

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CUBA CITY SCHOOL DISTRICT

and

CUBA CITY SCHOOL DISTRICT EMPLOYEES UNION

Case 24
No. 68576
MA-14276

Appearances:

Michael Wilson, Representative-at-Large, 8033 Excelsior Drive, Suite “B”, Madison, Wisconsin, appeared on behalf of the Union.

Kramer & Brownlee, LLC, Attorneys at Law, by **Eileen Brownlee**, 1038 Lincoln Avenue, Fennimore, Wisconsin, appeared on behalf of the Employer.

ARBITRATION AWARD

Cuba City School District Employees Union, herein “Union” and Cuba City School District, herein referred to as the “Employer,” jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission to serve as the impartial arbitrator to hear and decide the dispute specified below. The arbitrator held a hearing in Cuba City, Wisconsin, on April 22, 2009. Each party filed a post-hearing brief. The Employer, but not the Union, filed a reply brief. That reply brief was received August 7, 2009.

ISSUES

The parties stipulated to the following statement of the issues in this case:

1. Did the Employer violate the collective bargaining agreement when did not award the day shift custodian position to Grievant?
2. If so, what is the appropriate remedy? ¹

¹ The parties stipulated that I might reserve jurisdiction over the specification of remedy, including, but not limited to the calculation of back pay if either party requests that I do so in writing, copy to opposing party, within sixty (60) days of the date of the award.

FACTS

The Employer is a Wisconsin school district. The Union represents various non-professional employees including, but not limited to, custodians. The Employer operates two schools which are located on the same campus. It has two shifts of custodians. There is one day custodian who works 6:00 a.m. to 12:30 p.m. The day custodian is responsible to meet the custodial needs of both schools throughout his or her shift. All other custodians are night custodians. They are each assigned to work in a specific school and are not ordinarily called upon to move between buildings. Custodians perform routine repairs, clean equipment, clean classrooms and common areas, perform routine landscape maintenance chores and shovel snow. They occasionally drive school vehicles. The custodial position requires a high school diploma and at least three months of related experience. The position requires knowledge of chemicals used in cleaning, proper precautions in dealing with blood or other excretions and safety procedures. Grievant, Thomas Aird has been employed by the Employer as a night custodian for over twenty years. He is a member of the bargaining unit represented by the Union.

There are differences in the day custodian and night custodian positions. The schools are fully occupied during the day. The day shift custodian is required to deal with circumstances not normally faced by the night custodial staff. These situations include, but are not limited to, cleaning up after students who become sick or dealing with other situations while the building is occupied.

Mr. Timmerman was the long standing day custodian. He was known for his habit of working at a fast pace, namely, usually trotting instead of walking. The Employer faced budget shortfalls for the 2004-5, school year. It reduced the number of hours of work in this position because Mr. Timmerman was as efficient as he was. Shortly before this incident he passed away.

Superintendent McGrew has been the Superintendent of the Employer at all relevant times. He is the chief executive officer of the district and is the person with the ultimate authority to recommend the appointment of new employees to the School Board which makes the ultimate decision.

Superintendent McGrew decided to fill the position. At his direction, the position was posted in accordance with the posting procedure of the collective bargaining agreement. The Employer also published a notice seeking applicants from the general public which contained an abbreviated statement of the job duties and requirements from the job description. The Employer received over sixty applications, including one from Mr. Aird and one from Mr. John Davis. Two other bargaining unit members also applied. It decided to interview eight applicants, including Mr. Aird and Mr. Davis. Mr. Davis had done some contract work as a custodian for the Employer during the period September to October, 2004. Thereafter, he continued as a substitute custodian. Mr. Davis was ultimately selected for the position.

