

IN THE MATTER OF THE ONTARIO *LABOUR RELATIONS ACT, 1995*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN

WATERLOO COUNTY BOARD OF EDUCATION
- the Employer

-and-

CUSTODIAL AND MAINTENANCE ASSOCIATION
- the Union

AND IN THE MATTER of a grievance of Tom Gerry regarding the job posting for a Head Custodian at North Wilmot Public School

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Simon E. C. Mortimer - Counsel

Helen Thorman-McLean - Superintendent of Human Resources

On behalf of the Union:

Frank D. Carere - Counsel

Dave Weiler - President

George Martin - Chief Steward

Tom Gerry - Grievor

Intervenor:

Bruce Fritz

Hearing held in Kitchener, Ontario on May 8, June 11, June 14, June 24, August 29, September 6, October 3, October 16 and October 23, 1996.

AWARD

I. INTRODUCTION

In this grievance, Tom Gerry grieved his failure to obtain the position of Head Custodian at North Wilmot Public School. The grievor had applied for the position but was unsuccessful. The position was awarded instead to Bruce Fritz, an employee with less seniority than the grievor.

During the period of the hearing in his grievance, the grievor secured another Head Custodian position within the School Board and he no longer sought the North Wilmot position. Because of this, the Employer argued that the matter had become moot. In an interim decision dated September 25, 1996, I concluded that the matter was not moot.

Mr. Fritz attended some of the early hearing days and, on those days, he was treated as though he had intervenor status. While the issue of Mr. Fritz's status was not raised formally, there is no doubt that if it had been raised Mr. Fritz would have been granted status as an intervenor. Following the interim decision, I was advised that Mr. Fritz had also secured another position with the Employer and thus he was no longer the incumbent in the disputed North Wilmot position. After Mr. Fritz secured the second position he again attended the hearing. At that time the Union raised the issue of Mr. Fritz's right to intervenor status. Because he was no longer the incumbent and his rights could not be directly affected by the outcome of the arbitration, I ruled that he was no longer qualified to have status as an intervenor.

Before the end of the hearing the Employer had taken steps to fill the vacant position of Head Custodian at North Wilmot.

In total, evidence was received over eight days. The argument occurred on a ninth day.

While the dispute was focused upon the grievor and the North Wilmot position, the issues raised in the grievance have the potential to apply beyond this particular dispute. The Union raised a number of concerns regarding the manner in which the Employer conducted this particular job competition, but the evidence suggested that the Employer conducts other competitions in a similar manner. Nevertheless, these issues have been raised in the context of a particular dispute and I have endeavoured to deal with them in that context.

While there were a large number of issues on which the parties differed, the issues raised by the Union may be categorized into four groups:

1. Did the Employer correctly interpret Article 10.01 of the collective agreement, the principal provision regarding the selection of candidates for promotion and posted positions?
2. In its procedural conduct of this competition, did the Employer violate the agreement?
3. Was the required comparison between the grievor and the successful candidate flawed, and in particular was the grievor the better candidate? Alternatively, was the grievor "relatively equal" in terms of his qualifications, so that he should have been awarded the position as the senior candidate? and,
4. Was the posting fundamentally flawed from the very beginning - had the Employer earlier decided to put Mr. Fritz into the North Wilmot position so that everything which followed was essentially a sham?

II. THE EVIDENCE

As I have indicated, the receipt of evidence took place over eight hearing days. It is not necessary for me to detail all the evidence in order to resolve this dispute. In addition, the parties agreed that it was only necessary to lead evidence related to the top three candidates - Mr. Fritz, Donn Eby who was ranked second, and the grievor who was ranked third in this

competition. Mr. Eby, who was senior to Mr. Fritz, did not grieve. Mr. Eby testified that he no longer sought the North Wilmot position.

In this section I outline the factual background underlying the parties' dispute in general terms. I have left some analysis of the evidence for later sections of this award.

The grievor began work for the Employer on September 19, 1988 and Mr. Fritz began on January 21, 1991. Thus the grievor had approximately two and a half more years of seniority than Mr. Fritz.

In the Waterloo County Board of Education, custodians from various schools are grouped together for administrative purposes. In this instance, custodians at two high schools (Waterloo Oxford and Forest Heights) and custodians at the satellite elementary schools (including North Wilmot) for those two high schools are grouped under the leadership of a Supervisor of Custodial Services, Bruce Arnold. There is also an Assistant Supervisor of Custodial Services, Gary Fleming, in this family of schools. Thus the Head Custodian at North Wilmot reports to Mr. Arnold and Mr. Fleming.

North Wilmot is a small school with about 90 students. It has only one custodian who is referred to as a Head Custodian. Schools in this Board are rated from A through D and a Head Custodian in a D school such as North Wilmot receives the lowest rate of pay among Head Custodians; Head Custodians at A schools receive the highest pay.

