

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**FREEDOM AREA SCHOOL DISTRICT**

and

**FREEDOM AREA SCHOOL DISTRICT  
AUXILIARY PERSONNEL ASSOCIATION**

Case 16  
No. 68346  
MA-14202

(Filling of Middle School Lead Secretary Position)

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**Appearances:**

**James Kalny**, Attorney, Davis & Kuelthau, S.C., 318 South Washington Street, Suite 300, Green Bay, Wisconsin 54301, appearing on behalf of the District.

**Richard Elrod**, Attorney, Herrling Clark Law Firm, 800 North Lynndale Drive, Appleton, Wisconsin 54914, appearing on behalf of the Association.

**ARBITRATION AWARD**

The above-captioned parties, hereinafter the District and Association, respectively, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to decide the above-captioned grievance. A hearing was held on March 25, 2008, in Freedom, Wisconsin, at which time the parties presented testimony, exhibits and other evidence that was relevant to the grievance. The hearing was transcribed. The parties filed briefs on May 26, 2009. The record was closed on June 3, 2009, when the parties waived the filing of reply briefs. Having considered the evidence, the arguments of the parties, the applicable provisions of the agreement and the record as a whole, the undersigned issues the following Award.

**ISSUES**

The parties were unable to stipulate to the issue to be decided in this case. The Association framed the issues as follows:

- 1) Was the grievant, Rose Van Schyndel, qualified for the position of middle school secretary?
- 2) If she was “qualified”, does seniority then control the award of the position?

The District framed the issues as follows:

- 1) Is this grievance procedurally barred, barred by laches or has the Association waived its right to grieve this matter?
- 2) Did the District violate the collective bargaining agreement when it did not award the middle school secretary posting to Rose Van Schyndel?
- 3) If so, what is the appropriate remedy?

For the most part, I have adopted parts 2 and 3 of the District’s wording of the issue. I find that the issue which is going to be decided herein is as follows:

Did the District violate the collective bargaining agreement when it did not award the middle school lead secretary position to the grievant? If so, what is the appropriate remedy?

### **PERTINENT CONTRACT PROVISIONS**

The parties’ 2008-2010 collective bargaining agreement contains the following pertinent provisions:

#### **ARTICLE III MANAGEMENT RIGHTS RESERVED**

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Except as specifically restricted or limited by this agreement, the management of the District and the direction of its working forces are vested exclusively in the District. These rights include, but are not limited to the following:

...

- B. To hire, promote, transfer, schedule, and assign employees and positions within the school system.

...

## **ARTICLE X VACANCIES AND TRANSFERS**

- A. **POSTING:** Whenever a vacancy occurs or a new position is created, the District shall post the same for a period of five (5) working days in each school building in the District. The qualifications necessary for the job shall be part of the posting, as well as whether the job is a part time or full time position. Any employee who wishes to apply for such vacancy or new position must notify the District Administrator in writing within five (5) working days of the initial posting. During the summer, the District shall also provide notice of vacancies and new positions to the president of the Association. The Board shall allow five (5) working days to locate people during summer vacation for postings.
- B. **PREFERENCE:** All Association employees shall be given first preference in filling vacancies and new positions according to individual seniority and qualifications.
1. Probationary employees shall receive all rights and benefits of this agreement including increases resulting from a salary schedule change, promotion, or reclassification while on probation except that they may be terminated during the probationary period without recourse to any other provision of the agreement.
  2. A successful applicant for a permanent (position) vacancy that constitutes a promotion (i.e. higher or lower labor grade) shall have up to thirty (30) work days to demonstrate the ability to perform the job. If the employer determines that the employee lacks the ability to perform the job, the employer shall return employee to the former position at the conclusion of this period.
  3. A sidebar agreement will be drafted to address preference for the payroll agent (highly skilled) position.

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## **ARTICLE XXII GRIEVANCE PROCEDURE**

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5. Step 5: Arbitration

If the employee/s presenting the grievance is not satisfied with the action taken by the District in Step 4, the grievance may be

appealed to arbitration provided that written notice of the employee's request for such arbitration is filed with the Clerk of the Board within ten (10) working days of the receipt of the School District's answer in Step 3. When a request has been made for arbitration, the parties shall jointly petition the Wisconsin Employment Relations Commission to supply a panel of five (5) arbitrators. . . .

### **BACKGROUND**

#### A. Introduction

The District operates a public school system in Freedom, Wisconsin. The Association is the exclusive collective bargaining representative for the District's support staff employees. One position included in the bargaining unit is the middle school lead secretary position.

#### B. Bargaining History

The following bargaining history is pertinent to this case.

The parties signed an initial collective bargaining agreement in 1981. That agreement contained the following provision:

### **ARTICLE X. VACANCIES AND TRANSFERS**

. . .

- B. Preference – Regular full-time and school year employees shall be given first preference in filling vacancies and new positions according to individual seniority and qualifications. Regular part-time employees shall be given second preference in filling vacancies and new positions according to individual seniority and qualifications.

Over the next 25 plus years, this language was modified as follows. In the 1992-1994 collective bargaining agreement, language dealing with probationary employees was added. In the 1999-2002 collective bargaining agreement, the preference language was modified to extend to part-time employees as well as full-time employees. In the 2002-2005 collective bargaining agreement, a trial period provision was inserted. This provision gave employees a 30-day trial period whereby employees had the option of returning to their pre-existing position if the attempted transfer did not work out. In the 2005-2008 collective bargaining agreement, a provision was added which addressed the payroll agent. During that entire time period, the phrase "preference in filling vacancies and new positions according to individual seniority and qualifications" remained unchanged. When the parties were negotiating what became their 2008-2010 collective bargaining agreement, both parties made proposals regarding the

“Preference” provision. The District sought to eliminate preference for Association personnel altogether, and the Association sought to delete qualifications from consideration. Both sides eventually dropped their proposals.