Superintendent McGrew determined to use his long-standing method of selecting employees which he has used over the years. Under that procedure, he selects an interview committee consisting of himself, the person who supervises the position, a building principal, a peer or two of the position, the Director of Student Services, a School Board member and a member of the public. The committee prepares a set of questions to be asked of all of the candidates. Superintendent McGrew served on the committee and also participated in the interviews. The questions are asked in the same manner by the same person for each applicant. Each committee member takes his or her own notes rating the applicant from one to ten on each answer. There is no discussion in advance of what benchmarks would be used to evaluate answers. The group discusses each candidate after his or her interview. After the end of interviews, the Superintendent or his designate then conducts a criminal background check of each applicant and ordinarily conducts a reference check with approximately three of each interviewee's stated references. The committee then meets as a whole and ranks the candidates.

The panel involved in this process included, among others, Superintendent McGrew, Principal Tim Hazen. For the reasons discussed below, I conclude Mr. Brandt was included on the panel.

The panel determined to use the same job description used for all custodians. The panel did not discuss in advance any additional or special qualifications for the day custodian position. Specifically, there was no discussion about a potential job requirement for the day custodian to have stronger interpersonal skills than the night custodian or that the day custodian needed to be "speedier" than the night custodian

The questions the panel established before the interviews were as follows:

1. Describe your experiences, with some detail, that make you an excellent candidate for the job.
2. You have just cleaned the hallways and put up a "do not enter" sign in preparation of a meeting of the Board of Education. A student walks in the hallway with dirty shoes. How do you handle the situation?
3. A student just reported a leaky faucet in the girl's bathroom. What do you do or how do you do it?
4. You are cleaning the cafeteria and the principal walks by and tells you to wash the entry way windows, and a teacher comes to you to tell you that a student has just knocked over a container in the chemistry room? What tasks do you do first, second and third?
5. What is the purpose of the Material Safety Data Sheet and what is your responsibility concerning them?

6. Describe how you would completely clean a rest room.
7. How do you change a ballast?
8. What is the height you are going up before you decide to use a step ladder instead of standing on a chair?
9. What is the best way to clean up vomit? How touchy is your stomach?
10. What is the best way to strip and wax a classroom in the summer?
11. What is the best way to clean up a blood spill?
12. If you see a mechanical problem in the school, how do you determine if you should fix it or inform the maintenance person?
13. On a day when it is snowing hard, how often do you mop the entry way?
14. Your supervisor has just told you how to perform a task but you know a better way. How do you handle it?
15. Your supervisor is gone when a more senior custodian tells you to do a job a different way than you have been doing it. What do you do?
16. You are working to clean the cafeteria. One of the tables will not fold up. How do you decide to get the help of another custodian or the supervisor?
17. How much do you want the public to use the school building after hours?
18. How clean can we get sidewalks in the winter? Have you scooped them before?

The last three questions were not asked of any of the interviewees. No question was asked of the candidates as to speed and none of the interview questions gave the candidates an opportunity to describe how they would handle the task of being responsible for two schools rather than one. Superintendent McGrew conducted reference checks for Mr. Davis and Mr. Aird, except one reference check for Mr. Aird was conducted by a panel member who was related to the referrer. That referrer was Mr. Davis's supervisor in an outside position. Superintendent Mc Graw testified at page 32 of the transcript that he checked with Mr. Aird's immediate supervisor Greg Brandt and the building principal of each building. Superintendent Mc Graw testified that each referrer expressed concerns as to whether Mr. Aird had the speed necessary to accomplish the day time job. He also contacted School Board Member Ron Schroeder. Superintendent Mc Graw talked referrers Greg Brandt who had supervised Mr.

Davis during his part time fill in work with the employer. The panel rated Mr. Davis number one and Mr. Aird number two. Mr. Davis was hired. Mr. Aird filed a grievance concerning this matter which was properly processed to arbitration.

RELEVANT AGREEMENT PROVISIONS

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ARTICLE 4 – VACANCIES AND TRANSFERS

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4.02 Selection: A bargaining unit employee who applies for a vacant position, prior to the end of the posting period, shall be granted an interview for the position, and, if qualified, may be awarded the position. In the event two or more equally qualified bargaining unit employees shall apply for a position, the most senior applicant shall be selected. The District retains the right to select the most qualified applicant for any position. The District retains the right to determine the qualifications needed for any vacant position.