In the winter of 1995 the Head Custodian at North Wilmot was Greg Crocker. Mr. Crocker was planning to take a paternity leave in the spring of 1995. Mr. Crocker's wife worked days and, to facilitate his family's child care needs, Mr. Crocker was also considering the possibility of moving from his position as Head Custodian at North Wilmot, a day position,

to an evening position elsewhere with the Employer. At some point during the winter Mr. Crocker discussed these matters with Mr. Fleming.

Mr. Fleming thought that it might be possible for Mr. Crocker and Bruce Fritz, who was then the lead hand on the evening shift at the Waterloo Oxford High School, to switch positions. Mr. Fleming raised the possibility of this switch with Gerry Mills, the Employer's Manager of Plant Operations. Mr. Mills, in turn, raised this possibility with Dave Weiler, the President of the Union. Mr. Weiler expressed strong opposition to this proposal and indicated that the positions should be posted under the provisions of the collective agreement. Following Mr. Mills' conversation with Mr. Weiler the possibility of conducting a switch between Mr. Crocker and Mr. Fritz was not pursued.

In April 1995 Mr. Crocker began his paternity leave. The Employer had a right to place custodians in acting positions. The Employer selected Bruce Fritz to serve as Acting Head Custodian at the North Wilmot School. This selection was an unusual selection. Prior to this time the Employer had very rarely assigned a lead hand from a high school to serve as Acting Head Custodian in an elementary school.

Mr. Fritz served for approximately ten weeks in the spring of 1995 as Acting Head Custodian at North Wilmot. In mid-June Mr. Crocker returned from his paternity leave and resumed his position at North Wilmot. Mr. Fritz returned to Waterloo Oxford High School as lead hand.

On June 27, 1995 there was an end of the school year staff lunch at Waterloo Oxford High School. During that morning Mr. Fritz had met Alvin Rudy, the Principal of Waterloo Oxford High School, and indicated to Mr. Rudy that he might apply for the North Wilmot position when it was posted. At the staff lunch Mr. Rudy announced that Bruce Fritz would

be leaving Waterloo Oxford High School to become Head Custodian at North Wilmot. As of June 27 the North Wilmot position had not been posted and thus Mr. Rudy's announcement caused considerable concern among the other custodians who were present at the lunch.

On August 28, 1995 the position of Head Custodian at North Wilmot was posted. The posting was a general job posting and the terms were similar to the terms which had been included in earlier postings without complaint from the Union. That posting described the qualifications as follows:

- Several years of experience as a custodian.
- Require a person who is a self-starter, industrious and has a congenial personality.
- Ability to communicate effectively with staff, students and the public.
- Successful completion of several custodial training courses would be preferred.

There were a number of applicants for the North Wilmot position. In keeping with the Employer's usual practice, the number of applicants was narrowed to seven, and the seven short-listed candidates were interviewed on September 20, 1995.

When Bruce Fritz submitted his application he included two letters of reference from his Supervisor of Custodial Services, Bruce Arnold, along with a letter from his Assistant Supervisor of Custodial Services, Gary Fleming, and a letter from the Principal of North Wilmot School, Fred Wiens.

The grievor also applied. He had worked most recently as a night custodian at N. A. MacEachern Public School which is part of a different family of schools.

It was the common practice for Mr. Mills, as Manager of Plant Operations, to chair the interview panel but he was unavailable that day. When Mr. Mills was unavailable the usual practice had been for a Supervisor of Custodial Services from another family of schools to

participate. In this instance Mr. Fleming, the Assistant Supervisor of Custodial Services, participated as a third member. The interview panel consisted of Bruce Arnold (the Supervisor of Custodial Services) as chair, Fred Wiens (the Principal), and Gary Fleming (the Assistant Supervisor of Custodial Services). Each of the members of the panel had written reference letters on behalf of Mr. Fritz. The grievor had not worked for any of the three members of the interview panel.

Of the panel members, Mr. Arnold had considerable experience in the conduct of competitions for Head Custodian positions. It was the first time Mr. Wiens had participated in this process. Mr. Fleming had been involved in a very small number of earlier hiring competitions.

Although the language of the relevant article in the collective agreement changed as of January 1, 1993, Mr. Arnold testified that he had not changed the consideration he gave to seniority in the selection process. Mr. Wiens testified that he did not review the collective agreement before, or during, the process. Mr. Wiens also indicated that the criteria to be used were not discussed and that the panel did not review the criteria which they would apply nor how they would evaluate the candidates on the criteria on the summary chart which they were to complete.

The members of the interview panel each prepared a series of questions and prior to beginning the interviews they agreed on the questions which would be asked of all candidates. The interview panel asked all candidates the same questions. All candidates were given a similar opportunity to provide any additional materials or information which the candidate thought relevant.

Each candidate completed a form labelled:

APPLICATION FOR POSITION OF ADDED RESPONSIBILITY
PHYSICAL RESOURCES - SUPPORT SERVICES

The application included the following category:

References: (Only those references listed may be contacted. Contacts may be made prior to the interview.)

The back of the form began with "FOR OFFICE USE ONLY" and included a space for four lines of comments next to a heading "Remarks from Reference".

