

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 CUSTODIAL-MAINTENANCE EMPLOYEES : Case 101
 LOCAL 1750, AFSCME, AFL-CIO : No. 46911
 : MA-7103
 and :
 :
 SHEBOYGAN AREA SCHOOL DISTRICT :
 :

Appearances:

Godfrey & Kahn, S.C., by Mr. Paul Hemmer, appearing on behalf of the District.
 Ms. Helen Isferding, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

ARBITRATION AWARD

The above-captioned parties, hereinafter the District and the Union respectively, are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to said agreement, the parties requested the Wisconsin Employment Relations Commission to appoint a member of its staff to hear the instant dispute. The undersigned was appointed by the Commission. Hearing was held on May 11, 1992, in Sheboygan, Wisconsin. No stenographic transcript was made. The parties concluded their briefing schedule on July 2, 1992. Based upon the record herein and the arguments of the parties, the undersigned issues the following Award.

ISSUE:

The parties at hearing stipulated to the framing of the issue as follows:

Did the District violate the collective bargaining agreement when it granted the position of Head Custodian at Urban Middle School to Verlyn Volund rather than to Verlin Ertel, the grievant? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS:

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE V - SENIORITY - JOB POSTING

Section 1 - Seniority Seniority for transfers, promotions, vacancies and new positions shall be recognized.

Section 2 - Lay-Off and Recall * * *

Section 3 - Job Posting - Notice of promotional vacancies or new positions shall be posted on 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 Director of Personnel Services. A new employee may not bid for any posted position during the first year of employment.

Qualifications being relatively equal, the senior employee shall be given the position. The employee receiving such promotion shall serve a six (6) month 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 six (6) months trial period is over. 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) days after starting in the new position. If said employee feels dissatisfied, he/she may appeal the decision through the grievance procedure.

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

Section 4 - Termination of Seniority * * *

Section 5 - Definition - Seniority is defined as the time elapsed since an employee's last date of hire to a position included in the bargaining unit.

Section 6 - Probationary Employees * * *

ARTICLE XV - 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.

BACKGROUND

The instant dispute involves a posting for the position of Head Custodian at Urban Middle School. Five employees posted for said position and went through

the interview process. A panel of management representatives asked questions and scored the applicants on their responses. The applicants' scores on this interview were as follows:

<u>Candidate</u>	<u>Possible Score</u>	<u>Score</u>
Gene Gooding	1245	987
Verlyn Volund	1245	937
Richard Eddy	1245	645
Verlin Ertel	1245	454
John Warrens	1245	130

Gene Gooding withdrew from consideration after the interview and the Employer selected Verlin Volund for the position.

Verlin Ertel, a more senior employee than Volund, grieved the awarding of the disputed position. At the time of the grievance being filed, Ertel was a delivery person at the District's Central Support Building, while Volund was a head custodian at North High School. Because both the grievant and successful applicant's names are similar, they shall be referred to exclusively by their surnames.

POSITIONS OF THE PARTIES:

Union:

The Union strenuously asserts that Ertel, the grievant, is as qualified for the position of head custodian at Urban Middle School as Volund, the successful applicant. Stressing that the applicable language involves a modified seniority clause, based upon "relative ability," the Union claims that qualifications need not be "exactly equal." Approximate or near equality of competing employes warrants selection of the most senior employe.

Comparison of the qualifications, according to the Union, cannot lead to the conclusion that Volund is substantially superior to Ertel. Requisite qualifications for the disputed position do not include past experience in the position.

