2007. The reason they weren't pressed was because the Union was unsure if it could challenge the qualifications under the contract language. That does not mean the Union waived its right to challenge them now, nor can it be construed as an admission that they were reasonable.

The Union asserts that, while the District may require employees to meet all minimum qualifications, this does not give management the right to impose qualifications unrelated to an employee's likely ability to perform the work. The phrase "all minimum qualifications" does not include those that are unfair or unreasonable. Also, the fact that other employees have been able to meet those qualifications does not make them by that fact reasonable. Further, while the Union agrees that the District has no obligation to provide training, it denies that is what it is asking for. Training is not the same thing as familiarization and arbitrators have overturned decisions to refuse employees to bump into positions due to lack of training where familiarization was all that was required. Here, the short amount of time necessary for Zerger to learn the ALS and work order procedures is more akin to familiarization than training. The District, in effect admits this by arguing that Zerger could have obtained the necessary knowledge beforehand fairly quickly and easily. PEABODY COAL CO., 87 LA 758 (Volz, 1985), cited by the District, establishes that requisite ability to do the job implies also having the benefit of any usual and customary familiarization, instruction, or orientation customary for the position.

The Union does not agree that it must show intent by the District to give Dudek an advantage in order to establish that an unfair advantage was given. State of mind is not at issue, merely that Dudek was given opportunities that Zerger was not to obtain the knowledge in the areas for which Zerger was disqualified. When the District has unfettered control over making temporary assignments it has power to decide who gets opportunities and who does not. This power should not be used to subvert the seniority system.

District Reply

The District contends that the contract language requires applicants to meet all minimum requirements, not some or most of them. When the language was bargained there was no discussion about an interpretation other than the plain meaning of the language. The District agrees that Zerger had 23 of the 26 listed qualifications, but the language clearly requires all minimum qualifications, not most.

Zerger knew in advance what knowledge he would need going into the selection process. The Union contends that obtaining the information would only take a few hours, yet Zerger did not make the effort to do so. It is also notable that the original grievance did not challenge the reasonableness of the qualifications, but asserted that Zerger was entitled to the position based on seniority and that the District should then have provided him additional training to meet the qualifications. The Union admits the requirements were reasonable in its brief, and has waived its right to challenge them.

There is no evidence that Dudek was given preferential treatment. Training was available to all employees, but Zerger did not avail himself of the opportunity. It is outrageous for the Union to suggest that the District deliberately provided training to junior employees while denying it to senior employees. Cases cited by the Union, therefore, are inapplicable to this situation. In every situation cited by the Union, the promoted employee either had the minimum qualifications or was appointed before the current language went into effect. Those employees who received training after appointment had already demonstrated minimum qualifications. Zerger could have taken the initiative and sought training on the ALS system, work order system and fire drill procedure from a number of different people, which would have likely made him qualified, but chose not to. Instead, the Union now argues that the requirements were either unreasonable or that he should have been given the requisite training after appointment to the position.

The union relies heavily on the Don Schmidt appointment as support for its position. In fact, Schmidt was appointed to a Night Foreman position, which has different requirements, and all that was necessary was for him to know the night temperature settings, not enter a schedule using ALS. Despite that, however, Schmidt had obtained the knowledge on his own, unlike Zerger, and could have entered a schedule if asked. There are no cases where minimum qualifications have not been required under the present language.

Contrary to the Union assertion, the District has not undermined the concept of seniority. Rather, it is the Union that is seeking to subvert the contract language by changing the meaning of "all minimum requirements." The District has not tried to compile unreasonable qualifications, nor has it tried to nullify the agreement. The qualifications were reasonable and Zerger met nearly all of them. There is no evidence that the District's actions were in any way arbitrary, capricious, discriminatory or unreasonable. Qualifications 7, 8 & 9 all bear a significant relationship to the ability to do the job. Whether they could be learned on the job, and how much time it might take, are irrelevant. Zerger needed to know them when he applied for the job. He did not acquire the knowledge beforehand and is not entitled to special consideration after the fact that is not give to other employees. The grievance should be dismissed.