C. Past Filling of Vacancies

The record indicates that past vacancies were filled through the posting process. In all but two instances, the internal applicant who was awarded the position was the senior applicant. The administration did not usually test the applicants to determine qualifications. In one instance though when the District filled the lead secretary position for the elementary school, it tested the applicants. In that instance, two employees were tested – one of whom was Vosters.

Aside from the testing just noted, that case (i.e. the Vosters case) also involved a question of internal versus outside applicants. Vosters was the only internal applicant. The other applicant was a temporary employee who was not in the bargaining unit. The principal wanted to give the position to the temporary employee. The superintendent overruled the principal and directed that Vosters be given the position (rather than the temporary employee). Vosters was given the position, but the principal subsequently determined that Vosters had not passed the trial period. The Association leadership then took the matter to some school board members, who concluded that Vosters was not treated fairly. The superintendent ultimately directed that Vosters could keep the position.

**FACTS**

During the summer of 2007, Rose Van Schyndel contacted District Administrator Lois Cuff and told her that the incumbent middle school lead secretary was contemplating retirement. Van Schyndel expressed an interest in the position. In response, Cuff told Van Schyndel that she could apply, but the qualifications for the position would be scrutinized closely because of the level of responsibility in the position.

On October 16, 2007, the incumbent middle school lead secretary, Dort Van Den Bosh, announced her intention to retire from that position as of June 6, 2008. Her retirement/resignation was accepted, and the District decided to refill the vacancy.

This position is somewhat unique in the bargaining unit in that it is a full-time, year-round position. Many of the positions within the bargaining unit are school year only, and come with a lesser set of benefits. Aside from that, this position is also unique in that the middle school has just one secretary, whereas there are two secretaries each at the elementary school and the high school. The District has designated the secretary at the middle school to be a lead secretary, so that the position pays more than a (regular) secretary position pays.

The middle school lead secretary position vacancy was posted in early November, 2007. The posting specified that it was an internal posting (meaning just internal applicants could apply). It also specified that the qualifications for the position were as follows:

High school diploma  
Technical school training or two years of experience as a secretary  
Skills necessary to successfully complete Performance Responsibilities (see job description)  
Current American Red Cross First Aid certification or equivalent  
Current American Red Cross Cardiopulmonary Resuscitation certificate or equivalent  
Positive public relations skills including good oral and written communication skills  
Good organizational skills and commitment to high professional standards and ethics  
Any other qualifications as deemed important

These qualifications were identical to the qualifications listed in the position's job description, which was attached to the posting. The posting also stated:

In order to find the best qualified internal candidate skills testing will be required.

The job description for the lead secretary position contains the following summary of the "general duties" of the position:

The person in this position provides secretarial assistance to the administrator and coordinates the daily operation of the office. The Lead Secretary performs a variety of confidential, routine and complex clerical and supportive work including, but not limited to answering phones, receiving the public, cashiering, data processing, student record and bookkeeping as scheduled and/or assigned by the supervisor with minimal direction.

The job description then goes on to identify about two dozen "performance responsibilities". They are not quoted here.

One of the employees who applied for the position was Rose Van Schyndel. In her letter of application, she wrote the following:

I have many of the skills you are looking for. I have been the Sunday School Superintendent, Sunday School teacher, Youth Group leader and the leader of the United Methodist Women's Group at Peace United Methodist in Kaukauna. I have organized different craft projects for 100-150 people at the School of Christian Mission for the last 3 years. I have filled in the office when a secretary was called away for an emergency on several occasions. I have worked for registration for quite a few years. I have worked as a Secretary before I was employed here. I did many things including time sheets, payroll, parts inventory, shipping and receiving, answering the phone, taking orders over the phone and placing material orders. I also organized a parts book for each of the screw machines we made there. I think I have good organizational skills and am committed to doing the best job possible.

Van Schyndel was the most senior of the seven employees who applied for the position. She started working for the District in 1994. When she applied for the lead secretary position, she was a learning disability aide at the high school.

Administrator Cuff decided that the applicants for the lead secretary position would be given a skills test and go through a weighted interview process. Neither Cuff nor prior district administrators had used this process before (i.e. skills testing and interviewing) in filling a vacancy in the bargaining unit.

The first part of this process (meaning skills testing) occurred in late November, 2007. The skills tests were administered by Flex-Staff, at their site in Appleton. The skills test covered these five areas: Microsoft Word word processing skills; Microsoft Excel spreadsheet skills; filing procedures; typing/keyboarding skills; and listening/communication skills. These skills tests were graded and percentage scores attached to each candidate. Deb Reiter received a score of 73.5%. That was the highest score of all the applicants. Rose Van Schyndel received a score of 67.25%.

Cuff then drafted the interview questions. The questions which were drafted were as follows: 1) Why do you want this job?; 2) Describe what you think this job involves; 3) Tell us about your experiences working in an office; 4) Have you taken any classes since high school? Do you hold any certifications or licenses?; 5) Do you have any experience working with computers; 6) Describe how well you multi-task; 7) Are you a confidential person?; 8) How do you deal with difficult people?; and 9) How do you handle conflict or disagreement? Cuff envisioned that during each interview, the interviewers would take notes and make comments on an interview sheet that listed all the foregoing questions. For example, next to question one, the interviewer would list in short form the interviewee's answer to that question.

