

of disputes that are properly processed through the grievance procedure.

The Arbitrator, Richard John Miller, was selected by the Employer and the Union (hereinafter "Parties") from a panel submitted by the Minnesota Bureau of Mediation Services. A hearing in the matter convened on March 9, 2006, at 10:00 a.m. in the Board Room at the School District Office, 531 Elmhurst Avenue South, Braham, Minnesota. The hearing was transcribed. The Parties were afforded full opportunity to present evidence and arguments in support of their respective positions. The Parties filed posting hearing briefs which were received on May 1, 2006, after which the record was considered closed.

ISSUES AS DETERMINED BY THE ARBITRATOR

1. Was the grievance timely filed in accordance with the contractual grievance procedure?
2. If timely filed, is the School District's determination that the Grievant was not qualified for the promotion to Elementary School Custodian arbitrable under the terms of the Collective Bargaining Agreement?
3. If arbitrable, did the School District violate the terms of the Collective Bargaining Agreement by not offering the Elementary School Custodian position to the Grievant?

STATEMENT OF THE FACTS

The facts are not in serious dispute. The Grievant, Bonnie Swanson, has been employed by the School District since 2002. At

that time, she initially was employed as a long-term substitute in a cleaner/sweeper position at the Braham High School ("High School"). The Grievant's temporary employment in that position lasted until December 4, 2003, when the School District hired her in a permanent, full-time cleaner/sweeper position at the High School.

As a cleaner/sweeper, the Grievant is responsible for general cleaning duties. (School District Exhibit #1). The Grievant's duties include cleaning classroom floors, emptying pencil sharpeners, cleaning blackboards, emptying garbage and cleaning a set of restrooms and locker rooms. Id. She was assigned to the night shift from 3:00 p.m. to 11:00 p.m.

As a cleaner sweeper at the High School, the Grievant works with three other employees, a part-time cleaner/sweeper, another full-time cleaner/sweeper and a custodian. Occasionally, the Grievant's supervisor, High School Head Custodian/Groundskeeper Dennis Siltman, also will work in the building during the night shift. Thus, the Grievant always is under the observation of other employees.

On August 11, 2005, in accordance with the posting requirements contained in Article XIII, Vacancies, of the Collective Bargaining Agreement, the School District internally posted a notice of a vacancy for the position of full-time

Elementary School Custodian. (Joint Exhibit #3). The work hours of this position are from 3:00 p.m. to 11:00 p.m.

The job description for Elementary School Custodian sets forth the following job tasks and qualifications:

1. Floor maintenance of classrooms, special rooms and halls, move furniture.
2. Sweep, empty baskets, check heat, emergency cleaning in rooms, check sinks and faucets.
3. Clean toilets, fixtures, mop toilets floors, wipe off partitions, empty baskets, clean mirrors and tile, replace paper products and soap, disinfect area.
4. Cleans building entrances and remove trash.
5. Haul groceries, supplies and special equipment for programs.
6. Clean, change filters, oil and inspect room heating equipment, replace parts as needed.
7. Clean boiler, check boiler treatment, keep boiler room neat and clean, clean incinerator.
8. Lock and unlock doors, put up flag and take the flag down.
9. Report any equipment or areas of the building that need replacement or repair or are for some reason unsafe or are unsightly to the proper supervisor.
10. Assign work to students on work study programs and adults on special work assignments, work with other district custodians harmoniously on special assignments.
11. Repair plumbing, heating or electrical problems on existing systems.
12. Perform related work as apparent, appropriate or assigned.

Qualifications

*specific training or job experience required before High School Diploma.

High School Diploma.
Boiler License.
Chemical Use Training.

*Estimated length of time required for new entrant to achieve acceptable level of proficiency.

6 months.

(Joint Exhibit #4). In response to the posting, the Grievant submitted a letter of interest in the Elementary School Custodian position on August 15, 2005. (Joint Exhibit #5).

As is standard School District practice, the District convened a hiring committee to review the qualifications of the applicants for this position. The interview committee was comprised of Superintendent Nicholas Waldoch, High School Principal Kurt Kahlenbock, Elementary School Principal Craig Schultz, Elementary School Head Custodian Randy Coleman and High School Head Custodian/Groundskeeper Dennis Siltman.