The Union compares the work experience of the two employes as follows:

<u>Ertel</u>	<u>Volund</u>
<u>Work Experience</u> <u>In School District</u>	<u>Work Experience</u> <u>In School District</u>
1 1/2 as substitute. Over three and 1/2 years Central Support as C-2, 3 1/2 years C-2 Farnsworth Middle School, and since 1986 Delivery.	14 years school systems - 3 months Urban, 28 months Wilson, 10 months North, 11 years at Grant School C-3 (two employes under him) Approx. 4 years Head Custodian North High

1987-1991 Worked as Custodial
Substitute and Recreation
Attendant
Responsible for college kids
summers

Work Experience
Outside District

6 years in the National Guard
Recruiter in high schools, at
fairs

Work Experience
Outside District

8 years break in employment -
(7 months Plastics
Engineering, 3 years garbage
man City, 5 years Heritage
Insurance as custodian.

The Union submits that Ertel has the requisite experience to perform the head custodian job noting that his delivery job contains many of the same skills. His past experience substituting for head custodians, his supervisory experiences with respect to seasonal employes and his familiarity with boilers, electricity, heating, ventilating and air conditioning all support this conclusion. Pointing to the fact that negative work habits or problems are not part of the record, it submits that a clear inference may be drawn that both applicants are good employes.

The Union also argues that the District acted arbitrarily and capriciously in selecting Volund over Ertel. It claims that the District's action was biased against Ertel. The test which the District utilized was not relevant, reasonable or fair and should be given little weight. A score on such a subjective test is arbitrary and capricious. The scoring itself shows bias.

The Union asks that Ertel be awarded the position and made whole for any losses sustained.

District

The District argues that its authority to determine how and by whom employe qualifications for appointment to positions will be made is unrestricted by the terms of the agreement. Because of this unfettered authority, the Union may not successfully assert that the selection process provides a basis upon which to reverse the appointment decision. Citing a previous arbitration award, the District argues that it may choose the best qualified candidate, subject to union challenge on grounds that said decision is unreasonable under the facts, arbitrary, capricious, or discriminatory. In the absence of such evidence, the District stresses, the Union has no basis upon which to challenge the selection.

To support the reasonableness of its decision the District makes the following argument. It claims that it appropriately identified prior successful experience as a head custodian as the most important criterion in selecting a new head custodian for the middle school in question. In this vein, it points

to arbitral precedent which establishes experience as objective evidence and a reasonable criterion to apply for determining employe qualifications for the purpose of promotion.

In the instant case, it is only natural that the junior employe, Volund, would be more familiar with the procedures and requirements of the head custodian position based upon his past experience in head custodian positions. The District submits that it was justified in its conclusion that the relative abilities of Volund and Ertel were not relatively equal or even close. Volund's abilities were far superior based upon substantially greater experience. Irrespective of Ertel's substitute custodian experience, it would be necessary to show him how to do many aspects of the head custodian position, particularly in view of his lack of technical expertise and lack of involvement with matters such as scheduling and complete building maintenance.

The District avers that its selection committee acted responsibly in weighing prior successful experience as a head custodian as the most important criteria. Citing problems with the previous head custodian, it stresses that the District was not in a position to permit an inexperienced employe the opportunity to learn on the job. It required the services of an employe who was capable of performing all aspects of the job at the time of appointment.

The District maintains that Ertel is unqualified for the position because he has no prior successful experience as a head custodian, because he has not acquired the requisite experience with regard to operation of the school heating and boiler system, because his oral communication skills require substantial improvement, because he has limited record keeping experience, and because he has only limited interest in appointment to a head custodian position.

It stresses that Volund was substantially and significantly more qualified for appointment to the head custodian position than was the grievant and requests that the grievance be denied.

DISCUSSION:

The contract language applicable to the instant dispute involves job posting language and a very general management rights clause reserving to the District all rights in hiring, promoting, and transfer except as limited by other specific provisions of the agreement. Thus, the District is correct in its contention that reasonable promotion/transfer decisions are within its authority pursuant to Article XV - Management Rights, unless they are expressly restricted by other provisions of the agreement.

