ARBITRATION **Case: McDonald #3**

SOMEPLACE Public Schools

Employer,

and

Grievance: MIKE NINO
AAA Case No: 543904-04

SOMEPLACE Educational Support Staff

Union.

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DECISION AND AWARD

PATRICK A. McDONALD
Arbitrator

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II. INTROUDCTION

On April 13, 2004, new positions were announced for the new elementary school building entitled, TREELINE. Among them was a custodial day position. The grievant, a seventeen (17) year employee, applied for that position. When the grievant, the employee with the most seniority, was found not be qualified for the position, a grievance was filed protesting that action. (Joint Exhibit 2). The grievance was initially denied at the first step, but at the second step hearing dated September 28, 2004, the grievance was granted. Approximately one week later, however, by letter dated October 5, 2004, Mr. J. VINES, the Assistant Superintendent, acknowledged that he had sent an employer's response and was now denying the grievance. (Joint Exhibit 2A).

The grievance was not able to be settled through the steps of the grievance procedure and hence, was submitted for final and binding arbitration in accord with Article XIII of the Collective Bargaining Agreement. (Joint Exhibit 1). Utilizing the services of the American Arbitration Association, your undersigned arbitrator was jointly selected by the parties to conduct a hearing and render a final and binding decision. An evidentiary hearing was held on November 16, 2005 at the TREELINE elementary school in SOMEPLACE, Michigan. At that time, both parties were ably represented and had the full opportunity of presenting testimony and exhibits. They supplemented this opportunity with helpful post hearing briefs. This matter is now ready for decision and award.

III. FACTS

During the 2004-2005 school year, the SOMEPLACE Public Schools built two new school buildings. One was a middle school, and the other, an elementary school. The elementary school was named TREELINE. In staffing the new middle school, an old middle school was closed and the middle school staff moved into the new middle school.

By a posting dated April 13, 2004, certain positions were announced as being vacant at the new elementary TREELINE School. (Joint Exhibit 5). Among them were two custodial positions; a full time day position, and a one half night position. As a result of this posting, three applications for current SOMEPLACE employees, including the grievant, were received for the full time day position. The grievant, as a seventeen (17) year employee, was the senior applicant.

Interviews were conducted by a three person interview committee. They unanimously concluded that the grievant, Mr. NINO, despite having the most seniority, was not qualified for the vacant position. They recommended the second seniority person, Mr. PEACH. He was found by the committee to be qualified and was assigned to the position.

The first witness for the Union was Mr. Michael K. VINES, UNION Director, and employee of the UNION for thirty-two (32) years. He indicated that he had extensive experience in negotiations. Mr. VINES said that the first contract was negotiated in 1987. He referred to Article VIII concerning vacancies and transfers, which was negotiated at

that time. (Union Exhibit 8). According to Mr. VINES, the language of Article VIII had identical language in 1987 as it does in the present 2003-2005 contract.[1] (Joint Exhibit 1). According to Mr. VINES, that language indicates that the applicant to be appointed must be qualified for the position. If the employee is qualified, then the most senior employee gets the job. According to Mr. VINES, the job does not go to the best qualified, but to the most senior qualified employee.

This second witness for the Union was the grievant, Mr. MIKE NINO. He indicated that he has been employed by the school district as a custodian since September 26, 1988. During that period of time, he has worked in seven (7) different buildings, as well as summer assignments. For six years, Mr. NINO testified that he covered three buildings, including working summers. He worked with lighting, stripping of floors, minor repairs, toilets, etc. He has ordered materials for these schools to which he has been assigned. Mr. NINO identified a vacancy for custodian at SOMEPLACE High School in August of 1998. (Union Exhibit 6). That notice of vacancies listed preferred qualifications, as well as the position summary. He stated that he was selected for that position. Mr. NINO also identified a vacancy for a full time position at Marshall Elementary dated August 4, 2004. (Joint Exhibit 7). He indicated that he was qualified for

[1]The parties stipulated that the language concerning qualifications within Article 8, has remained the same from 1987 through the present.

that position. In the past, he has done light plumbing, changed valves, unplugged toilets, repaired light switches, among other things.