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ARTICLE 7 – GRIEVANCE PROCEDURE

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7.04 Arbitration:

b. Arbitration Hearing: The arbitrator shall schedule a hearing on the grievance and, after hearing such evidence and arguments as the parties desire to present, shall render a written decision. The arbitrator shall have no power to add to, subtract from, modify, or amend any term of this Agreement.

. . .

ARTICLE 21 – MANAGEMENT RIGHTS

21.01 Management retains the rights of possession, care, control and management that it has by law, and retains the right to exercise these functions under the term of the collective bargaining agreement except to the extent such functions and rights are restricted by the terms of this Agreement. These rights include, but are not limited to, the following rights:

I) To select employees, establish quality standards, and evaluate employee performance.

. . . ”

POSITIONS OF THE PARTIES

Union

The Employer violated Article 4 by failing to select Mr. Aird for the day time custodian position. The Union notes that the Employer refused some of its requests for bargaining information about the selection process. The arbitrator should draw a negative inference from the Employer's failure to provide that information. Mr. Aird was never told why he was denied the position. Mr. Davis and Mr. Aird supposedly finished first and second respectively in the interview process. Mr. Aird has 20 years experience doing the same work as is in dispute. Mr. Davis has no experience at that work. It is incredible that Mr. Davis is deemed more qualified. The record demonstrates that there were two, and only two, reasons why the panel determined that Mr. Davis was allegedly more qualified than Mr. Aird. The Employer asserts that the job expectations were higher than those expressed in the job description. The sole criteria by which the Employer chose Mr. Davis as best qualified was his speed. However, there is no evidence that the Employer ever told Mr. Aird this was a requirement or used any objective criteria or tests to determine the relative speed of the two applicants. Mr. Aird was entitled to an honest evaluation of his credentials. Mr. Aird clearly had the better credentials to perform the essential duties of the position. It is obvious why Superintendent McGraw and the other interviewers might find Davis had the more outgoing personality: they are his friends. Speed was the ticket because if the normal had been good enough, Mr. Aird clearly would have been the better qualified. The Union request that the arbitrator sustain the grievance and award the day shift position to Mr. Aird.

Employer

The Employer did not violate the agreement when it did not select Mr. Aird for the vacant position. Section 4.01 permits the Employer to select the most qualified applicant for a position. The Union bears the burden of proof to establish that the Employer's decision was unreasonable, discriminatory, arbitrary or capricious. Section 4.02 permits unit employees to apply for a position, but does not require that the employee be selected. It states in relevant part that the employee “. . . may be awarded the position.” This is permissive language. Similarly, the provision also states that: “The District retains the right to select the most qualified applicant for any position.” The provision refers to “applicant” and does not require that the Employer select a unit employee if there are unit and non-unit applicants. The only role seniority plays is when the Employer chooses between two equally qualified candidates. The language is, therefore, clear: the Employer has the right to select the most qualified applicant.

Mr. Aird's qualifications were not equal to those of Mr. Davis. The previous occupant of the position was known for his efficiency and speed in doing his work. Mr. Aird is not as qualified an applicant as Mr. Davis. Four of the seven individuals on the interview committee agreed that Mr. Davis was able to work at a superior rate of speed. The Union has failed to meet its burden of proof that the Employer's actions were arbitrary, capricious, discriminatory or unreasonable. The grievance should be denied.

In reply, the Employer notes that in its view, the Union has made two arguments: Mr. Aird was the most qualified and the Employer should be punished for not giving the Union the information it requested. The Union incredibly asserts that because Superintendent McGrew and Mr. Davis attend the same Church and are members of the same Lion's Club, the seven members of the interview panel were somehow tainted. This panel included one interviewer who was a reference for Mr. Aird, but ultimately rated Mr. Davis higher.