As part of this hiring practice, the committee makes an initial determination as to the qualifications of the candidates. This determination is based upon an interview with the applicant, review of the applicant's file, including job history and experience, and input from the applicant's supervisor. Once it is determined that the applicant(s) are qualified, the committee

then applies seniority to the extent applicable. The Grievant was the most senior person who applied for the Elementary School Custodian position.

The Grievant was interviewed for the Elementary School Custodian position on August 22, 2005. Based upon each area of the interview process, the interview committee determined that the Grievant was not qualified for the position for several reasons. First, during the interview process, all applicants were asked the same questions as to their qualifications for the position. Specifically, the Grievant and other candidates were asked as to their ability to perform the specific tasks required of the Elementary School custodian. One of the major tasks each candidate was questioned about was their ability to conduct repairs. (Joint Exhibit #4). These repairs would include things such as: replacing or changing ballasts and light bulbs in high places such as the cafeteria, gym and classrooms, as well as minor boiler repairs and the repair of any equipment used in the day-to-day performance of their duties (i.e., vacuum cleaner repair). In response to this question, the Grievant informed the committee that she did not have experience and does not know how to conduct many of the types of repairs that would be required. In fact, last summer the Grievant refused to go up on the Genie Lift to perform some work.

Although the job description required that the applicant have "specific training or job experience," the Grievant could relate no experience or training in the maintenance of any type of equipment over which she would be responsible.

During the second part of the application process, the School District also reviewed the Grievant's personnel file in considering whether she was qualified for the position. The Grievant's file contains the results of a criminal background check. This background check, conducted in accordance with Minnesota Statutes Section 123B.03, revealed that as recent as July of 2002, the Grievant had been convicted of felony theft. (School District Exhibit #2). The Grievant testified that this conviction resulted when it was discovered by her former employer, the City of Harris, that she had stolen approximately \$58,000 from the City while working as a city clerk. The Grievant disclosed her felony conviction to the School District before she was hired in 2002.

The Grievant's criminal history was considered by the committee in determining her qualifications. In this regard, the committee reviews any employee's criminal history with respect to the pertinence of the offense to the position for which the person is applying. The School District reviews the requirements of the position, the nature of the conviction, how long ago the

offense occurred and the type of access the person will have to the School District, its students and personnel. While some offenses automatically will disqualify a person from employment based on the nature of business conducted by the School District, (e.g., sex crimes) other offenses would disqualify someone only if his or her duties were directly relevant to the conviction.

In this instance, the School District determined that the Grievant's conviction for felony theft was not the type of offense that would disqualify her from all employment within the School District, as evidenced by the fact that the District had offered and employed the Grievant in the cleaner/sweeper position. However, the nature of the cleaner/sweeper position did not pose significant concerns for the School District in light of the nature of the duties of this position and the offense for which the Grievant had been convicted.

In this regard, the Grievant specifically was not assigned to clean any administrative offices or any area where she would have access to anything valuable or sensitive. She was not provided with keys to any offices where such items may be kept. As a cleaner/sweeper in the High School, the Grievant could be constantly observed. The entire High School is monitored by video cameras and an alarm system. Additionally, while the cleaner/sweepers at the High School work independently, they do

not work alone. Rather, there are at least three other employees who also would work the same shift as the Grievant.

In contrast, the committee believed the position of Elementary School night custodian is more sensitive to the issues raised by the Grievant's prior conviction. There is no security system in the building. An essential responsibility of the night custodian position is the ability to work unsupervised and to have access to the entire school, including administrative offices where valuable and/or confidential materials are kept. Based upon the fact that the custodians in both buildings have cleaning duties and access to the administrative offices, the committee determined that the risk that the Grievant may once again engage in felony theft disqualified her from any position, including that of the Elementary School Custodian, where she would have unsupervised access to anything of value.

The third area the committee reviewed in determining if the Grievant was qualified for the position was her past performance. Here, also, concerns were raised. From the time of the Grievant's employment, particularly when under the direct supervision of Mr. Siltman, through the time of her application, several performance issues had been noted. As noted previously, the committee was concerned as to Grievant's willingness and/or ability to work in high places based upon her statements that she

would not perform duties. Additionally, several performance issues arose which were discussed between the Grievant and Mr. Siltman, which the School District claims were verbal warnings.