Mr. NINO also identified a memorandum dated April 13, 2004, indicating a custodian position at the new elementary TREELINE building. (Joint Exhibit 5). Mr. NINO said he applied for that position and was the highest seniority employee applying for that position. [2] He went through the interview with the committee and was notified that another custodian was to receive the position. As a result, he filed a grievance, which is the subject matter of this procedure.

Mr. NINO testified that he is trained in computers, email and has his own computer at home. Usually, qualifications are mentioned on the postings for the positions. If there are new duties, ordinarily, training occurs.

On cross examination, Mr. NINO was asked whether he was informed of the qualifications at the time of the interview. He indicated that, "yes, he was to some extent, but not before the interview". According to Mr. NINO, the interview emphasized three areas. First was the male role model, second, supervising and computers, and third, cooling tower and water chemistry within the building. According to Mr. NINO, he sent a communication to the administration on those three points. Mr. NINO also stated that during the interview process, he walked through the building, including the cooling tower.

[2]The parties stipulated that the grievant is the senior applicant for this position.

The school district presented several witnesses. The first witness was Mr. Dan PEARS, the Principal. Mr. PEARS took the arbitrator and the representatives of both parties on a tour of the building, with the heat transfer unit and heating being unique. There is also a lunch room which involves the use of autistic children, along with other children.

The second witness was Ms. LEAVES. Ms. LEAVES manages the high school cafeteria. Ms. LEAVES testified concerning a meeting held in March of 2004. Three officers of the Union were present. The postings for the middle school and the TREELINE school were discussed. It was emphasized that qualifications and seniority were important in filling both positions. Ms. LEAVES identified a memo sent to Mr. VINES, the Assistant Superintendent, following that meeting. (Employer Exhibit 10). She acknowledged that memo was not an official document from the Union.

The third witness for the Employer was Mr. J. VINES, the Assistant Superintendent for the past four years. Prior to that time, Mr. VINES was a high school Principal. His duties include human relations area, including staffing requirements. Mr. VINES testified that he drafted the qualifications for the custodian position. According to Mr. VINES, he had to staff two buildings, the middle school and the new elementary school. The administration moved staff from the old middle school to the new middle school with the consent of both Unions. The elementary school, however, was an additional building. In drafting the qualifications for the new elementary school, Mr.

VINES said he was assisted by Mr. LAND, the Maintenance Director, and Mr. PEARS, the Principal of TREELINE since it opened. Mr. VINES emphasized two of the differences at the TREELINE school. The first was that it had a number of special needs students in attendance. Further, the new building had a cooling tower, and special knowledge of water chemistry and pool operation would be necessary. Mr. VINES emphasized that during the interview process, the applicants were asked about any computer knowledge experience, cooling towers and water chemistry, as well as dealing with special needs students. Mr. VINES said that the committee concluded that the grievant was not qualified to be a custodian at the TREELINE elementary school.

On cross examination, Mr. VINES indicated that the qualifications were discussed with the applicants during the interview process. Subsequently, these qualifications were showed to the Union. He acknowledged that the posting was general in nature, and did not list all of the qualifications for the position. He stated that no new certifications were necessary for the new building, however, the interview committee was looking for certain attributes. Mr. VINES admitted that the contract allows for a trial period for job filling purposes. If a person comes from a new position, they may or may not get training; however, he did acknowledge that the successful applicant, Mr. PEACH, did get training per Article VIII-G of the Collective Bargaining Agreement.

The next witness was Mr. D. PEARS, the Principal of TREELINE Elementary since it opened. Mr. PEARS said he was elementary Principal in the OTHERPLACE school district in Michigan for six years, prior to coming to the TREELINE school. In

opening that school, it was necessary to hire fifty (50) employees, including a custodian. He helped develop the requirements for the job. During the interview process, Mr. PEARS confirmed that the requirements for the job were explained to the applicants. This included lunch room experience.

Mr. PEARS explained the grievant had little or no experience in opening schools. He did have experience working with youth groups at his church. Mr. PEARS acknowledged that he knew the successful applicant, Mr. PEACH, because he was a parent in the OTHERPLACE school district, and had a special needs child at his school. The special needs program for autistic children is special to this school for the first four grades.