Cuff also compiled a rating scale for the interview process. The rating scale assigned the number 5 to a score of Excellent; the number 4 to a score of Very Good; the number 3 to a score of Average; the number 2 to a score of Below Average; and the number 1 to a score of Unsatisfactory. Cuff envisioned that following each interview, the interviewers would complete an evaluation form for each interviewee and assign one of the aforementioned rating numbers to each of the following categories:

- \_\_\_\_\_ 1. Professional characteristics; conducted self in a professional manner during interview
- \_\_\_\_\_ 2. Personality/Enthusiasm for the job
- \_\_\_\_\_ 3. Expressed understanding of office skills
- \_\_\_\_\_ 4. Technology background; computer skilled
- \_\_\_\_\_ 5. Interpersonal relations; ability to get along with people
- \_\_\_\_\_ 6. Responses to hypothetical situations presented during interview
- \_\_\_\_\_ 7. Ability to express ideas, command of English language and communication skills

- \_\_\_\_\_ 8. Organizational skills
- \_\_\_\_\_ 9. Confidential personality traits
- \_\_\_\_\_ 10. General overall feelings/reactions about the candidate
  
- \_\_\_\_\_ Total

The interviews were conducted in mid-December, 2007 by Cuff and Middle School Principal Ken Fisher. All the interviewees were asked the same questions noted above. Following each interview, Cuff and Fisher completed an evaluation form for the interviewee wherein they assigned rating numbers for the categories noted above.

Van Schyndel's interview was the shortest of all the applicants. It lasted about 20 minutes. The reason it was the shortest was because Van Schyndel did not elaborate much on the questions asked of her. When she was asked the question about her prior secretarial experience, she said that she had worked in the office of a local screw company from age 16 through 19. She described her duties there as filing, ordering, answering the phone, and as she put it, "helping out". When she was asked the question about her computer experience, she said she did not spend much time on computers, but was willing to learn.

After the interview was over, Cuff and Fisher rated Van Schyndel in the ten categories referenced above. Cuff assigned her a total rating of 26 and Fisher assigned her a total rating of 22, for a combined score of 48. This was the lowest combined interview score of any of the applicants. It was their view that Van Schyndel did poorly in the interview.

Following the interview, Cuff and Fisher concluded that Van Schyndel was not qualified for the position. In their view, she did not possess the communication skills, secretarial experience or computer knowledge necessary to perform the job duties for the middle school lead secretary.

The position was ultimately offered to Deb Reiter. The record indicates that she possesses a two-year degree from a technical college, had 17 years of what the Employer considered "relevant work experience" in an office setting, had a skills test score of 73.5% (which was the highest of all the applicants), and had a combined interview rank score of 93 (which was the highest of all the applicants).

After the Employer's decision to offer the position to Reiter was announced, Association President Paula Driessen sent Cuff a letter wherein she asked Cuff to change her decision and instead offer the position to Van Schyndel. In that letter, Driessen stated that Van Schyndel was the senior applicant and, as a result, should have been awarded the position and 30 days to prove that she could do the job.

On January 24, 2008, Cuff met with the Association's leadership regarding the filling of the middle school lead secretary position. In that meeting, Cuff was asked to change her decision, and to award the position to Van Schyndel. Cuff declined to do so.



On February 4, 2008, the Association formally grieved the filling of the middle school lead secretary position. The grievance averred that Van Schyndel was the most senior qualified applicant, and as a result, should have been given the position.

The grievance was thereafter processed through the contractual grievance procedure. The Association advanced the grievance to Step 5 of that procedure on March 31, 2008.

In October, 2008, the Association requested an arbitration panel from the WERC.

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At the hearing, Van Schyndel provided more detail about her work experience at Mid-Central Tool Company. She testified that when she worked there she processed time sheets, handled parts, did shipping and receiving, answered the phone, placed orders and organized four parts books. She also testified that she started working there during the last half of her junior year of high school. During that semester, she worked there about 30 hours a week. During the summer months between her junior and senior year, she worked full-time. When her senior year started, she again worked about 30 hours a week. After she graduated from high school, she worked there full-time for about one year. Her employment with this company ended about 1980.

### POSITIONS OF THE PARTIES

#### Association

The Association responds at the outset to the District's assertion that the grievance was not appealed to the WERC in a timely fashion. It disputes that assertion. It contends that it did, in fact, appeal the grievance to the arbitration step per the contractual deadline. As for the actual appeal to the WERC, the Association notes that the grievance procedure does not contain a time limitation for appealing to the WERC. It also points out that the District did participate in choosing the arbitrator. That being so, the Association contends that its actions caused no detriment to the District. The Association therefore asks the arbitrator to address this case on the merits and not dismiss it on procedural grounds.

With regard to the merits, the Association begins by making the following arguments concerning the contract language involved herein. First, it interprets Article X, Section B to mean that "the most senior qualified applicant for an internal position shall be awarded that position." As the Association sees it, that applicant, pursuant to subsection B(2) of Article X "is then given a thirty-day window of time to prove their capacity to perform the new position." To buttress this interpretation, it calls attention to the fact that the word "seniority" is given "top billing". According to the Association, the reason it is given "top billing" is this: it is a "cornerstone" of union rights, "a truly objective criteria", and "demonstrates experience, loyalty, and because of the privilege it tends to bring, creates an incentive amongst newer employees." Second, the Association argues that the parties' past practice supports its