Both parties look to Article V, the Seniority - Job Posting article to support their respective positions. Section 1 is a general statement mandating that "seniority for transfers, promotions, vacancies, and new positions shall be recognized." Section 3, the job posting provision is much more specific providing that "qualifications being relatively equal, the senior employe shall be given the position." It also provides that the employe receiving the promotion shall serve a six (6) month trial period.

The clause in Article V, Section 3 of the contract before the undersigned is a "relative ability" modified seniority clause. With such a clause comparisons between employes bidding for the job are necessary and proper. Seniority becomes a factor only if the qualifications of the bidders are "relatively" equal. 1/ "Relatively" does not mean "exactly" equal as the Union

1/ Elkouri and Elkouri, How Arbitration Works, Fourth Edition, p. 611.

notes. 2/ Only an approximate or near equality in qualifications is necessary to bring seniority into the decision as a determining factor. 3/ Conversely where the qualifications of the junior employe are substantially superior, he/she may be given preference over the senior employe.

Section 1, being a strict seniority clause, and Section 3, a relative ability modified seniority clause, conflict with and contradict each other. Where two provisions of a contract conflict or contradict each other, the task of arbitrators is to harmonize them. Moreover, generally speaking, the more specific provision will be favored over the more general or broad proposition.

Thus while Section 1 is a broad mandate to "recognize" seniority in most personnel transactions, the "relative ability modified seniority" language in Section 3 applies specifically to job postings. Accordingly, it is concluded that this more specific standard set forth in Section 3 is the standard to be applied in the instant case.

While the Union is correct in its assertion that the qualifications of the applicants need not be exactly equal, if the qualifications of the junior applicant are substantially superior, he may be awarded the position under the parties modified seniority clause. Thus, the real question is whether the qualifications of Volund are substantially superior to those of Ertel, the grievant.

The record indicates that Volund has far more extensive experience as a head custodian than does Ertel. Volund served as a C-3 head custodian at Grant Elementary School for 11 years and as a head custodian at North High School for three years as a C-4. Ertel has substitute experience as a C-3 and C-4 head custodian in the early and middle 1980's but such experience at most accounts for approximately 154 hours. While many of Ertel's skills may be transferrable from his current stock room position to that of head custodian at the middle school in question, it is evident that Volund's work experience as a head custodian is far superior to that of Ertel.

Similarly, the record also demonstrates that Volund's supplemental educational training is also greatly superior to Ertel's. Volund, although not possessing a boiler operator's license, did complete a Lakeshore Technical College comprehensive Custodial Training Program and had completed a boiler code and inspection plus an auxiliary power plant system course. Ertel, having

2/ Supra at p. 611.

3/ Ibid, p. 611-612.

participated in several in-service courses on maintenance, nevertheless, did not take the Lakeshore Technical College comprehensive Custodial Training course nor did he have any courses relating to boiler operations.

The District argues that Ertel's verbal skills and motivation for performing the head custodian position were lacking. Citing his low score on a verbal interview test, it maintains that Ertel's responses figured into the decision in a minor way. The undersigned expressly refuses to determine whether said test was arbitrary, capricious, unreasonable, or biased. 4/ Rather she relies upon the District's un rebutted assertions that its decision as to qualifications was premised primarily on the past work experience and ancillary educational training in custodial matters possessed by the applicants.

Having found Volund's qualifications in these two areas, the reasonableness of these criteria not really being challenged, to be substantively superior to those of Ertel, the undersigned finds the District's selection to be within its authority as set forth in Article V, Section 3. It is my decision and

AWARD

1. That the District did not violate the collective bargaining agreement when it granted the position Of Head Custodian at Urban Middle School to Verlyn Volund rather than to Verlin Ertel, the more senior employe.

2. That the grievance is denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 13th day of August, 1992.

By _____
Mary Jo Schiavoni, Arbitrator

4/ This arbitrator expressly declines to find Ertel unqualified for said position premised upon said interview but rather finds that Volund's work and educational qualifications were far superior to those of Ertel, thus justifying Volund's selection under the applicable contract language.