The final witness was Mr. LAND, the Maintenance Director since August of 1999. Mr. LAND supervises the custodial crew of thirty employees. He had input into the design of the TREELINE elementary school, as well as the requirements for custodian.

Mr. LAND explained that knowledge of water chemistry, because of the water tower at the school, was important. It was also necessary to have good organizational skills. Mr. LAND said he was on the interview committee concerning the three applicants. He explained the connection with water chemistry and the differences between an open loop and closed loop system. According to Mr. LAND, the grievant acknowledged that he did not have experience with water chemistry or setting up a new

school. Mr. LAND said he felt Mr. PEACH, the successful applicant, was more qualified. He then added that he did not think the grievant was qualified.

On cross examination, Mr. LAND acknowledged that leadership skills and hands on mechanical skills are trainable attributes.

The final witness recalled was Mr. VINES. According to Mr. VINES at the grievance hearings, the Union spoke about seniority and not qualifications. On cross examination, Mr. VINES was shown Union Exhibit 6 and Joint Exhibit 7. Under those position postings, Mr. VINES said that the grievant was probably qualified. Mr. VINES stated that the job requirements were created during the period from May through July of 2004. They, however, were not posted.

IV. RELEVANT CONTRACTUAL LANGUAGE

ARTICLE VIII
VACANCIES AND TRANSFERS

A. **Vacancy Defined**

A vacancy shall be defined as a newly created position or present position that is not filled that the Board wishes to fill.

B. Job Description

The District shall have the right to determine specific requirements for each position in the bargaining unit provided such requirements are not arbitrary or capricious. The District shall develop job descriptions encompassing these job requirements. Job descriptions may be updated on an annual basis to meet changing needs, and postings for vacant positions will be as stated in the job description. Job descriptions will only be changed after study of positions and proper notification of the UNION. When a job description is changed to include certification, notice to the UNION will be given six (6)

months prior notice to such change taking affect. Where work responsibilities within classifications are interchangeable (e.g. custodial/grounds), the posting will be for the position containing the greater work emphasis, and said posting will also indicate additional responsibilities with the other position.

C. Postings

When a vacancy occurs within the bargaining unit, the Board will post such vacancies within thirty (30) working days of the job becoming vacant. The Board shall publicize the same by giving written notice of such vacancy to the UNION with copies to be posted in each building. No vacancy shall be filled except on a temporary basis due to an emergency, until such vacancy has been posted for at least ten (10) working days.

Bulletin boards will be placed in each work area for postings and other official announcements.

D. Applications

All applications shall be submitted in writing to the Superintendent or his/her designee.

E. Written Responses

When the Board reaches a decision, each applicant shall be so notified in writing with a copy being forwarded to the UNION.

F. Filling Vacancies

Vacancies will be filled with the most seniored applicant who is qualified.

G. Trial Periods

1. Employees awarded new positions shall be given adequate instruction and granted a trial period to determine:

    a. The desire to remain on the job;
    b. The ability to perform the job. The immediate supervisor shall work with the employee to help him/her to succeed in a new position.

    Employees moving from one location or building to another in the same job category or classification, shall have a trial period of no more than two weeks (10 work days). Employees moving to a new category shall have a trial period of no more than four weeks (20 work days).

2. During the trial period, employees shall have the opportunity to revert back to their former job. If the employee's performance is unsatisfactory in the new position, notice and reasons shall be submitted in writing to the employee.

ARTICLE III
BOARD RIGHTS AND RESPONSIBILITIES

A. Source of Rights

The Board, on its own behalf and on behalf of the electors of the District, hereby retains and reserves unto itself, without limitation, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and the Constitution of the State of Michigan and of the United States, including, but without limiting the generality of the foregoing, but not in conflict with the conditions of this Agreement, the right to:

B. Specific Rights

2. Continue its rights and past practices of assignment and direction of work of all of its personnel, determine the number of shifts and hours of work and starting times and scheduling of all the foregoing.

3. Direct the working forces, including the right to hire, promote, suspend and discharge employees for just cause, transfer employees, assign work or extra duties to employees, determine the size of the work force and to lay off and recall employees.