interpretation of the language. In support thereof, it notes that in all but two instances over the last 30 years (i.e. the Vosters and Vandenberg situations), the person who was given the position was the senior bidder. According to the Association, this consistent and long-standing practice shows that seniority has always been used to determine who was awarded a position. In other words, seniority has been the “primary consideration” in filling past vacancies. The Association also calls attention to the fact that each year, the special education aides get to change jobs. When this happens, it’s done by straight seniority. Third, the Association contends that the parties’ bargaining history supports its interpretation of the language. It notes in this regard that in the last round of bargaining, the District made a bargaining proposal to eliminate the word “seniority” from Article X, Section B. The Association further notes that it resisted that move, and the language in Article X, Section B ultimately was not changed. According to the Association, this shows that the District’s attempt to avoid the past practice was unsuccessful. Putting these three points together, it’s the Association’s view that what happened here is that the District simply ignored the contract language (as interpreted by the parties’ long-standing past practice) and failed to give seniority its proper contractual weight. To support that premise, it notes that when the District prepared the posting, it made no reference whatsoever to seniority. The Association believes that’s significant. Instead, the posting made reference to another factor (i.e. “skills testing”) which is not even referenced in the contract language. According to the Association, when these points are considered collectively, they establish that the District did not consider seniority and simply ignored the parties’ past practice. The Association contends that if the District wants to discontinue this practice, it bears the burden of negotiating a change in that practice in contract negotiations. However, until that happens, any unilateral efforts to eliminate the past practice is a breach of the contract.

Next, the Association avers that the most senior applicant for the middle school secretary position (Van Schyndel) was qualified for the position. As the Association sees it, all it needed to establish was that Van Schyndel possessed the “basic qualifications” for the job. It argues it proved that. Here’s why.

First, it goes through the eight qualifications listed in the job posting one by one. With regard to the first qualification (i.e. a “high school diploma”), it asserts that Van Schyndel has that. With regard to the second qualification (i.e. “technical school training or two years of experience as a secretary”), it contends that Van Schyndel has the latter. To support that contention, it notes that Van Schyndel worked in a company office while in high school and for a year thereafter. Specifically, she worked at Mid-Central Tool Company in the second half of her junior year of high school for 30 hours a week, the same number of hours during her senior year of high school, and then full-time for one year following high school. The Association tabulates the work hours just referenced and divides them by 2080, and concludes that Van Schyndel “more than met” the two years experience requirement. With regard to the third requirement (i.e. “skills necessary to successfully complete performance responsibilities”), it cites Van Schyndel’s testimony for the proposition that she “credibly testified as to either having experience doing the general tasks set forth within the performance responsibilities, or the clear capacity to understand and complete those tasks.” With regard to

the next two qualifications on the list (i.e. possessing a Red Cross first aid certification, as well as CPR certification), it notes that neither side addressed those qualifications. With regard to the sixth qualification (i.e. “positive public relations skills including good oral and written communication skills”), the Association avers that the arbitrator had the opportunity to experience Van Schyndel’s communication skills at the hearing. According to the Association, the hearing was “a much more stressful environment than a middle school office would present.” Building on that premise, it asserts that since she communicated effectively in the hearing environment, “she has absolutely demonstrated the ability to communicate effectively in a middle school secretary position.” With regard to the seventh qualification (i.e. “good organizational skills and commitment to high professional standards and ethics”) it avers that the record testimony was that Van Schyndel was an excellent District employee. It notes that District Administrator Cuff acknowledged that Van Schyndel was very good at what she did (i.e. being a special education aide). With respect to the final, catch-all qualification (i.e. “any other qualifications as deemed important”), it simply avers that “no additional qualifications were ever expounded upon by the District.” Putting all the foregoing together, it’s the Association’s view that Van Schyndel possessed the basic qualifications set forth in the posting for the middle school secretary position.

Second, the Association addresses what it characterizes as Van Schyndel’s “track record” at the District. It notes that in her 15 years with the District, she has held a number of positions, most recently in various special education aide positions. According to the Association, these particular positions have involved “a great number of responsibilities for a great number of students, in a variety of classroom settings” and have required her “to be able to communicate appropriately with students, parents, and various staff.” It also avers that these positions have required her “to spend considerable periods every day on the computer.” To support that premise, it points out that she takes notes for her students, translates those notes into the computer system, assists her students with computer research projects and paper writing and helps them with their homework. As the Association sees it, the foregoing establishes that Van Schyndel has a solid work history in the District in a very demanding position.

Third, the Association anticipates that the District will claim that the information which Van Schyndel supplied at the hearing concerning her qualifications is irrelevant. The Association disputes that, and asks the arbitrator to consider all the information provided by Van Schyndel about her qualifications.

Fourth, the Association points out that Van Schyndel’s skills test score was not substantively different from the person who was awarded the secretary position.

Finally, the Association makes several comments about the interview process which the Employer used. First, it emphasizes that the Employer never used an interview process before to fill a bargaining unit position. Thus, this was the first time that the Employer used an interview process. Second, it calls the interview process that was used “absolutely subjective”. According to the Association, it amounted to a popularity contest which was used

to ensure that the more popular candidate got the job. Third, it comments on the fact that Van Schyndel's interview was 10 minutes shorter than the other employees who were interviewed. As the Association sees it, the administrators who conducted the interview failed to follow up appropriately during the interview on the answers which Van Schyndel provided to the questions asked. Thus, the Association faults the interviewers for not getting "all the information" they needed during Van Schyndel's interview.

Building on all the foregoing, it's the Association's view that since Van Schyndel was the most senior bidder, and possessed the basic qualifications linked in the posting, she should have been given 30 days to prove her ability to perform the middle school lead secretary job. That didn't happen of course, so a contract violation occurred. The Association therefore asks the arbitrator to grant the grievance, place Van Schyndel in the middle school lead secretary position, and make her whole.