On or about March 17, 2005, Mr. Siltman, spoke with the Grievant with respect to the manner she was performing her cleaning duties. (School District Exhibit #3). Mr. Siltman explained that the Grievant was not cleaning bathrooms to the extent that he expected. Id. Thus, Mr. Siltman returned to the bathrooms with the Grievant and showed her specifically what had not been done properly and how such cleaning should be performed. Id.

Similarly, on or about August 8, 2005, Mr. Siltman had further concerns as to how the Grievant was cleaning the classrooms assigned to her. (School District Exhibit #3). Again, Mr. Siltman noted that not all cleaning had been done and gave the Grievant the opportunity to correct these issues. Id. He spoke with the Grievant and directed that she go around the classrooms when she was finished to ensure that everything had been completed. Id.

When Mr. Siltman checked a few days later to determine whether the Grievant had followed his directives, he found that she had not. In this regard, on August 12, 2005, Mr. Siltman first checked with the Grievant to find out if she had finished

cleaning the classrooms. Id. The Grievant responded that she had finished the work. Mr. Siltman then went through the classrooms to check them and found that she had not, in fact, completed cleaning them. Id. Therefore, Mr. Siltman, again, took the Grievant around the classrooms and showed her where she had failed to clean the corners, cabinets and desks. Id.

The Grievant admitted that she had been made aware of these concerns and others in the past, but none of these concerns were ever documented in her personnel file and she never received any verbal warnings.

There were issues raised to the Grievant regarding her performance and ability to perform her job independently without supervision during her evaluation. In this regard, on or about January 17, 2006, the Grievant was formally evaluated by Mr. Siltman. (School District #7). In this evaluation, it was noted that the Grievant did not use extra time to perform additional cleaning duties. The evaluation noted that the Grievant had been watching sports, outside of her break time, when she should have been working. Her evaluation addressed the Grievant's ability to properly clean the classrooms. Id.

Although this evaluation was not conducted until after the application process, the concerns addressed the Grievant's performance during the entire year since Mr. Siltman assumed

supervision over the Grievant, which would have included the time period prior to her application. Thus, Mr. Siltman verbally conveyed the concerns addressed in the evaluation, as well as those noted above, to the committee during the hiring process. Mr. Siltman explained that based upon the fact that the Grievant was not properly performing her cleaning duties at the High School and required supervision to ensure the job was done properly, the Grievant was not qualified to perform even more cleaning duties at the Elementary School where there was no supervision.

Members of the committee agreed that it was essential that the person filling the Elementary School Custodian position be able to make appropriate decisions as to what needs to be cleaned and how to clean independently. Thus, the committee further determined that issues as to the Grievant's past performance also rendered her unqualified for the Elementary School Custodian position.

Based on all of these concerns--the Grievant's inexperience and knowledge in conducting repairs, her past criminal history and her past performance--the committee unanimously determined that Grievant was not qualified for the Elementary School Custodian position. Although the committee members considered the fact that Grievant was the most senior applicant, they

determined that seniority was not a relevant factor as they initially decided that she was not qualified for the position.

The School District notified the Grievant on August 23, 2005, that she was not selected for the position.

There is a requirement in the "qualifications" section of the Elementary School Custodian job description that one must possess a boiler license that is "required before appointment." The School District hired an individual outside of the Bargaining Unit to fill the position of Elementary School Custodian that did not possess a boiler license. This individual was assigned the hire date of August 30, 2005.

The Grievant filed a grievance dated August 27, 2005. (Joint Exhibit #2a). The grievance was filed and received by the School District on September 2, 2005. Id. In the grievance, the Grievant stated that nature of her claim as follows: "Failure to recognize employees seniority and assigning the senior qualified applicant with the internally posted job." Id. The Grievant based her grievance upon Article XIII of the Collective Bargaining Agreement. Id. The remedy sought by Grievant is appointment to the position of Elementary School Custodian. Id.

The grievance was denied by the School District throughout the levels contained in the grievance procedure, including a Level III denial on November 21, 2005. (Joint Exhibit #2e).

Subsequently, by letter dated December 1, 2005, which was received by the School District on December 7, 2005, the Grievant requested final and binding arbitration of her grievance. (Joint Exhibit #2f).