6. Determine employee qualifications and the conditions of continued employment.

V. CONTENTIONS OF THE PARTIES

A. For the Union

According to the Union, the Employer should have placed the grievant, Mr. NINO, into the day custodian position at TREELINE elementary. The Union emphasizes that Mr. NINO is a long time employee of the district, has worked in eight different types of custodian positions for the district over his seventeen years of employment. The language governing the filling of positions in Article VIII, has been in the contract for a number of years. (See Union Exhibit 8).

According to the testimony of Mr. Mike VINES, UNION staff person, an employee, after completing the requirements to become a custodian in the school district, is qualified to do all custodian positions within the district. The contract, in addition, provides for a trial period for employees who are assigned to positions with new responsibilities. During that trial period, the school district is responsible for providing adequate instruction to the employee if there are new functions in the position.

The UNION emphasizes that, while the school district has the right to update job requirements to meet changing needs, the contract is very clear and about the process and procedure the district must follow. According to the contract, job descriptions will only be changed after a study of the position and proper notification of the UNION. In this case, if the position had a change in responsibilities, these procedures were not followed. Further, even the successful applicant was given training on new components of the job. In addition, Mr. LAND testified that the new requirements were trainable.

In this case, the UNION emphasizes that the grievant, Mr. NINO, who has worked for the district for seventeen years, has been assigned to work in eight different assignments. He has met all of the requirements and qualifications for the custodian position in the past, and based upon this record, he meets the requirements in this position as well.

In summary, the UNION submits that is has demonstrated that the school district violated a contract by not appointing the grievant to the custodial position at the TREELINE elementary school. It, therefore, requests that the grievant be granted this position with back pay for any monies lost because of not receiving that job.

B. For the Employer

The school district in this case, emphasizes that in non-disciplinary cases, the UNION representing the grievant, has the burden of demonstrating a contractual violation. In this case, according to the school district, the Union failed to sustain that burden.

The school district maintains that under Article VII, Section F, new job vacancies should be assigned to the most senior employee who is qualified. In this case, the Employer submits that the evidence demonstrates the grievant is not qualified and therefore, did not have the right to be appointed to this position.

The Employer emphasizes that under the Collective Bargaining Agreement, the Employer has the right to determine the qualifications for the custodian I position. Having so determined, following the interview process, the interview committee determined that the grievant was not qualified for that position. This decision was explained because there was a need to have a custodian who had knowledge and/or experience working with special needs (autistic) children because the school has a high enrollment of these special needs students. Further, the successful applicant should have experience with technology, such as water chemistries and computers, and experience in being a custodian I and supervision. In this case, the grievant had little or no experience in opening up a new facility. His knowledge of working with computers was limited. He had little or no experience working with special needs students in the lunch room.

The Employer also emphasizes management rights under Article III of the Collective Bargaining Agreement. Rights, including managing the school's business, determining employee qualification and directing of the work force. In this case, after interviewing the applicants, the committee, unanimously, gave the position to the senior qualified applicant.

The Employer submits that at no time during the interview process nor during the arbitration process, did the grievant demonstrate that he was qualified for this position. As a result, the Employer submits that the grievance has no merit and must be denied.

VI. ISSUES

By not selecting the grievant, who was the most senior applicant, did the Employer violate Article VIII of the Collective Bargaining Agreement? If so, what is the remedy?

VII. DISCUSSION AND DECISION

In answering this issue, both parties have referred to Article VIII of the Collective Bargaining Agreement between the parties. That Article, entitled vacancies and transfers, is controlling in resolving this dispute.

Under Section VIII-F, filling of vacancies, the parties have agreed to the following language, which has been in the agreement since 1987; “vacancies will be filled with the most seniored applicant who is qualified”.

Since this grievance specifically talks in terms of "seniority", a brief discussion of this concept is in order. Prior to collective bargaining contracts, many employers gave some consideration and preference to employees who had more years of service with their particular company. Generally, however, such preferences were voluntary in nature and not binding as a legal obligation. In the present context of labor relations, seniority benefits exist as rights to the extent made so by labor collective bargaining contracts. Seniority is used in many aspects of the

employment relationship. These include promotions, layoffs, rehiring, shift preferences, vacation schedules, overtime work, etc.

Generally speaking, seniority is based upon length of service. Most collective bargaining contracts, however, have a definition that may even include super seniority for Union officers or deny such seniority under certain circumstances.