### **District**

The District contends that the grievance should be denied on procedural and substantive grounds. First, the District avers that the Association waived its right to arbitrate this grievance for reasons which will be identified later. Second, if the arbitrator addresses the merits, the District asserts it did not violate the collective bargaining agreement when it did not award the lead secretary position to the grievant. It contends that notwithstanding the Association's contention to the contrary, the contract language does not require the District to award a vacancy to the senior bidder. Instead, it reads the language to allow it to give the position to the most qualified applicant. It argues that the grievant was not qualified for the lead secretary position. It elaborates on these contentions as follows.

At the outset, the District raises three procedural objections to the grievance. First, the District acknowledges that while the Association's appeal of this grievance to arbitration in March, 2008, was timely, it avers that the Association then sat on its hands after that and did not request an arbitration panel from the WERC until October, 2008. As the District sees it, this seven-month delay was unreasonable and inconsistent with the parties' intent to process grievances in an expeditious manner. It argues that a line must be drawn somewhere, and it draws the line at six months. According to the District, six months is the "default limitation" period that applies when a statute does not provide for a specific time period for requesting judicial review of an agency decision. The District asks the arbitrator to use that limitation to bar the consideration of this appeal. Second, the District contends that the Association should be estopped from bringing this appeal because after the former middle school lead secretary retired, it trained her replacement (Reiter) and paid her at the lead secretary rate. The District avers that if the grievance is sustained, its back pay liability will be unduly increased because of the Association's seven-month delay in asking for an arbitration panel from the WERC. Third, the District asserts that the Association did not follow the contractual provision dealing with appealing a grievance to the WERC. It notes in that regard that the contract language says that when a grievance is appealed to arbitration, "the parties shall jointly petition the WERC for a panel of arbitrators." The District points out that did not happen here and no

joint petition for arbitration was filed. Instead, the Association unilaterally requested arbitration. As the District sees it, the grievance should be dismissed for any of the foregoing reasons.

Next, the District avers that at the hearing, the Association raised several matters that are not material to the determination of this grievance. It addresses them as follows. First, with regard to the Vosters' transfer, it points out that that matter did not involve the application of the preference language to determine qualifications between bargaining unit members. As the District sees it, that's what is involved here. It contends that the Vosters' case dealt with the topic of internal applicants versus non-bargaining unit applicants. Building on that premise, it's the District's view that the Vosters' case is not at all probative of whether the grievant is qualified for the position involved herein. Second, the District notes that at the hearing, the grievant testified at much greater length about her office experience than she did when she was interviewed for the position. As the District sees it, the Association's goal in doing that was to seek a do-over (meaning a second chance for the grievant to identify her secretarial experience). The District contends that the problem with that is that there is nothing in the collective bargaining agreement that requires that an applicant's qualifications are to be reviewed for a second time after the interview. The District argues that the grievant had a chance to identify her secretarial experience at the interview, but her "communication" in that regard "was so poor that she in fact flunked the interview." Third, the District asserts that the side bar agreement which the parties had in their 2005-08 collective bargaining agreement concerning the filling of the payroll position is not material to this case because that "side bar does not address the issue of qualifications and seniority between the unit members, nor does it address who sets or determines qualifications." Fourth, the District submits that at the hearing, the Association's witnesses attempted to present the notion that the contractual 30-day trial period somehow alters the determination of whether an individual is qualified for the position in the first instance, and somehow lowers the bar on qualifications. That notion is not shared by the District. It avers that the 30-day trial period applies only to people who have already been deemed as successful applicants. According to the District, the sole purpose of the 30-day trial period is to enable those individuals to go back to their original position in the event that either party agrees they cannot perform the functions of the job. Building on that premise, the District maintains that the trial period provision does not alter the District's contractual authority to determine qualifications. Fifth, the District anticipates that the Association will challenge the District's right to use interviews to help it review the bidders' qualifications. The District acknowledges that interviews are subjective in nature. Be that as it may, it asserts it can still use them to help determine qualifications. It argues that the Association knew that interviews and subjective criteria were going to be used as part of the District's qualification determination process, so any Association arguments challenging same are untimely and should not be considered by the arbitrator. As the District sees it, the Association should be estopped from challenging the District's use of interviews and subjective criteria to determine qualifications.

Next, the District makes the following arguments concerning the language contained in Article X, Section B (Preference). First, it contends that the phrase "according to individual

seniority and qualifications” does not mean what the Association says it means, namely that the District has to give the job to the senior bidder. According to the Employer, the language simply does not say that. It asks rhetorically, “if seniority is to be the trump card, why are individual qualifications important?” It answers that rhetorical question by saying that seniority is not paramount under this language. In its view, individual qualifications are the paramount factor and seniority is a tie breaker. Building on that premise, the District reads the language to allow it to pick the most qualified bargaining unit employee who posts for the vacancy. Second, it argues that the parties’ bargaining history supports its interpretation of the language. It notes in this regard that the parties very first agreement – the so-called “Working Document” – contained language that stated that vacancies would be filled “on a seniority basis if the requesting employee is qualified.” The District emphasizes that that language did not make it into the parties’ first formal collective bargaining agreement. Instead, the parties agreed on the “individual seniority and qualifications” language which survives to this day. The District avers that the parties intended something different in their first collective bargaining agreement than what they included in their Working Document. Otherwise, the language would not have been changed. Third, with regard to the Association’s contention that seniority “has always been used” to determine who was awarded a position, the District acknowledges that in the majority of past situations where it filled bargaining unit positions, it filled the position with the senior bidder and gave little or no consideration to the qualifications of the bidders. In other words, the District agrees that in the majority of past transfers that involved the filling of positions with few technical requirements, it did not exercise its right to consider qualifications. As the District sees it, by doing that, it did not waive its right to look at the qualifications of the bidders for what it calls “key” or “complex” positions such as the lead secretary position. According to the District, nothing in the contract restricts it from making its determination on vacancies based on the type of job that is open, “while reserving the right to more thoroughly examine the qualifications in those that need some skills and additional qualifications.” Building on the foregoing, it’s the District’s view that there is no past practice that vacancies have to be filled by the senior bidder. It cites the standard criteria for establishing a past practice and asserts that not all are present here. Specifically, it avers that there has been no clear enunciation of such a “practice” by the parties, nor has such a “practice” been unequivocal.