SCHOOL DISTRICT POSITION

In resolving this grievance, there are preliminary matters as to the Arbitrator's jurisdiction which must be resolved. First, the matter before the Arbitrator is not arbitrable based upon Grievant's failure to follow the agreed upon timelines and procedures in the grievance process, which removes this matter from the jurisdiction of the Arbitrator, including any claim for removal of disciplinary action. Second, the subject matter of the grievance, namely the Grievant's contention that she was entitled to be hired for the custodial position, is not a subject matter within the jurisdiction of the Arbitrator to decide. Rather, in accordance with the terms of the Collective Bargaining Agreement decisions as to the selection of qualified employees for promotion is within the School District's exercise of its inherent managerial right, which is unaltered by the Contract. While the Parties did agree to arbitrate issues as to the filling of vacancies, the Parties did not include in the Contract an intent to arbitrate issues arising out of the filling of promotional positions or the fundamental decision as to whether

or not an employee is qualified for a position. As such, the grievance must be denied in its entirety based upon the Arbitrator's lack of jurisdiction to nullify the School District's determination on these issues.

Even if the matter were arbitrable, the School District did not violate the terms of the Collective Bargaining Agreement by not selecting the Grievant for the custodial position. While the Union argues that applicants are to be appointed by seniority, the clear and unambiguous language of the Contract clearly evidences that this is not the case. The Union has not presented any credible evidence that the Contract language was ever intended to have such an application. Rather, if past practice was even relevant to this determination, the facts show that the School District has retained the discretion to make determinations as to the qualifications of employees prior to appointing the more senior applicant.

The School District's decision not to hire the Grievant for this position was based upon the fact that she was not qualified for the position due to her past performance, her lack of knowledge and skills required of the position, as well as her criminal history. If the School District was required to place the Grievant in this position, the District would be placing itself at significant risk.

Accordingly, the School District urges the Arbitrator to dismiss this grievance in its entirety.

UNION POSITION

The grievance is both procedurally and substantively arbitrable and proper for decision by the Arbitrator on the merits of the case.

It is an accepted principle that, to say one thing is to exclude another. One can say, "The road is blacktop" and can be taken to mean precisely that. One need not add, "And the road is not gravel, the road is not brick, the road is not dirt, and the road is not concrete." Just the same, the vacancy language contained in the Contract provides for a thought-filled, detailed, and specific procedure by which positions are posted, and by which employees apply for and receive promotions and transfers. The School District does not have the ability to re-interpret Contract language over the objection of the other party.

What is ultimately at stake in this grievance goes far beyond the job assignment for one veteran employee. What is at stake is this group of employees' faith that what they bargain with the School District is actually enforceable and that their hard-fought battles to retain seniority in their Contract have not been for naught. The grievance was filed on behalf of Ms.

Swanson, but the entire Bargaining Unit has a stake in the outcome. The School District is seeking, in this arbitration, to gain what once it tried to gain through the collective bargaining process, but was unsuccessful. In effect, the School District is seeking to change the long-standing interpretation of the Contract through an arbitration decision.

The Grievant wishes to advance his career with the School District and serve in the capacity of Elementary School Custodian. Therefore, the Union implores the Arbitrator to sustain the grievance and order that the Grievant be assigned to the Elementary School Custodian position and be made whole, and that that the Arbitrator rule in favor of the long-standing uncontested meaning of the vacancy language in the Contract. Specifically, that "senior most qualified..." means, that the senior candidate bidding on a position shall be awarded that position at the close of the posting. If the scenario were to arise of two employees with the same seniority date bid on a posting, then the School District would then determine "most-qualified" and that candidate would be awarded the position.

The Arbitrator should also rule to strike all discipline related documentation in the Grievant's personnel file which occurred between the filing of this grievance and its settlement, which were attempts to target and intimidate the Grievant.