In resolving the issue before me, many arbitration decisions are available as references to this Arbitrator. In reviewing the arbitration decisions, there is little or no consistency. This is due to the fact that most of the arbitration case decisions are based upon specific contractual language peculiar to that employer-union relationship. The definition of the term "seniority" or the past practice and custom of the parties in interpreting particular ambiguous contractual language is also important.

Seniority is a valuable right, and as such, it should not be either lightly discarded or easily changed. Particularly in these economic times, it may mean the difference between having employment or not. Moreover, unlike other benefits, an employee's seniority affects the rights of other employees. As such, if a right such as seniority is to continue to accrue or accumulate, the language in the contract should be clear and unambiguous. With this background, let us now examine the relevant language and issues in this case. Basically, there are two types of seniority provisions. There are “strict seniority provisions” and “modified seniority provisions”. The strict provisions require that the employer give preference to the employee with the most seniority without regard to any other considerations. The modified seniority provisions, while giving weight to seniority, recognize other factors as well. The ability of the individual to perform the job as well as his seniority is considered. In addition to seniority, an applicant must

be qualified to perform the job. Seniority alone is not enough to guarantee that an employee will receive a desired job opening.[3]

Modified seniority clauses fall within several basic categories:

In the first basic type of modified seniority clause, seniority will govern, but only if the employee possesses ability and fitness equal to that of a junior employee. This is commonly referred to as a "relative ability clause".[4]

Under this type of clause, comparisons are valid; not only must the senior employee possess the skill and competence to perform the job, but his ability must be equal to the younger employee. Seniority will be taken into consideration, but only if the ability of the two employees is equal.

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[3]Elkouri and Elkouri, *How Arbitration Works*, 4th Edition, 1985, at p610.

[4]For examples of the "relative ability clause" see: Atlas Powder Co., 30 LA 674 (Frey 1958): American Smelting & Refining Co., 29 LA 262 (Ross 1957); Temco Aircraft, 28 LA 72 (Boles 1957); Kuhlman Electric Co., 26 LA 885 (Howlett 1956); Pittsburgh Steel Co., 21 LA 565 (Brecht) 1953). A typical "relative ability clause" reads as follows:

> "In all cases of promotion...seniority and qualifications shall be the determining factors. However, when aptitude, fitness, skill and ability of employees are relatively equal, seniority shall govern." Atlas Powder Co., supra.
>
> "Promotion...the following factors as listed below shall be considered: however, only where facts 'a' or 'b' are relatively equal shall length of continuous service be the determining factor:
>
> a) ability to perform the work,
> b) physical fitness,
> c) continuous service."

Under the second type of modified seniority clause, commonly referred to as a "sufficient ability clause," the senior employee will be given preference if he or she possesses the minimum qualifications to perform the job.[5] The only determination to be made is whether the senior employee can do the job.[6] Comparisons between the senior and junior employees are not valid; "the job must be given to the senior bidder if he is competent, regardless of how much more competent some other bidder may be."[7]

The language in this Collective Bargaining Agreement amounts to a sufficient ability clause. As a result, comparisons between applicants are unnecessary and are indeed, improper. The job must be given to the most senior bidder, if he or she is qualified and competent. This is so, regardless of how much more competent other bidders may be. In other words, if the senior employee meets the minimum qualification requirements, they are entitled to receive the position.

This sufficient ability clause is a modified seniority clause. As such, it's designed to give recognition to management's right to manage its business, and at the same time, protect senior

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[5] Ball Brothers Co., Inc., 27 LA 353 (Sembower 1956);
Marquette Cement Mfg. Co., 25 LA 479 (Barnes 1955);
Central Franklin Process Co., 19 LA 32 (Marshall 1952);
Alabama Power Co., 18 LA 24 (McCoy 1952);
Republic Steel Corp., 1 LA 244 (Platt 1945). A typical "sufficient ability clause" reads as follows:

> "...in questions of promotions...laying off, and rehiring of employees, where employees are qualified to do the job, that employee having the longest record of continuous service with the company shall be entitled to preference..." Franklin Process Co., supra.

[6] Republic Steel Corp., 1 LA 244 (Platt 1945).