DISCUSSION

The dispute in this matter centers on the scope of management's authority in determining qualifications for vacancies and filling them. In this regard, the District contends

that the contract language gives it unqualified authority to determine minimum qualifications for positions and that applicants are required to meet all minimum qualifications in order to be considered. Since David Zerger did not meet all the minimum qualifications, the District was within its management rights to pass him over for the position of Head Custodian at North High School and offer the position to Don Dudek instead, despite his lower seniority. In the alternative, it argues that the qualifications are reasonable on their face and that the Union waived its right to challenge them by not objecting at the time the job description was created. The Union agrees that the District has the prerogative to determine qualifications, but that they must be reasonable and asserts that the qualifications Zerger was found not to have were not reasonable. It denies that it waived its right to challenge the qualifications and it asserts that the District pre-selected Dudek for the position and that Zerger should have been awarded the position based on the qualifications he did have. It maintains that the knowledge and/or training required for the three qualifications Zerger missed was easily acquired and that Zerger could have obtained it with minimum time and effort after starting the position.

At the outset, I dispense with the allegation that the District pre-selected Dudek for the Head Custodian position and that Zerger's disqualification was pretextual. There is no evidence of improper motive on the part of the District. The District appointed Dudek to the position on a temporary basis during the incumbent Head Custodian's leave of absence, as it had the right to do. The District had no knowledge that the incumbent was planning to resign prior to January 2008, nor is there evidence that Dudek was its preferred candidate for the job. The disputed qualifications had been originally placed in the Head Custodian position posting in May 2007, long before the North High School position became vacant, so they could not have been added specifically to apply to Zerger. Further, there is no evidence that any other applicants for Head Custodian positions were held to lower standards than Zerger. In fact, since the contract language was changed at least two other candidates for Head Custodian positions have also been disqualified on the basis that they did not have the requisite knowledge of the ALS system. Thus, I find the allegation of bias has no merit.

I agree that the contract gives management the right to establish job qualifications and, since the parties seem in accord on this point, I consider that matter to be settled. That does not mean, however, that management's discretion is unfettered. Article V, Section 3 states that when "...additional minimum qualifications are added...from a previous posted position in that classification, the posting will first be reviewed by the union-management committee..." It is not clear what occurs if there is not agreement by the Union members of the committee on the new qualifications, but the evidence indicates that in practice where management agrees with Union concerns it changes or removes the qualifications, and where it does not agree it leaves the qualifications unchanged. This occurred when a new job posting was created for the Head Custodian position at Urban Middle School. Six new qualifications were added to the posting and were reviewed by the committee. The Union members challenged one qualification dealing with knowledge of the HVAC system because they felt it was unfair to certain bargaining unit members and the District agreed to remove it. Three others, which also happen to be the ones at issue here, were questioned because there was not training for those qualifications available

to second shift employees. The District felt that those qualifications were essential, however, and they were left in. Parenthetically, those qualifications were also added to the posting for the Head Custodian position at South High School in November 2007 and the posting for this position in January 2008, but they were not challenged at those times. Union Steward Jeff Timm testified that he believed that once the qualifications were initially added they could not be challenged later.

The qualifications are also subject to the grievance procedure. Despite management's prerogative to establish qualifications, the Union is correct that they must meet a standard of reasonableness. Thus, the District may not base the disqualification of an applicant on qualifications that are arbitrary, capricious, discriminatory, or otherwise unreasonable. In challenging the qualifications, however, the Union bears a significant burden. In order to meet the standard, the Union must establish, in effect, that the qualifications have no rational basis and are not reasonably related to the position.

I do not find that the Union waived its right to challenge the qualifications by not grieving them at the time they were added to the job posting. At the time the qualifications were originally added to the Head Custodian position at Urban Middle School in May 2007 the language requiring review by the union-management committee had not yet been added to the contract and would not take effect until July 1. Further, the qualifications were not an issue in the filling of that vacancy, so there was no need for the Union to challenge them at that time. When the position description for the Head Custodian at South High School was created in November 2007, Jeff Timm testified that the committee did not challenge the qualifications because they were no longer new, so there was doubt about the Union committee members' standing. There was, likewise, no issue arising from those qualifications in filling that vacancy, so there was no need to grieve them. Thus, the Union was not precluded from grieving the reasonableness of the qualifications as they applied to the North High School position.

This is not to say that the Union may challenge the contract requirement that an applicant must meet all minimum qualifications. The contract language is clear on this point. The evidence indicates that the language was added specifically due to Union concerns over the ambiguity of the previous relative ability language. The new language makes the threshold clear – to be considered, an applicant must meet all minimum qualifications and seniority is only considered as between applicants who are otherwise qualified. The language has been in place since 2002 and there is no evidence that the District has awarded a position to any applicant who failed to meet all the listed qualifications at any time since. Thus, if the qualifications are otherwise reasonable, an applicant must meet all of them in order to be considered for the position.