ANALYSIS OF THE EVIDENCE

The first issue is whether the grievance was timely processed by the Parties through the timelines established in the contractual grievance procedure. The Parties fault each other Party for violating the established timelines. The Contract language pertaining to grievances is found in Article XVIII, Grievance Procedure, as follows, in relevant part:

Section 4. Time Limitation and Waiver: A grievance shall not be valid for consideration unless the grievance, signed by the grievant, is submitted in writing to the School District's Superintendent, setting forth the facts and the specific provision of the Agreement allegedly violated and the particular relief sought within twenty days after the date of the first event giving rise to the grievance occurred. Failure to file any grievance within such period shall be deemed a waiver thereof. Failure to appeal a grievance from one level to another within the time periods hereafter provided shall constitute a waiver of the grievance. An effort shall first be made to adjust an alleged grievance informally between the employee and the School District's Superintendent.

Section 5. Adjustment of Grievance: The School District and the employee shall attempt to adjust all grievances which may arise during the course of employment of any employee within the School District in the following manner:

Subd. 1. Level I: If the grievance is not resolved through informal discussions, the School District Custodial Supervisor shall give a written decision on the grievance to the parties involved within ten days after receipt of the written grievance.

Subd. 2. Level II: In the event the grievance is not resolved in Level I, the decision rendered may be appealed to the superintendent of schools, provided such appeal is made in writing within five days after receipt of the decision in Level I. If a grievance is properly appealed to

the superintendent, the superintendent or designee shall set a time to meet regarding the grievance within fifteen days after receipt of the appeal. Within ten days after the meeting, the superintendent or designee shall issue a decision in writing to the parties involved.

Subd. 3. Level III: In the event the grievance is not resolved in Level II, the decision rendered may be appealed to the School Board, provided such appeal is made in writing within five days after receipt of the decision in Level II. If a grievance is properly appealed to the School Board, the School Board shall set a time to hear the grievance within twenty days after receipt of the appeal. Within twenty days after the meeting, the School Board shall issue its decision in writing to the parties involved. At the option of the School Board, a committee or representative(s) of the Board may be designated by the Board to hear the appeal at this level, and report its findings and recommendations to the School Board. The School Board shall then render its decision.

Section 6. School Board Review: The School Board reserves the right to review any decision issued under Level I or Level II of this procedure provided the School Board or its representative notifies the parties of the intention to review within ten days after the decision has been rendered. In the event the School Board reviews a grievance under this section, the School Board reserves the right to reverse or modify such decision.

Section 7. Denial of Grievance: Failure by the School Board or its representative to issue a decision within the time periods provided herein shall constitute a denial of the grievance and the employee may appeal it to the next level.

The grievance pertains to the fact that the School District did not promote the Grievant, a cleaner/sweeper at the High School, to the Elementary School Custodian position. Pursuant to the terms of the contractual grievance procedure, the School District and Grievant were to attempt to resolve the disagreement

of her promotional denial through Level I of the grievance proceedings through informal discussions between the School District Custodial Supervisor, Mr. Siltman, and the Grievant. A written response to the grievance is then to be issued within ten days of the receipt of the written grievance. A non-decision within this time frame is considered to be a denial of the grievance, which requires a written appeal by the Grievant to move the grievance to the next level, pursuant to Article XVIII, Section 7 of the contractual grievance procedure.

The School District alleges that a decision on the grievance by Mr. Siltman was to be made no later than ten days from September 2, 2005, the date of the receipt of the grievance or September 19, 2005. Thus, according to the School District the Union appeal would have been required to have been made five days following September 19, 2005, which would have been September 26, 2005.

It is undisputed that the Grievant did not provide Mr. Siltman with a copy of the grievance, and the Grievant's only communication with Mr. Siltman regarding her grievance was a note she taped to her time card, prior to filing her grievance, telling Mr. Siltman that she intended to file a grievance. Similarly, she did not contact Mr. Siltman after filing her grievance to discuss the matter, nor did Mr. Siltman attempt to

contact the Grievant about the grievance. As Mr. Siltman had not received any such communications from the Grievant, he did not issue any response to the grievance within the ten-day time period.

According to the contractual grievance procedure, if the matter is not resolved at Level I, the decision may be appealed to the Superintendent of Schools, in writing, within five days after receipt of the written decision in Level I. Since the Union had not received a reply from Mr. Siltman, they requested information via e-mail about the status of the grievance on September 20, 2005. The School District responded to this e-mail on September 28, 2005, requiring that the contractual grievance process must be followed, including adherence to all the steps. (Joint Exhibit #2b).