Other than the consideration it gave to the applications and the interviews, the panel did not investigate the qualifications of any of the candidates. In particular, the panel did not examine any employee's personnel file, nor did the panel contact any referees who were listed on the application form.

A number of referees for both the grievor and Mr. Fritz had provided letters of reference. The grievor, however, had listed as a referee the Principal of N. A. MacEachern School, John Spinak, but the grievor did not include a letter from Mr. Spinak. Mr. Spinak testified that he felt a letter provided for inclusion in the grievor's package of materials would be of little value. He felt that his opinion would be more persuasive if he provided it directly to the panel. In his testimony Mr. Spinak was very positive about the grievor and his suitability for a Head Custodian position.

During the interview each of the interviewers had before them a document prepared by the Waterloo County Board of Education called APPLICANT SUMMARY CHART. The chart listed seven "Skills & Abilities" as follows:

Planning/Organization
Communications
Supervisory

Problem Solving

Reliability

Experience (past work record)

Technical (cust./maint.)

The Chart indicated that each interviewer should rate the candidates on a scale of 1 to 4, 1 being "Pass", 2 being "Average (what you would expect)", 3 being "Superior" and 4 "Outstanding". The Chart included the following statement:

Purpose: To determine the best choice candidate for the posted position.

The word "seniority" does not appear on the Chart.

Each of the three interviewers used this chart during the interviews and each ranked Bruce Fritz as the top candidate. Two of the three interviewers ranked the grievor number 3 and the third interviewer (Mr. Arnold) ranked the grievor as the 4th candidate.

The total possible score for the seven categories on the chart was 28. Mr. Wiens (Principal) gave Mr. Fritz 25 points, Mr. Eby 24 points and the grievor 20 points. Mr Fleming (Assistant Supervisor of Custodial Services) had the same three candidates in the same order but with scores of 22, 21 and 20 respectively. Mr. Arnold (Supervisor of Custodial Services) gave Mr. Fritz 20 points, Mr. Eby 16, and the grievor 14. On Mr. Arnold's chart the grievor was marked as number 4 but, as there were two candidates tied for second place, the grievor was in fact Mr. Arnold's fifth ranked candidate.

Following the interview process the panel members had a discussion and agreed that Mr. Fritz was their preferred candidate. The candidates were not seen as being "relatively equal" and the issue of seniority was not considered. The members then discussed what would be communicated to the unsuccessful candidates. The notes prepared by Mr. Arnold in

consultation with the other panel members prior to speaking with the grievor read as follows:

Don't give up -Very good interview!

No letter from Principal?

Hang in there.

Notwithstanding the comment of "very good interview" directed to the grievor, one of the reasons the panel preferred Mr. Fritz was that Mr. Fritz had a better interview. In particular, Mr. Fleming testified that the grievor was not very forthcoming in his answers and that he had to be pressed to provide more complete answers.

As the chair of the panel Mr. Arnold then reviewed the results with Gerry Mills (Manager of Plant Operations). Mr. Mills authorized Mr. Arnold to offer the position to Bruce Fritz. Mr. Fritz accepted the position. Tom Gerry subsequently grieved his failure to obtain this job.

III. PROVISIONS OF THE COLLECTIVE AGREEMENT

The following are the relevant provisions of the collective agreement.

ARTICLE IV - RESERVATION OF MANAGEMENT FUNCTIONS

4.01 The Association acknowledges it is the exclusive function of the Employer to:

a) Maintain order, discipline and efficiency.

b) Hire, classify, re-classify, transfer, promote, demote, lay off Employees . . .

. . .

4.09 The Employer will post all vacancies in positions of added responsibility, maintenance positions, permanent day positions and permanent night secondary school positions. These positions will be posted for six working days in order for permanent full-time and permanent part-time Employees to apply, before outside applications are invited.

Under what it considers to be extenuating circumstances, management retains the right to make appointments to permanent day or night secondary level positions without posting.

The Employer will attempt to reach an agreement with the Association prior to this action being taken.

ARTICLE X - SENIORITY

The rules herein respecting seniority and competence are designed to give Employees security based on length of service with the Employer.

10.01 In all cases of promotion and posted positions, the following two factors shall be considered:

- a) seniority of the applicants, and
- b) skills, competence, efficiency, reliability, training, experience, and past work record with the Employer.

When factor (b) is relatively equal between two or more applicants, seniority shall govern.

IV. POSITION OF THE UNION

The Union submitted that the Employer had misinterpreted and misapplied Article 10.01. The Union noted that the preamble to Article X, that is the introductory words before Article 10.01, indicated that the rules were "designed to give Employees security based on length of service with the Employer." No mention was made and no importance was given in the preamble to any interest of the Employer in selecting the most qualified employee. The Union noted that, unlike many collective agreements, nowhere in Section 10.01 was there any reference to the Employer's opinion. There should thus be no deference to the Employer's views.