The Union asserts that it was entitled to the interviewer notes. It cites no law or precedent in support of that novel approach. The Union also argues that the Employer should have provided it with the applicant rankings and the reasons for its hiring decisions. The Union, however, never asked for either.

The Union asserts that Mr. Aird is more qualified based upon his twenty years' experience. The record does not support that conclusion. The record shows that the panel and the Employer were aware of Mr. Aird's years of service. They ranked him second among sixty (60) applicants. Both Superintendent McGrew and Mr. Hazen testified that the position requires amazing speed. The Union has not shown that decision of the Employer was arbitrary, capricious, discriminatory or unreasonable. It merely upbraids the Employer. The grievance should be denied.

DISCUSSION

There is considerable ambiguity in the provisions of Section 4.02. Nonetheless, it does provide: "The District retains the right to select the most qualified applicant for any position." The believable evidence in this case indicates that Mr. Timmerman, deceased, was a very fast worker. He is one whom the Employer is not likely to be able to replace. The believable evidence also indicates that the Employer reduced the number of hours allocated to this position in the 2004-05 school year based upon the fact that Mr. Timmerman could get the job done quickly. Under the circumstances, I conclude that ability of one of the two qualified applicants to handle the day shift custodian job unusually quickly was an important qualification for the position, even though it has now become a somewhat unrealistic expectation.

The Union correctly argues that the first sentence of Section 4.01 includes an obligation by the Employer to give an employee a fair chance to state his or her credentials. I do not believe that Mr. Aird was given any chance to address the unusual speed requirement. Nonetheless, under the specific circumstances of this case, I conclude that he would not have

been selected anyway. This is true because three members of the interview panel had direct knowledge of Mr. Aird's speed at his current job. Of these, two were in his chain of direct supervision, Principal Hazen and Supervisor Brandt, and had detailed knowledge both of his speed and that of Mr. Davis. Both agreed that Mr. Davis was more likely to be able to come closer to the speed requirement.

I, therefore, must address the Union's main contention. The Union's main contention is that the panel including Principal Hazen and Supervisor Brandt agreed that Mr. Davis would be faster and should otherwise be selected essentially not because of any difference in qualifications between the two but merely because Superintendent McGrew was advocating Mr. Davis' selection because of Mr. Davis' social relationship with Superintendent McGrew. Essentially, the Union is stating that the testimony of the Employer's witnesses is not credible as to their real reason for the decision.

Superintendent McGrew testified that the sole factor which distinguished the two candidates was the issue of speed. Principal Hazen testified there were two concerns he remembered being discussed. He remembered that the panel concluded that Mr. Davis would be a better person to interact with the public and that the panel believed that Mr. Davis would be faster at the job. While this testimony calls into question the motivation for this decision, I conclude that Principal Hazen's testimony is forthright and honest. He effectively testified mainly at page 98 of the transcript that he concurred with the panel that Mr. Davis would be faster at the day shift job.

It is unclear whether Mr. Brandt, Mr. Aird's immediate supervisor, was on the interview panel. Employer witnesses did not list all of those who served on the panel, but merely discussed the structure of the panel in general terms. Superintendent McGrew testified that the supervisor of the subject position was included in the interview which would be Mr. Brandt. I have therefore concluded he was on the panel and did support the conclusion that Mr. Davis would be faster. I note, however, that in any event Superintendent McGrew credibly testified that he did perform a reference check with Mr. Brandt and that Mr. Brandt did not believe Mr. Aird had the extra-ordinary work speed required for the position. The evidence is insufficient to conclude that Mr. Brandt's reference was improperly motivated. Under the circumstances, I conclude that the Employer did not violate the agreement when it selected Mr. Davis for this position.

AWARD

The Employer did not violate Section 4.01 or any other provision of the agreement when it failed to select Mr. Aird for the disputed position. The grievance filed herein is denied.

Dated at Madison, Wisconsin, this 23rd day of September, 2009.

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Arbitrator