Absent a response from Mr. Siltman the Union exercised its right to advance the grievance to the next level--Level II. Once a grievance advances to level II, "...the superintendent or designee shall set a time to meet regarding the grievance within fifteen days after receipt of the appeal." The School District continued to communicate with the Union in regards to the grievance at Level II, but made no effort to set-up a time with the Union which is required in Level II. As a result, in a letter from the Union dated October 3, 2005, the Union clearly

states that the next level sought for the grievance would be Level III--School Board level. (Joint Exhibit #2c). The Union timely requested that the grievance advance to Level III on October 12, 2005, pursuant to Article XVIII, Section 7. (Joint Exhibit #2d).

On November 21, 2005, the School District provided the Grievant with a response to the Level III hearing. (Joint Exhibit #2e). In this response, the School District, again, reserved its objections with respect to the Grievant's failure to follow the grievance process and informed the Grievant that her grievance was denied based both on her failure to follow proper grievance procedures as well as on the merits. Id. The Grievant then timely filed a request with the School District for final and binding arbitration on December 1, 2005. (Joint Exhibit #2f).

When reasonable doubts exist with respect to either procedure or substantive arbitrability questions, the courts and arbitrators usually resolve them in favor of finding jurisdiction upon the theory that the long-term interests of the parties are better served by resolving the merits of the case, rather than upon technical grounds. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960); Reserve Mining Co. v. Mesabi Iron Co., 172 F. Supp. 1, Aff'd, 270 F.2d 567 (8th Cir.

1959); Layne-Minnesota Co. v. Regents of the University of Minnesota, 123 N.W.2d 374-375; Ingram Mfg. Co., 75 LA 113, 116 (1980); University of Dubuque, 75 LA 420, 426 (1980); Alliance Machine Co., 74 LA 1058 (1980). Indeed, because of the strong arbitral and legal policy in favor of arbitration, "an order to arbitrate a particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. The doubt should be resolved in favor of coverage." AT & T Technologies v. Communications Workers of America, 475 U.S. 643 (1986), quoting Warrior & Gulf Navigation Co., 363 U.S. 574 at 582-83 (1960).

The Minnesota Supreme Court has ruled that the issue of arbitrability must be presented to an arbitrator for decision if it is "reasonably debatable" whether the parties' dispute is within the scope of their agreement to arbitrate. Minnesota Federation of Teachers, Local 331 v. Independent School District No. 361, 310 N.W.2d 482, 484 (Minn. 1981); Minnesota Education Association v. Independent School District No. 495, Grand Meadow 290, N.W.2d 627, 629 (Minn. 1980) (Grand Meadow); State v. Berthiaume, 259 N.W.2d 904, 909 (Minn. 1977); Atcas v. Credit Clearing Corp. of America, 202 Minn. 334, 197 N.W.2d 448, 452 (1972).

In the instant case, the contractual grievance procedure timelines are quite obviously "susceptible to an interpretation that covers the asserted disputes" raised by the Union and "reasonably debatable" whether the parties' dispute is within the scope of their agreement to arbitrate. If anything, both Parties are at fault in not adhering to the contractual timelines. Thus, the grievance must be construed as being timing filed in accordance with the contractual timelines.

The School District alleges that the grievance is not substantively arbitrable. The Employer claims that it has preserved its inherent managerial right to select an employee to a position which constitutes an employment advancement, transfer or promotion. The Contract germane to the School District's argument is contained in Article XIII, Vacancies, as follows:

New positions or vacancies of more than thirty (30) days duration will be posted for a period of five (5) working days, and the senior qualified applicant will be assigned thereto, within five (5) days after the closing of posting. Applicants for posted positions must submit their bids to the proper office in writing, and duplicate copies of all bids will be delivered to the local steward of the unit by the applicant before the close of the posting. The final decision for employment advancement, transfer or promotion, however, will be made by the School District and such authority is vested in the School District subject to relief procedure as specified by P.E.L.R.A.

It is undisputed that the Grievant is seeking a promotion when she applied for the Elementary School Custodian position.

She would receive an increase in pay from that of a cleaner/sweeper to that of a custodian. The Elementary School Custodian position entails more responsibilities including increased supervisory duties. While it is true that "[t]he final decision for...promotion...will be made by the School District and such authority is vested in the School District..." that decision is subject to review an arbitrator by virtue of the "...relief procedure as specified in P.E.L.R.A."