The Union then submitted that it was clear that there were only two factors in Article 10.01. The first of those two factors was the seniority of the applicants. The second of the two factors was a composite of "skills, competence, efficiency, reliability, training, experience

and past work record with the Employer", which I will refer to in these reasons as factor (b). The Union then argued that the two factors of (1) "seniority" and (2) "skills, competence, efficiency, reliability, training, experience and past work record with the Employer" should have been given equal weight. The Union further submitted that a proper reading of Article 10.01 indicated that seniority was a factor to be considered in the initial decision. The Union submitted that the concluding sentence indicated that when factor (b) was relatively equal between two or more candidates, then "seniority shall govern". Thus the Union said that seniority was given further or additional weight by the final sentence.

The Union noted that prior to January 1, 1993 the collective agreement provision had read as follows:

10.01 In all cases of promotion and posted positions, the following factors shall be considered:

Skills, competence, seniority, efficiency, reliability, training, experience, and past work record with the Employer. All of the above being equal, seniority shall prevail.

The Union submitted that a comparison with the language from the earlier collective agreement showed that the new agreement gave additional importance to the candidates' seniority. In addition, the Union said that a review of the language of the earlier collective agreement supported its view that the current language called for an assessment of seniority as one of two factors in all cases.

In considering whether or not the Employer had complied with Article 10.01 in this situation, the Union submitted that I must ensure that:

1. The Employer was correct.
2. The Employer had complied with the provisions of the collective agreement.
3. All relevant factors had been considered.
4. No irrelevant factors had been considered.
5. The decision was based on the proper principles.

6. The Employer acted honestly and in good faith.
7. The Employer acted without bias.
8. The Employer acted fairly and reasonably.

Applying Article 10.01, and without needing to resort to the last sentence, the Union argued that the grievor should have obtained the position. In the alternative, the Union argued that when applying the last sentence of Article 10.01 the grievor and Mr. Fritz were relatively equal and, as the grievor had greater seniority, he should have been awarded the position. The Union submitted that the term "relatively equal" has been interpreted by many arbitrators to mean that one should determine whether one employee was more qualified than another by a "substantial and demonstrable margin". The Union submitted that the grievor was more qualified than Mr. Fritz, or in the alternative that he was at least relatively equal to Mr. Fritz on factor (b).

In addition, the Union submitted that there were a number of problems - matters which I have characterized in this award as procedural flaws - in the selection process. The Union alleged fifteen procedural flaws as follows:

1. The failure to properly apply the standard of "relatively equal".
2. The failure to consider seniority in comparing the candidates.
3. The failure to consider the criteria in the collective agreement.
4. The improper composition of the interview panel.
5. The failure of the interview panel to familiarize themselves with the criteria and weighting of the summary chart.
6. The Employer's failure to provide any evidence as to the relative importance of the questions and the failure to provide any evidence as to whether the questions truly tested the applicants for the position.
7. The failure to investigate the qualifications of the applicants.

8. The impropriety of relying on Bruce Fritz's experience as Acting Head Custodian at North Wilmot Public School, an advantage which had been given to Bruce Fritz, but not to the grievor.
9. The failure to disclose to the applicants a job description, or the method used in evaluating the candidates.
10. The impropriety of the panel considering factors not included in the posting.
11. The panel's failure to follow the Employer's Procedural Manual.
12. The panel's error in considering supervisory skills when there was no requirement in the position for supervisory skills.
13. The Employer's failure to leave the final decision with the Principal of the school involved as specified in the Employer's Procedure Manual.
14. The impropriety in allowing Mr. Mills to make the final decision without Mr. Mills having participated in the interviews.
15. The improper bias in favour of Bruce Fritz and the plan from the winter of 1995 onward to award the position to Bruce Fritz.

On the matter of remedy, the Union asked that I:

1. Provide the parties with an interpretation of Article 10.01;
2. Declare that the selection process was flawed;
3. Set aside the awarding of the position to Bruce Fritz, and order that the Employer post the position and conduct the selection in accordance with the provisions of the collective agreement; and,
4. Declare that the selection process was biased or not conducted in good faith because the Employer had pre-determined that Bruce Fritz would be the successful candidate.

The Union relied upon the following authorities: *Re Island Telephone Co. Ltd. and International Brotherhood of Electrical Workers, Local 1030* (1983), 8 L.A.C. (3d) 132 (Christie); *Re City of Fredericton and Canadian Union of Public Employees, Local 1783*