I turn now to a consideration of the specific qualifications at issue. The evidence indicates that Zerger met 23 of the 26 listed qualifications and is apparently a capable and competent employee in his current position. The qualifications he did not meet are, as follows:

8. Ability to demonstrate the proper day/night setting as per the Sheboygan Area School District's Energy Policy using time clocks and the Automatic Logic Control System.
9. Ability to demonstrate understanding of the key components of the Work Order System and the process used to monitor the status of submitted work orders.
10. Experience and demonstrate knowledge of fire alarm systems and procedures associated with drills and minor troubleshooting.

As to #8, According to Maintenance Supervisor Dave Albright and Coordinator of Facilities Services Wayne Kolzow, the Automated Logic System (ALS) is a proprietary computer system that provides direct, digital controls for heating and air conditioning systems in the various District buildings. ALS was first introduced in 1992 on a limited basis and has been expanded since. It is currently used in at least part of all the District's buildings. It allows the District to time set the temperatures in individual rooms based on time of day and occupancy to maintain optimal temperatures in an efficient manner, in accordance with the District's Energy Policy. The Head Custodians in the various buildings are responsible for being able to operate the ALS system in their buildings and to troubleshoot problems. While job applicants are not required to be able to operate the ALS system, they are expected to be able to demonstrate the proper day/night settings using time clocks in accordance with the District Energy Policy, to set a weekly schedule for a building using the ALS and to know the correct occupied and unoccupied temperature settings for District buildings. Job applicants are aware of the expectation before their interviews and have available to them various means of obtaining the necessary information and skill, including seeking training from Albright, Timm, or Maintenance Mechanic Phil Hubing, or reviewing a tutorial DVD the District makes available on request. According to Zerger, he met with Albright for half an hour in April 2007 to discuss ALS, but did not view the DVD. At his interview he did not know the correct temperature settings for the buildings, nor could he demonstrate the proper day/night settings using time clocks. He indicated he didn't use ALS in his current position and would need on the job training.

Qualification #9 refers to the District's computerized work order system. According to Albright and Kolzow, the District phased out the paper work order system and went to a computerized system in order to increase efficiency and reduce cost. Time is of the essence with work orders, particularly with repair issues, in order to reduce the chance of more significant problems. Applicants are required to be able to identify four of the six key components of a work order and to demonstrate ability to track the status of a work order. Here, again, applicants are aware of the requirement from the posting and training in use of the work order system is available either from Albright or Timm. Zerger indicated he did not seek training on the work order system prior to his interview. At his interview, he told the screening committee that he was unable to answer the questions regarding the work order system because he had always used paper work orders in the past and that he would require on the job training after he started the position.

As to Qualification #10, knowledge of the fire alarm and fire drill procedures are deemed by the District to be high priority functions for a Head Custodian, hence the need to demonstrate understanding during the selection process. The questions asked require the applicant to correctly identify the processes for initiating a fire drill and addressing a fire alarm. Each process has four steps and the applicants must be able to correctly identify them all. Zerger answered three out of four on each question. As to the drill procedure, he did not identify the need to obtain pre-authorization from the Principal. As to the alarm procedure, he did not identify the need to notify the Principal in the event of a false alarm.

The Union does not dispute the importance of Head Custodians having a working knowledge of the ALS system, the work order system, or the fire alarm and fire drill procedures. Rather, it asserts that it is unreasonable for the District to require applicants to have this knowledge prior to being awarded the position. In that regard, it asserts that prior knowledge in these areas is not as essential as in some others, which Zerger had, and that the required knowledge is quickly and easily obtained and so could be acquired by the employee after starting the new job as part of a familiarization process without significant inconvenience to the District.

To me, in assessing whether the qualifications were inherently unreasonable, it is significant that they were apparently never challenged by the Union on that basis. Timm testified that the Union questioned the qualifications when they were originally added to the posting for the Head Custodian position at Urban Middle School in May 2007 on the basis that there were no opportunities for second shift employees to obtain advance training in those areas, so they would be unfairly disadvantaged, but the District, through Human Resources Coordinator Kelly Cvetan, indicated that they were deemed essential and would remain. For her part, Kelly Cvetan did not remember any such conversation. In either event, it appears that there was no general objection to the qualifications on the basis of reasonableness, or on the basis that the knowledge or skill could better be acquired through an on-the-job familiarization process. Further, the Union's articulated concern did not apply to Zerger because he did not work second shift and had access to training if he wanted it. It was apparently only when Zerger could not meet the qualifications and was denied the Head Custodian position that they were first regarded as unreasonable *per se*. Thus, although the Union did not waive its right to challenge the qualifications, that it did not do so at an earlier stage, when they were under discussion, hurts its argument that they are clearly and obviously unreasonable.