The inherent managerial right of the School District to make such hiring decisions is further recognized in Articles IV, School District Rights, and XVIII, Grievance Procedure, of the Contract. More specifically, Article IV, Section 1 provides as follows:

Inherent Managerial Rights: The exclusive representative recognized that the School Board is not required to meet and negotiate on matters of inherent managerial policy which include, but are not limited to, such areas of discretion or policy as the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure and selection and direction and number of personnel.

Similarly, Article XVIII, Section 9, Subd. 7 provides that the jurisdiction of the arbitrator shall not extend to matters of inherent managerial policy.

In light of the foregoing Contract language, it is a well-established principle of arbitration that a determination as to

an employee's ability to fill a job is a management decision and that the determination of an employee's qualifications can be challenged only on the basis that it was arbitrary, capricious, discriminatory, clearly wrong, made in bad faith or contrary to the contract. National Labor Relations Bd., 68 LA 279 (1977); Monsanto Research Corp., 39 LA 735 (1962); Trans World Airlines, Inc., 40 LA 697 (1963); Dry Dock and Repair Co., 6 LA 838 (1947). Absent abuse of discretion, an arbitrator's judgment should not be substituted for that judgment specifically reserved to the School District. Foesch v. Independent School District No. 646, 300 Minn. 478, 485, 223 N.W.2d 371,375 (1974). Clearly, the grievance is substantively arbitrable and the merits of the grievance are properly before the Arbitrator for decision.

The Union asserts that pursuant to the first sentence in Article XIII ("New positions or vacancies of more than thirty (30) days duration will be posted for a period of five (5) working days, and the senior qualified applicant will be assigned thereto..."), the School District is obligated to appoint the senior applicant to any position within the Bargaining Unit. The Union fails to recognize the word "qualified" in this sentence. Such language in the Contract is deemed to be a "modified seniority clause" which requires new positions or vacancies (such as promotions) be awarded to the most senior applicant only as

long as that applicant can meet the qualifications of that posted position. Seniority is used only after an applicant is found to be "qualified" for the vacancy.

Any alleged past practice by the Union that seniority alone dictates the awarding of open positions or vacancies does not change the clear and unambiguous Contract language of "senior qualified applicant." This language does not provide that the most senior applicant shall be appointed to a vacant position but, rather, that the senior "qualified" applicant will be appointed.

Even if this Contract language was unclear, the Parties' past practice has established that the School District has the right to make determinations as to the qualifications of its employees and reject applicants it deems to be unqualified. The unrefuted evidence establishes that for several years, the School District always has utilized a hiring committee when filling positions within this unit. If the School District were required to hire individuals based solely upon seniority, this practice would be irrelevant and unnecessary. Yet, it has continued, unchallenged for years.

Moreover, while the Union presented examples of situations when the most senior applicant was provided a position for which he/she applied, no evidence was presented that the individual's

were unqualified for those vacancies. In fact, in each of the instances cited by the Union, it was conceded that the applicant was qualified for the position. Further, the School District presented evidence that there have been occasions when the most senior employee was not hired due to a determination he was not qualified for the position. Thus, the Union has not supported its argument that there is a past practice that requires the automatic appointment of the most senior applicant for a position without regard to whether the employee is deemed to be qualified.

The School District's decision not to hire the Grievant for the Elementary School Custodian position was based upon their determination that she was not qualified for this position due to her criminal history, her past performance, and her lack of knowledge and skills required of the position.

As to criminal history, it is undisputed that the Grievant was convicted of felony theft as recent as July of 2002 for stealing approximately \$58,000 from the City of Harris while working as a city clerk. The School District was aware of her conviction when they hired the Grievant as a long-term substitute in a cleaner/sweeper position at the High School in 2002.

The Grievant's criminal background has never been an issue in her current full-time cleaner/sweeper position at the High School. There is no evidence that the Grievant has engaged in

any theft of School District property during her employment. In fact, the Grievant clearly stated that she regretted her past mistakes and would not repeat them.