(1989) 5 L.A.C. (4th) 264 (Bruce); *Canadian Food and Allied Workers Union, Local 175 v. Great Atlantic and Pacific Company of Canada Limited et al.* (1976), 76 C.L.L.C. 14, 056 (Ontario Divisional Court), leave to appeal to C. A. refused 13 L.A.C. (2d) 211n; *Re Regal Stationery Company Ltd. and Canadian Paperworkers' Union, Local 300* (1978), 18 L.A.C. (2d) 139 (Hinnegan); *Re Elgin Roman Catholic Separate School Board and London & District Service Workers' Union, Local 220* (1992), 26 L.A.C. (4th) 204 (Rose); *Re Wellesley Hospital and Ontario Nurses' Association* (1989), 5 L.A.C. (4th) 55 (Weatherill); *Re Victoria General Hospital and Canadian Brotherhood of Railway, Transport & General Workers, Local 606* (1991), 21 L.A.C. (4th) 185 (Slone); *Re Hamilton Civic Hospitals and Ontario Nurses' Association* (1992), 29 L.A.C. (4th) 43 (Knopf); *Re Fairview Home Inc. and Fairview Nurses M.N.U., Local 21* (1991), 21 L.A.C. (4th) 223 (Cherniack); *Re Allen's Food Industries Inc. and Bakery, Confectionery & Tobacco Workers International Union, Local 446* (1994), 46 L.A.C. (4th) 64 (DeMont); *Re The Queen in right of Newfoundland (Department of Works, Services & Transportation) and Newfoundland Association of Public Employees (Bowers)* (1992), 30 L.A.C. (4th) 13 (Alcock); *Re North York General Hospital and Service Employees International Union, Local 204* (1989), 7 L.A.C. (4th) 418 (Mitchnick); *Re Clarendon Foundation (Cheshire Homes) Inc. and Ontario Public Service Employees' Union, Local 593* (1989), 8 L.A.C. (4th) 398 (H. D. Brown); and *Re Colchester-East Hants District School Board and Nova Scotia Teachers' Union* (1992), 25 L.A.C. (4th) 218 (DeMont).

IV. POSITION OF THE EMPLOYER

The Employer submitted that as arbitrator my role was to ensure compliance with the collective agreement. The Employer submitted that it was not my role to decide if the decision was correct. I am not, submitted the Employer, to hold the Employer to an ideal standard of perfection. Instead I should assess whether the Employer acted reasonably, in

good faith, and in a non-discriminatory manner. The Employer submitted that in my review I should be mindful of the actual process involved. Each interview lasted approximately 20 to 25 minutes and all interviews were conducted on the same day.

The Employer submitted that the onus was on the Union to show that the grievor and Mr. Fritz were relatively equal on factor (b) and that only then did the onus shift to the Employer to show that the Employer did not act in an arbitrary or unreasonable manner. If the Union failed to demonstrate that the two candidates were relatively equal, there was no need to consider whether the Employer acted in an arbitrary or unreasonable way.

The Employer noted that each of the panel members had ranked Mr. Fritz first. Two had ranked the grievor third and one had ranked the grievor fourth.

The form of the job posting used in this instance to advertise the North Wilmot position had been used before. There had been no grievance or concern raised about this form of job posting in the past. All candidates were asked the same questions. All candidates were given an opportunity to submit documents. Candidates themselves had access to their own personnel files and could have provided evidence from those files. There was no evidence that any candidate submitted performance evaluations.

The Employer submitted that the questions reflected the qualifications and requirements listed on the posting. Many of the questions used in the interview process had been used before. The evidence indicated that the panel members considered, but did not use, other questions. All three interviewers recorded their scores separately and all interviewers tallied their scores at the end of the interviews. There had been no complaint from the grievor regarding his actual treatment in the interview. The interviewers were aware that if the candidates were "close", seniority would govern.

The Employer submitted that there were, in fact, reasonable differences between the candidates. Mr. Fritz had been a lead hand, a position of responsibility within the bargaining unit, for some three and a half years. He had been Acting Custodial Department Head of Waterloo Oxford High School in the summer of 1994. He had served for a number of weeks as Acting Head Custodian at North Wilmot School. On the other hand, Tom Gerry did not state in his application that he had any experience as Acting Head Custodian. He had not been a lead hand. He had never been Acting Custodial Department Head. Although he had in fact been an Acting Head Custodian, he had not spent as much time as Acting Head Custodian in elementary schools as had Mr. Fritz.

While Mr. Fritz had worked for all three members of the interview panel, there was no indication that there was a close personal relationship between Mr. Fritz and any of the interviewers.

With respect to the temporary transfer of Mr. Fritz to serve as an Acting Head Custodian, there had been no complaint about this at the time. While the actual transfer was a matter of management right, if there had been concerns the Union could have raised them in an informal manner. None were raised.

The Employer submitted that it would be improper for me to determine the parties' intention on the basis of a review of the changes in the collective agreement introduced in 1993. The Employer submitted that Article 10.01 was a relative equality clause. Seniority would only have come into play if the applicants were relatively equal on the second factor, factor (b) - skills, competence, efficiency, reliability, training, experience and past work record with the Employer. The Employer submitted that the appropriate approach was that the Employer choose the best person for the job. That was the intent of the collective agreement. The parties intended that the Employer should draw distinctions between candidates on the basis

of their qualifications.

By way of remedy, the Employer asked me to dismiss the grievance. In any event, as Mr. Fritz had moved to another position, and as the grievor no longer sought the position, the Employer asked that I not order the Employer to re-post the position. If I decided there had been violations of the collective agreement, the Employer stressed that this was an individual grievance and that any declarations should be made in the context of the individual grievance.