I am also not persuaded that these qualifications are of lesser importance than the others and so should not be disqualifying factors. It is established that the District has the discretion to add qualifications that it feels are necessary to the position, subject to a challenge that they are arbitrary, capricious, or unreasonable. As I have previously noted this is a very high burden for the Union to carry, essentially requiring a finding that the District's action had no rational basis. The District witnesses testified at length to the effect that knowledge of the ALS system, the work order system and fire alarm and drill procedures are necessary to the Head Custodian position and their testimony was credible. Moreover, where an arbitrary and capricious

standard applies, it is not for the arbitrator to substitute his judgment for that of management, even if he would have reached a different conclusion. Under the circumstances, therefore, and on this record, I am unable to state that there was no rational basis for the qualifications and, thus, do not find them to be unreasonable.

Finally, the Union takes the position that the knowledge Zerger would have needed to adequately meet qualifications 8, 9 & 10 was *de minimis* and required only a short period of familiarization, not training, to acquire. It relies on KCS INDUSTRIES, INC., WERC CASE 1, NO. 51905, A-5314 (Nielsen, 6/27/95) in support of its position that if the requisite skills or knowledge can be acquired by a brief period of familiarization, the employer cannot reasonably deny the position to a senior employee over a junior employee who already has the skill. It also cites PEABODY COAL CO., 87 LA 758 (Volz, 1985) for the proposition that qualification implies ability to do the job after whatever period of familiarization is customary for the position. It is the Union's position that Zerger could have acquired the skills and knowledge required for the ALS system, work order system and fire alarm and drill procedures with a brief period of familiarization and, therefore, should not have been disqualified on that basis. I disagree.

In KCS INDUSTRIES, INC., senior employees in a manufacturing plant were laid off and were denied the ability to bump junior employees working in another department because, in management's opinion, they did not have the requisite skill to perform the work, which involved fabricating and packaging neon signs. In sustaining the grievance, Arbitrator Nielsen noted that the Company had made a blanket determination to not allow bumping because it needed to maintain high production levels due to a rush job, and so it assumed the senior employees were not qualified without properly assessing their qualifications. He further noted that the contract language specifically defined qualification as the ability to do the job "with a bare minimum of familiarization." In the Arbitrator's view, several of the jobs on the production line could have been done with a bare minimum of familiarization and the Company's assumption that training would be required, without making any attempt at assessment of the employees' abilities, was unreasonable. This case is distinguishable from KCS INDUSTRIES, INC., in a couple of significant ways. Here, there is no language providing for any degree of familiarization to be able to do the job. The employee is expected to meet all minimum qualifications in order to be initially awarded the position. Further, the qualifications are clearly spelled out, the applicants are made aware in advance of what they are expected to know, opportunities to obtain the knowledge and skills are made available and the applicants are given an opportunity to demonstrate that they have the qualifications as part of the selection process. None of these factors were present in KCS INDUSTRIES, INC. The fact that management's selection process was much more directed and specific, combined with the opportunity for applicant's to know obtain the required training in advance and demonstrate their knowledge, set this case apart from KCS INDUSTRIES, INC., in my view. Likewise, the arbitrator in PEABODY COAL CO. interpreted the phrase "ability to step into and perform the work" as implying with the additional benefit of whatever familiarization is customary in the position. Here, again, however, by specifically listing qualifications 8, 9 & 10 in the posting, the employer made it clear that, whatever additional training or familiarization would be

needed to master those tasks, that minimal degree of knowledge or skill was expected at the outset, without any level of familiarization or orientation. I am also of the view that, particularly as to the ALS system, while the amount of necessary training may not be overly lengthy, it goes beyond mere familiarization and is not the kind of skill that would be obtained simply through a brief period of orientation.

For the reasons set forth above, therefore, and based up on the record as a whole, I hereby enter the following

AWARD

The District did not violate Article V, Section 3 of the collective bargaining agreement when it failed to select David Zerger for the position of Head Custodian at North High School. The grievance is denied.

Dated at Fond du Lac, Wisconsin, this 31st day of October, 2008

John R. Emery /s/

John R. Emery, Arbitrator