Next, the District argues that pursuant to the management rights clause, it has the right to determine qualifications. Building on that premise, it avers that after giving “due consideration” to the qualifications it felt were necessary for the lead secretary position, it set eight qualifications in the posting. One of the qualifications was two years secretarial experience or technical school training. Aside from those qualifications, it also considered the following factors important in determining an employee’s ability to perform the job: the ability to multi-task and the need for computer expertise. It envisioned the person who filled the position as the principal’s right hand person, and someone who could diffuse situations and effectively communicate with teachers and parents. According to the District, the qualifications it set and the factors it considered important were reasonably necessary and job-related. Said another way, they were not arbitrary, capricious or discriminatory.

Finally, the District contends that the grievant was not qualified for the position. Here's why. The two people who interviewed her concluded that she lacked four of the eight qualifications listed on the posting: 1) the technical training or secretarial experience; 2) the skills necessary to complete the performance responsibilities of the job; 3) public relations/communications skills; and 4) other qualifications as deemed important. With regard to #1, the District notes that the office experience that the grievant had was almost 30 years ago. Aside from being dated, the administrators felt that the grievant's work experience at the screw company was not similar to the work performed by a lead middle school secretary. Insofar as the administrators could determine, her prior office experience did not train her or assist her in being responsive to difficult questions, communicating effectively and effectively multi-tasking. With regard to #2, the District notes that it felt that one of the position's necessary work skills was computer acumen. It points out that during the interview, the grievant essentially admitted that she has no computer experience. With regard to #3, the District notes that the grievant had a poor interview. In its view, that was "indicative, if not dispositive, of the grievant's innate inability to be effective and spontaneously respond to and communicate with other people in a high pressure situation." It asserts that she could not articulate her own qualifications effectively, and her responses were either "unresponsive or suggested a lack of understanding of the question or what the job entailed." The District also notes that her response to the question of how she would respond to an irate person was to say she would refer the matter to the principal. According to the District, that response did not demonstrate any understanding of the way to address an irate person in a manner consistent with the Administration's expectations. With regard to #4, the District avers that during the interview, the grievant was given the opportunity to explain her ability to multi-task, but she "failed to give the interviewers any reason to believe she could effectively perform more than one duty at a time." The District argues that since the grievant did not have the foregoing qualifications, she was not qualified for the position. The District asks the arbitrator to not find otherwise.

Building on the premise that the grievant was not qualified for the position, it's the District's view that "seniority does not enter the picture." It therefore requests that the grievance be denied.

## DISCUSSION

### Procedural Objections

Inasmuch as the District has raised several procedural objections to the grievance, they will be addressed first.

The District contends that the grievance should be denied on various procedural grounds. However, none of the District's procedural objections are going to be addressed herein. The reason is this – I have decided to presume for the sake of discussion that no procedural impediments exist. Consequently, my decision is not going to be based on procedural grounds. My reason for making this call will become apparent at the end of my discussion.

## Merits

The focus now turns to the merits of the grievance.

My discussion begins with a review of the contract language. The parties agree that the language pertinent to this dispute is found in Article X, Section B. That section is one sentence long and provides thus:

All Association employees shall be given first preference in filling vacancies and new positions according to individual seniority and qualifications.

In analyzing this sentence, I'm going to break it into two parts. The meaning of the first part is not disputed. The parties agree that it provides that Association employees (i.e. bargaining unit employees) get "first preference" in filling vacancies. This portion of the sentence clearly and unambiguously establishes that bargaining unit employees get a preference over outsiders when vacancies are filled. Specifically, when the District has a vacancy, bargaining unit employees get "first preference" in filling it over outsiders (meaning someone who is not an existing bargaining unit employee). In this case, the Employer complied with this contractual directive because it limited the posting in question to just internal applicants. Moving on, the meaning of the second part of this sentence is disputed. In contrast to the first part of the sentence, the meaning of the phrase "according to individual seniority and qualifications" is not so clear. While the terms "seniority" and "qualifications" have well-known meanings in labor relations, the problem is not in defining those terms. Rather, as will be elaborated on later in this paragraph, it is applying those terms to a given factual situation. I'm going to begin by opining on what the phrase "according to individual seniority and qualifications" does not mean. First, notwithstanding the Association's contention, it does not mean that the senior bidder gets the job. The Association's proposed interpretation (i.e. that seniority is paramount) completely ignores the other factor referenced in the sentence (i.e. individual qualifications). Second, notwithstanding the District's contention, it does not mean that the most qualified bidder gets the job. The District's proposed interpretation adds a qualifier (i.e. "most") that simply is not there. Additionally, that interpretation (i.e. that qualifications are paramount) completely ignores the other factor referenced in the sentence (i.e. seniority). Thus, I do not adopt either side's proposed interpretation of the language. In my view, the Association's interpretation over-emphasizes seniority and forgets qualifications, while the District's interpretation overemphasizes qualifications and forgets seniority. That being so, the question then becomes what the language means. I interpret the second part of Article X, Section B to say in broad general terms that when the Employer fills a vacancy, it has to consider and compare both the seniority and qualifications of the applicants. That's it; that's all the instruction it gives. The language does not specify how this comparison is to be made, or identify the relative weight to be given to these factors (i.e. seniority and qualifications). While the term "seniority" is objective in that someone's seniority date can be easily quantified, the term "qualifications" is far less objective. It can mean different things to different people. That being so, some labor agreements define what is meant by the term "qualifications". Here, though, the parties did not do that. Instead, they left the term