The Employer relied on the following authorities: *Re OPSEU (Peters) and The Crown in Right of Ontario (Ministry of Revenue)* (1991), G.S.B. 1423/90 (Kaplan) (November 21, 1991, unreported); *Re Sunnybrook Medical Centre and Ontario Nurses' Association*, February 22, 1988 (Gandz) (unreported); *Re The Tribune (Division of Cariboo Press Ltd.) and Communication Workers of America, Local 226* (1989), 4 L.A.C. (4th) 390 (Chertkow); *Re Public Utilities Commission of City of Sault Ste. Marie and Canadian Union of Public Employees, Local 3* (1994), 44 L.A.C. (4th) 286 (Hinnegan); *A. O. Smith Enterprises Ltd. and United Steelworkers of America, Local 3313* May 28, 1991 (Brandt) (unreported); *Re Dufferin-Peel Roman Catholic Separate School Board and Canadian Union of Public Employees, Local 1483* (1985), 21 L.A.C. (3d) 368 (Kennedy); *Re British Leaf Tobacco Co. of Canada Ltd. and Canadian Union of Operating Engineers & General Workers* (1981), 3 L.A.C. (3d) 235 (Kennedy); *Re Co-op Atlantic and United Food & Commercial Workers, Local 1288P* (1988), 3 L.A.C. (4th) 11 (Bruce).

V. CONCLUSIONS

I have grouped my conclusions into four sections:

1. I first deal with the proper interpretation of Article 10.01. As part of that

interpretation, I review:

- a) How is seniority to be considered, and must seniority be considered in all instances or only in those instances in which candidates are "relatively equal" in factor (b)?
 - b) What is the meaning of "relatively equal" in the concluding sentence of Article 10.01? and,
 - c) How did the various criteria listed in factor (b) - skills, competence, efficiency, reliability, training, experience and past work record with the Employer - relate to the qualifications which were listed in the job posting; how did those criteria relate to the factors listed on the Applicant Summary Charts which were used by the interview panel; and what must the Employer consider in its analysis of factor (b) in the collective agreement?
2. In the second section I address the various alleged procedural flaws raised by the Union regarding the conduct of this job competition.
 3. The third section is an evaluation of the grievor and Mr. Fritz as candidates for this position.
 4. Finally, I address the allegation made by the Union that the entire process was a sham designed from the beginning to place Mr. Fritz in the position.
1. Interpretation of Article 10.01
 - a) Use of Seniority

This dispute involves multiple allegations that the Employer did not follow the requirements of the collective agreement. As the Employer is required to follow its collective agreement, the first and most important step in resolving this grievance is to carefully examine the agreement and to interpret the words which these parties have in their agreement in order to

determine what the Employer was required to do in its conduct of this job competition.

In my view, for purposes of this competition the Employer operated through the interview panel and I find the panel's actions to be the Employer's actions. While Mr. Arnold did review the outcome with Mr. Mills, in this situation I find that the panel, not Mr. Mills, made the Employer's decision.

For ease of reference, I reproduce the principal provisions involved in this grievance - the introduction to Article X together with Article 10.01.

ARTICLE X - SENIORITY

The rules herein respecting seniority and competence are designed to give Employees security based on length of service with the Employer.

10.01 In all cases of promotion and posted positions, the following two factors shall be considered:

- a) seniority of the applicants, and
- b) skills, competence, efficiency, reliability, training, experience, and past work record with the Employer.

When factor (b) is relatively equal between two or more applicants, seniority shall govern.

I view the introductory words in the Article as a preamble which is intended to provide guidance to the interpretation of the provisions which follow. The preamble indicates that the rules - that is the provisions of Article X, including Article 10.01 - have a particular purpose. The rules are said to be "respecting seniority and competence". The rules are designed to give employees "security based on [their] length of service with the Employer". I note as well that the entire Article is headed "Seniority".

The Employer argued that "seniority" need not be considered in *all* cases. In particular, the

Employer submitted that seniority did not have to be considered in *this* case. As a result I will begin with a careful review of the wording of Article 10.01.

Article 10.01 indicates that in "all" cases of promotion two factors "shall" be considered. What are the two "factors" which "shall" be considered? I believe that one of those two "factors" must be the seniority of the applicants which is listed in clause (a). The other "factor" must then be the composite of "skills, competence, efficiency, reliability, training, experience and past work record with the Employer" which is clause (b). This interpretation is consistent with the final sentence of Article 10.01 which refers to "factor (b)". As clause (b) (skills, competence, efficiency, reliability, training, experience, and past work record with the Employer) is "factor (b)", then seniority, i.e. clause (a), must have been intended by the parties as the first of the two factors which "shall" be considered in "all" cases of promotion.

I also note that in my view the word "shall" was intended as mandatory. That is the common use or meaning of the word "shall" in collective agreements and I see nothing in this agreement to suggest that the parties intended another meaning. Thus the Employer was required to consider both factors in all cases.