[7] Alabama Power Co., 18 LA 24, (McCoy 1952).

employees. Generally speaking, in disputes of this type, Union's tend to overemphasize seniority while management tends to overemphasize ability versus seniority.

In this case, the grievant is a long-term, seventeen year employee. He has held custodial positions over that lengthy period of time and testified that he has held eight such previous positions. Obviously, he is qualified to be a custodian.

The Employer has argued that it has the right to determine specific requirements for each vacancy. Indeed, under Article VIII-B, this right is expressly recognized, provided such requirements are not arbitrary or capricious. However, in that particular Article and paragraph B, there is a procedure and protocol to be followed if job descriptions are being updated and modified. The parties have provided that such job descriptions may be updated on an annual basis to meet changing needs, as was the case at the TREELINE elementary school.

The parties have expressly included language which states, "job descriptions will only be changed after study of positions and proper notification of the UNION". In this case, there was testimony from Mr. PEARS, the TREELINE building Principal, Mr. VINES, the Assistant Superintendent and Mr. LAND, the Maintenance Director, that the job requirements for the custodian I at TREELINE were examined and changed. Unfortunately, however, for the school district, the memorandum announcing the vacancy at TREELINE elementary, did not list any changes in job requirements or preferred qualifications as it did in other vacancies. (Union Exhibit 6 & Joint Exhibit 7). Instead, as Mr. VINES explained, qualifications were first discussed with the applicants during the interview process. In other words, the first time these qualifications and special attributes were mentioned, was during the interview process, when

things like technology, water cooling towers, water chemistry and working with special needs students were emphasized.

Further, Mr. VINES, honestly, acknowledged that, “subsequently, we shared the qualifications with the UNION”. He stated that the, “posting was general in nature, and did not list all the qualifications for the position”. He further admitted that, “no new certifications were necessary for the new building position, however, the interview committee was looking for certain attributes”. Unfortunately, these attributes were not mentioned in the job vacancy posting, nor to the UNION, until after the interviews had been conducted. In doing so, the procedure set forth in Article VIII-B was not followed. That language is quite clear; “job descriptions will only be changed after study of positions and proper notification of the UNION”.

In this case, the grievant was clearly qualified to be a custodian and fill the custodian position. He had been doing so for seventeen years in the school district. If the school district wanted to change qualifications and update its job description for this particular school, it had the right to do so under Article VIII, provided, however, that it met the procedures set forth in Article VIII-B. Unfortunately, those procedures were not followed in this case, and as a result, a contractual violation has been demonstrated.

In remedying this violation, your arbitrator will order the school district to appoint the grievant to the custodian I position at the TREELINE elementary school. Under Article VIII-G, the grievant would be entitled to be given, “adequate instruction and granted a trial period to determine the desire to remain on the job and his ability to perform the job”. Further, his immediate supervisor under the contract, “shall work with the employee to help him to succeed

in a new position". Of course, if another elementary custodian I position were available that was agreeable to the grievant and the UNION, this also would suffice as a remedy in this case.

In reaching this conclusion, your arbitrator, in no way, is attempting to diminish or restrict the management rights of the school district administration in future cases. At the same time, under the Collective Bargaining Agreement, I have a duty to enforce the terms jointly negotiated by the parties. In this case, the expressed procedures set forth in Article VIII, were not followed by the school district. By doing so, a contractual violation has been demonstrated and needs to be remedied.

VIII. AWARD

1. The grievance is sustained. The school district is ordered to place the grievant, Mr. NINO, at the first shift position for custodian I at the TREELINE elementary school or in a similar position at another elementary school, if the grievant is agreeable.

2. In accordance with the express remedy requested by the UNION in its post hearing brief, the grievant is also to be paid, "back pay of five cents (.05) per hour for hours worked at the TREELINE elementary from July 21, 2004 through the placement of the grievant at his position at TREELINE elementary school.

3. The parties are to meet concerning this matter, and the grievant is to be placed into the position of custodian I day shift at TREELINE elementary school, under Article VIII-G, no later than fifteen (15) days following receipt of this award.

Your arbitrator will continue jurisdiction over this matter in event, clarification of this award is necessary and until the award is carried out.

Respectfully submitted,

Patrick A. McDonald

PMcD/clbh