While it is true that the Grievant works with other employees at the High School and there are security cameras to monitor the employees at the High School, unlike the situation at the Elementary School, if the School District did not trust her to work they would not have hired her in the first place. Thus, it is a moot point to state that being trusted to work independently at the High School is different than being trusted to work alone as the Elementary School Custodian.

The School District has safeguards to prevent theft if they believe the Grievant is still a safety risk at the Elementary School. They can prohibit her from entering rooms that may pose a potential security risk. Most importantly, the School District can terminate her for just cause for proven theft.

The School District further deemed the Grievant to be unqualified for the Elementary School Custodian position based on her past performance. The School District cites three performance issues as to improper cleaning of restrooms and classrooms at the High School before she applied for the Elementary School Custodian position. They also cite cleaning performance issues in her evaluation during the year prior to her

application for the position. The School District deemed these examples of poor cleaning to be verbal warnings to the Grievant to improve upon her work performance. There is, however, no documentation in the Grievant's personnel file indicating that Mr. Siltman deemed her performance issues to be verbal warnings. The Grievant was never presented with any documentation from Mr. Siltman or anyone else indicating that her work performance was unsatisfactory, meriting verbal warnings for her to challenge in the grievance process. If anything, the discussions Mr. Siltman had with the Grievant about her work performance issues would be construed as coaching/counseling sessions, which are not generally recognized in arbitration as being disciplinary in nature, but act as a forewarning of possible future discipline, such as verbal and written warnings, suspension, and then discharge. Clearly, her past performance issues were treated as being minor in nature by her supervisor, and do not make the Grievant unqualified for the Elementary School Custodian position.

Finally, the School District deemed the Grievant to be unqualified for the Elementary School Custodian position based upon her lack of knowledge and skills required of the position. The School District cites examples of the Grievant not being able to complete repairs. Although the job description for Elementary

School Custodian required that the applicant have "specific training or job experience", it also states that the "[e]stimated time required for new entrant to achieve acceptable level of proficiency is 6 months." In other words, not every applicant selected for the Elementary School Custodian position is required to possess knowledge and skills of every task contained in the job description. An applicant is given six months to prove their worth. If, in fact, the Grievant cannot perform the required tasks of the position, the School District can remove her from the job, assuming there is substantial and compelling evidence to prove her incompetency.

It is also noteworthy that the noted "qualifications" on the job description for the Elementary School Custodian position states one must possess a "boiler license." The Grievant possessed a boiler license, unlike the successful outside candidate that was awarded the position. This fact establishes that not only was the Grievant the most senior applicant who applied for the Elementary School Custodian position, she was the only applicant who was fully qualified for the position.

In the final analysis, the School District's determination as to the qualifications of the Grievant were arbitrary, capricious, and clearly wrong. The Grievant was qualified for the Elementary School Custodian position. She was also senior

to the outside candidate. As a result, she met the criteria established in Article XIII as being the "senior qualified applicant" for the Elementary School Custodian position. She is entitled to be awarded this position, with resultant back pay and other applicable fringe benefits.

For the first time at hearing, the Union requested that all discipline references incurred since the filing of the grievance be permanently removed from the Grievant's file. There are three letters to which this request applies, one dated October 7, 2005, and two dated February 20, 2006. (School District Exhibits #4-6). The Grievant did not include in her grievance any reference to disciplinary matters or any request to have such matters removed. Moreover, no request was made, either during the grievance process or thereafter, to include the removal of these letters as part of the grievance, or even as a separate grievance. Therefore, the Grievant waived any right to contest these letters and seek their removal, let alone any right to raise this issue in these proceedings. The time for raising this issue has long expired even if a verbal request at the hearing were considered. Thus, in accordance with the terms of the Collective Bargaining Agreement, the Arbitrator is without jurisdiction to consider the requested remedy of removal of these letters.

AWARD

Based upon the foregoing and the entire record, the Grievant, Bonnie Swanson, shall be assigned to the Elementary School Custodian position and be made whole, including, but not limited to, back pay and all applicable fringe benefits.

The Arbitrator is without jurisdiction to consider the Union's requested remedy of removing from the Grievant's personnel file all of the discipline references incurred since the filing of the grievance, namely the three letters, one dated October 7, 2005, and two dated February 20, 2006.

Richard John Miller

Dated May 8, 2006, at Maple Grove, Minnesota.