If those are the two factors which "shall" be considered, then what must the Employer actually do? The agreement contemplates a competition, but a competition based on the two factors. Thus the Employer must consider the two factors, and the factors are to be considered together, as parts of a whole, or as parts of one package.

In the simplest case where there is one candidate who has a large advantage over any other candidate on the basis of the assessment of those two factors together, then the candidate with the large advantage should be awarded the position. This would be the result even if the clearly superior candidate is junior to the other candidate(s). In other words the

agreement calls for a competition between applicants and in many cases the result will simply be that the person who is assessed as the best candidate on the combined assessment of the two factors, factor (a) and factor (b), wins.

Part of the Employer's submissions as to why seniority did not have to be considered in this case relied on the last sentence of the article. I thus turn to that sentence.

If seniority is to be considered in *all* cases of promotion then what is the purpose of the concluding sentence which indicates that "seniority shall govern" when candidates are "relatively equal" on factor (b)? I leave the question of the meaning of the words "relatively equal" to be considered later.

In my view, the concluding sentence of article 10.01 was designed to ensure that a relatively small difference in factor (b) (skills, competence, efficiency, reliability, training, experience and past work record with the Employer) in favour of a junior candidate does not override the greater seniority of another more senior candidate under factor (a). Thus, if there are two candidates and the junior candidate is only marginally superior on factor (b) then, because of the concluding sentence, "seniority shall govern", the position would be offered to the more senior "relatively equal" candidate even though the more senior candidate is marginally weaker on factor (b) - skills, competence, efficiency, reliability, training, experience and past work record with the Employer.

I think it is helpful to look at an example and to assess the results of a competition first without using the last sentence and then, secondly, applying the last sentence. I do this to clarify the application of this provision and to demonstrate a situation in which the result is changed because of the provision.

Assume that there are two candidates and that the senior candidate had worked for the Employer for ten years whereas the junior candidate had worked for ten years minus one day. There is thus an extremely small difference between the two candidates in terms of their seniority, or factor (a). Assume further that when the Employer considers factor (b) (skills, competence, efficiency, reliability, training, experience and past work record with the Employer) it concludes that the junior candidate is marginally superior on that factor. However, the junior candidate is superior by a greater margin on factor (b) than the tiny difference between the two candidates in factor (a).

Assessing the two factors together as a package, *and in the absence of the concluding sentence of Article 10.01*, the Employer would reasonably conclude that, as the difference in factor (b) is greater than the difference between the two candidates in factor (a), the junior candidate is superior overall on the two factors taken together as a package and would thus select the junior candidate.

However, to continue with the same example, the parties did include the final sentence of Article 10.01 in their agreement. In my view, the purpose or intention of the final sentence is to ensure that where the two candidates are similar in terms of factor (b), that is when they are "relatively equal", then the senior candidate shall get the job. Thus the Employer can not use a minor difference in factor (b) to override another candidate's greater seniority. Instead, in all cases in which candidates are relatively equal on a consideration of factor (b) - skills, competence, efficiency, reliability, training, experience and past work record with the Employer - the agreement requires that "seniority shall govern". In this example, as the junior candidate is only marginally superior on the second factor - and let us thus assume that the two candidates are therefore "relatively equal" on factor (b) - the final sentence dictates that the job shall be awarded to the senior person.

Reference was made in argument to the provisions of the agreement as it existed prior to 1993. That language was given earlier. The Union submitted that the change from the earlier language supported its interpretation and referred me to *Re Island Telephone*. I do not find the language of Article 10.01 to be ambiguous or confusing and I do not find it necessary to rely on the earlier language. I do agree, however, that the effect of the change made in 1993 was to place increased importance on seniority.

Some of the authorities relied upon by the Employer reach a different conclusion on similar language. For example the *A. O. Smith* case dealt with a lay off grievance in which the Company was required to apply two "factors" in determining who should be laid off. One of the factors was seniority and the other factor was a composite factor (b) similar to the factor (b) in the case before me. The article being considered in that case concluded with the following:

When, in the judgment of the Company, (b) is equal as between two (2) or more employees, then the employee having greater seniority will be given preference.

The Arbitrator's analysis and conclusions on the interpretation of that clause are as follows:

It is evident that this is a competition clause. For the grievance to succeed it is not sufficient to establish that the grievor is able to perform the two jobs claimed. Rather the union must establish that, in terms of the various factors set out in [factor (b)], the grievor is at least equal to either [of the incumbents]. Where that equality is established the grievor is entitled to claim preference for the position by reason of his greater seniority. (at p. 3)

The basis of the Arbitrator's conclusions is not clear. It may be that the parties agreed that the above was the correct approach. Alternatively, the grievor and the incumbents may have had very similar seniority. Or it may have been that the inclusion of the phrase "in the judgment of the Company" or the requirement of "equality" was seen as important. In any event, I do not find anything in the above interpretation which would suggest that I disregard the clear language of this agreement requiring seniority to be considered in "all cases".