“qualifications” undefined. Additionally, they did not specify how “qualifications” are to be balanced against an individual’s “seniority”. Since just two factors are listed, is each factor to be given a weight of 50%? The foregoing demonstrates that applying this broad language is going to be harder than stating it.

To help me interpret this language, I’m going to review the two sources which arbitrators traditionally use to help them interpret ambiguous language: the parties’ bargaining history and their past practice.

I’ll focus first on the parties’ bargaining history. In my view, there is nothing in the parties’ bargaining history that conclusively demonstrates what the parties intended the phrase “according to individual seniority and qualifications” to mean. I’m persuaded that all the bargaining history shows is that each side got something out of this broad general language. Specifically, the Association got an explicit reference to seniority and the Employer got the right to consider the individual qualifications of the bidders. Other than that, all the bargaining history really shows is that for a long time, the parties have not been able to mutually agree on what the phrase “individual seniority and qualifications” means.

The focus now turns to an alleged past practice to see if it sheds any light on what the parties intended the phrase “individual seniority and qualifications” to mean. According to the Association, seniority “has always been used” to fill vacancies. As support for this premise, the Association avers that in all but two prior instances (i.e. the Vosters and Vandenberg situations), the person who was given the position was the senior bidder. As the Association sees it, that constitutes a practice that seniority has always been the “primary consideration” in filling vacancies. Building on that premise, the Association contends the Employer violated this practice because it did not award the position to the senior bidder here. I find there are two problems with the Association’s contention. First, the alleged practice differs from the contract language just reviewed. As was just noted, that language does not require the District to fill vacancies on the basis of strict seniority. The Association essentially asks the arbitrator to overlook the contract language and apply the alleged practice instead. If the undersigned were to accept the Association’s past practice argument, that would in effect nullify express contract language. The problem with that is that usually when past practice conflicts with express contract language, the contract language governs over the practice. Second, the undersigned is persuaded that the alleged practice and the contract language can be reconciled. Here’s why. As previously noted, the Association relies on the fact that when other positions were filled, the person who got the job was the senior bidder. While that establishes that in most prior instances the senior bidder was awarded the position, that evidence does not also establish that the position was filled solely on the basis of seniority. It could have been that the senior bidder was deemed “qualified” by the District. Aside from that, the record indicates that in prior instances when it filled vacancies with the senior bidder for bargaining unit positions, the District gave little or no consideration to the qualifications of the bidders. From its perspective, it did not need to get into that (i.e. consider the qualifications of all the bidders). That was the District’s call to make. However, by doing that (i.e. giving little or no consideration to the qualifications of the bidders in past cases), the District did not waive its right to look at the qualifications of bidders for future vacancies. That’s especially the case

where – as here – the position being filled is what the District considers a key position. Given the foregoing, I find there is no binding past practice that vacancies have to be filled by the senior bidder.

Since there is no practice or bargaining history which sheds light on what the parties mutually intended the phrase “individual seniority and qualifications” to mean, it falls to me to interpret it. I interpret it thus: if the senior bidder possesses the basic qualifications for the job, then that person gets the job. In so finding, I’m well aware that the contract language does not include the word “basic” as a qualifier before the word “qualifications”. Be that as it may, it is necessary to decide what level of qualifications the applicant has to have to pass muster. Specifically, is the proverbial bar to be set high or low? It’s my view that when no level is specified in the contract language – as is the situation here – the proverbial bar is set low as opposed to high. By low, I mean basic. Thus, the question to be answered is this: does the employee possess the basic qualifications for the job?

Before I address that question, I’m first going to address some matters which made the filling of this particular position unique. For background purposes, it is noted that the District knew before it posted the vacancy that there would be substantial interest in this vacancy because it is a full-time, year-round position. Knowing that there would be multiple bidders, the District decided to do two things it had not done before in filling a bargaining unit position: it tested the applicants and interviewed them.

First, it is noted that the District could do those things. There is no contract language which prohibits the Employer from using skills testing or interviewing to help it determine the qualifications of the job bidders. Given the absence of any express contractual prohibition against same, it follows that the Employer has the right, via the Management Rights clause, to use skills testing and interviews.

Second, I find that the written tests which were given to the applicants were job specific and job-related. I make that same finding concerning the questions which were asked of the applicants at the interview.

Third, the focus turns to one particular aspect of the grievant’s interview. The one aspect I’m referring to is this: the fact that her interview was the shortest of all the applicants. In her interview, the grievant was asked the same questions as the other interviewees were, but by her own admission, she did not elaborate much on the questions asked during the interview. In other words, her answers were short. According to the Association, the administrators who conducted the interview failed to follow up on the responses the grievant gave during her interview. I find that contention misses the mark. Simply put, it was not their responsibility to ensure that the grievant had a good interview; that was her responsibility. By all accounts, she had a poor interview, and her interview scores from the interviewers reflected that. While the Association characterizes the interview as a popularity contest which was used to ensure that the more popular candidate got the job, that characterization is not supported by the record evidence.

Having addressed those matters, the focus now turns back to deciding whether the grievant, who was the senior bidder, possessed the basic qualifications for the middle school lead secretary position. I've decided to begin my discussion by noting that the job posting listed eight qualifications for the job. Some of those qualifications, such as the sixth ("positive public relations skills"), the seventh ("good organizational skills") and the eighth ("any other qualifications as deemed important") can fairly be characterized as subjective in nature. By subjective, I mean hard to quantify. In and of itself, there's nothing wrong with subjective qualifications such as those just referenced, but it is hard for an outsider (i.e. the arbitrator) to quantify them. That being so, I'm not going to hang my hat on them, so to speak, and use them as a basis for deciding whether the grievant was qualified for the position. Instead, I'm going to hang my hat on the qualifications on that list that are more objective in nature. By objective, I mean capable of being quantified by the record evidence. In my view, the first, fourth and fifth qualifications which refer, respectively, to a high school diploma, Red Cross certification, and CPR certification, can fairly be characterized as objective. For the most part though, the parties essentially ignored/bypassed these criteria in litigating this case, so the undersigned will do likewise. By the process of elimination then, I'm down to just the second and third qualifications. I consider both to be objective in nature. I'll address them in the order just listed. The second qualification specifies that an applicant must have "technical school training or two years of experience as a secretary." An applicant can satisfy this qualification if they have either the education specified or the work experience specified. The grievant did not have the education specified (i.e. "technical school training"), so in order to qualify for the position, she needed to possess the work experience specified (i.e. "two years of experience as a secretary"). In trying to prove that the grievant satisfied this criteria, the Association primarily emphasized the time element (i.e. whether she had "two years of experience"). For the purpose of discussion, it is assumed that the grievant satisfied the "two years of experience" part of the qualification via her work at Mid-Central Tool Company. However, while the time element is important, it's just one part of the qualification. The other part of the qualification is that the work be "as a secretary". During her interview, the grievant described her job duties at Mid-Central Tool Company as filing, ordering, answering the phone and, as she put it, "helping out". At the hearing, she elaborated in more detail on her work duties there. Specifically, she testified she processed time sheets, handled parts, did shipping and receiving, answered the phone, placed orders and organized four parts books. In my view, it does not matter whether I rely on what the grievant said about her work at Mid-Central Tool Company in her interview, or what she said about it at the hearing. Neither established that her work at Mid-Central Tool Company was comparable to the work of a District lead secretary. Here's why. The District's lead secretary job description identifies over two dozen job duties that the incumbent is expected to perform. When the job duties that the grievant performed at Mid-Central Tool Company are lined up against the job duties of a District lead secretary, there is little similarity between them. By my count, I find just two of the grievant's job duties from Mid-Central Tool Company on the lead secretary job description. Specifically, I'm referring to answering the phone and filing communications. Let's assume that the fact that the grievant answered the phone and filed communications at Mid-Central Tool Company establishes that she could perform those duties at the middle school. That's not enough though, because there are still about two dozen other job duties on

the lead secretary job description that the grievant did not perform at Mid-Central Tool Company. That being so, the grievant's work there does not demonstrate she could perform the two dozen job duties that a District lead secretary is expected to perform. It would be one thing if the grievant's work duties at Mid-Central Tool Company, or anywhere else for that matter, lined up with or were comparable to, the duties of a lead secretary. However, they don't. They're not even close. I therefore find that the work the grievant performed at Mid-Central Tool Company was not relevant to the lead secretary position. In so finding, I am well aware that the job posting did not say that an applicant's prior work experience has to be relevant to the lead secretary position. Be that as it may, it's implicit. It's also implicit that an applicant's prior work experience should not be too dated. The Employer concluded that the grievant's work experience at Mid-Central Tool Company was dated in that it occurred almost 30 years ago. The undersigned is hard pressed to disagree with that conclusion. Given all the foregoing, I find that the grievant did not satisfy the second job qualification. Next, with regard to the third qualification on the job posting (i.e. that the applicant possess the "skills necessary to successfully complete [the] performance responsibilities" listed in the job description), the grievant relied on the following: 1) her work at Mid-Central Tool Company; and 2) her assertion at the hearing that she could perform all the lead secretary job duties. The first contention has already been addressed, so no additional comment is needed. As for the second contention, it suffices to say that the grievant's mere assertion that she could "successfully complete" all two dozen job tasks of a lead secretary is insufficient to prove it. Objective proof is required and is lacking here. Consequently, I also find that the grievant did not satisfy the third job qualification either.

Since the grievant did not satisfy the second and third qualifications on the posting, I need not address the District's remaining arguments concerning what happened at the grievant's interview. Consequently, no additional comments will be made about that.

Having found that the grievant did not meet the second and third qualifications which the Employer set for the lead secretary position, it follows that she did not possess the basic qualifications for the job. As a result, the District did not have to award her the position even though she was the senior bidder. The District also did not have to give her a 30-day trial period to demonstrate that she could perform the job because the trial period referenced in Article X, Section B, 2 only applies to the "successful applicant". The grievant was not a "successful applicant" for the middle school lead secretary position because she did not possess the basic qualifications for the job. Consequently, no contract violation has been found.

Those arguments not addressed in my discussion were considered, but were deemed unnecessary to decide this matter.

In light of the above, it is my

**AWARD**

That the District did not violate the collective bargaining agreement when it did not award the middle school lead secretary position to the grievant. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 16th day of September, 2009.

Raleigh Jones /s/

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Raleigh Jones, Arbitrator