The Employer also referred to *Re Dufferin-Peel* on this question of interpretation. The language of that collective agreement was similar to the language before me, although it concluded with an "equal", as opposed to "relative equality", provision. Most of the evidence in that case had been provided by the grievor as the employer had called no evidence. The arbitration board considered the evidentiary onus on the parties in such a situation and commented as follows:

Of greater significance, however, is the fact that [the article] is clearly on its language a competitive clause . . . Seniority becomes the governing consideration only when the ability, knowledge, training and skill of the applicants are equal and the basic onus on the union is to establish a *prima facie* case of such equality before any evidentiary onus shifts to the employer to justify its selection. (page 372)

It is clear that the arbitration board was concerned about an evidentiary onus in a case in which it had little or no evidence about the successful candidate. The union had argued that once it led evidence about the grievor the employer should be required to produce evidence to justify its selection, and the arbitration board decided that the employer did not have any such obligation unless the union had established a case for equality. As there was little evidence about the successful candidate, the union had not established a case for equality and there was no reason for the employer to have to call any evidence. The board was not interpreting the language in a context similar to the one I am confronted with and, in my view, there is nothing in the conclusions in *Re Dufferin-Peel* which conflicts with the interpretation I have given above to the language of the agreement before me.

On this issue the Union referred me to the decision of Arbitrator Christie in *Re Island Telephone*. The article being interpreted there was as follows:

5.3 When selecting employees to fill vacancies and/or new additional jobs covered by this agreement the Company will recognize seniority, ability and qualifications. Where these factors are relatively equal the senior employee will be selected.

In that case the parties had changed the language a few years before and the arbitrator

concluded that the change in wording made it clear that the parties intended that greater weight be placed on seniority. He then interpreted the clause as follows:

[I]t is the company's obligation to "recognize seniority, ability and qualifications" as a composite, or package, weighing and balancing each of these factors off against one another in the case of each competing job applicant. The judgement to be made is whether the three-factor package of one employee clearly outweighs the three-factor package of the other. If it does not, that is where the packages "are relatively equal" then "the senior employee will be selected". While art. 5.3 does not specifically say so, the clear implication is that if, upon recognition of these three factors as a package, one employee clearly outweighs the other he or she is entitled to the job. The difficulty with this, of course, is that art. 5.3 assigns no relative weights to seniority, ability and qualifications in assessing each job applicant. However, even the standard forms of seniority clause call for difficult judgments by management. It must suffice to say here that seniority cannot be weighed so lightly that art. 5.3 becomes, in effect, a standard "contest" clause, nor so heavily that it becomes a standard "minimum requirements" clause. Quite evidently, the parties intended neither of those. (page 140)

While the language in *Re Island Telephone* differs from that before me, the interpretation given to the language there is consistent with my conclusions regarding the intentions of these parties regarding the language which they have adopted in this collective agreement. Like Arbitrator Christie, I have concluded that the parties intended to give greater weight to seniority than had been the case in the past. Similarly in applying the article in the case before me, I have concluded that the two factors - seniority as one factor and the criteria listed in clause (b) (skills, competence, efficiency, reliability, training, experience and past work record with the Employer) as the second factor - must be assessed, or evaluated, or weighed together as a package. If on the basis of that assessment one applicant is clearly superior then that person should be awarded the position.

Article 10.01 was not interpreted by the Employer in the manner I have described above in this competition.

Two of the panel members, Mr. Arnold and Mr. Wiens, testified that factor (a), seniority, would only be considered if the other factor, factor (b), was relatively equal between the

candidates. As they felt the candidates were not relatively equal on this factor of "skills, competence, efficiency, reliability, training, experience and past work record with the Employer", they did not consider seniority. The summary charts used by the three members of the interview panel indicated that they were to determine the best choice for the position but no mention was made on the chart of the use of seniority. Mr. Arnold testified that he was aware of the changes in Article 10.01 of the collective agreement but that he had not changed the use he made of seniority in the selection process. Mr. Wiens testified that he had no prior experience in interviewing for a Head Custodian position. He indicated that at no point did he see the collective agreement and that the criteria to be used were not discussed. Although the third panel member, Mr. Fleming, indicated that he kept seniority in mind, it was not clear that he actually used seniority in making his decision and I conclude he did not use seniority.

Thus I conclude that the Employer did not apply Article 10.01 in the proper manner in this instance in the use made of seniority.

b) The meaning of "relatively equal"

The Union also argued that when the panel members considered the concept of relative equality they did not apply it properly.

As I noted above, the parties first used "relatively equal" in their agreement in 1993. At that time they used it to replace "equal". Other collective agreements have used "relatively equal" in this context for many years and I assume that the parties to this collective agreement, by choosing "relatively equal", were also intending to adopt the meaning which had been given to the term in the past by arbitrators. I accept and adopt the views expressed in some of the authorities, see for example *Re Wellesley Hospital* at page 57-58 and *Re Victoria General*

Hospital at pages 197-198, that the question in a relative equality provision is whether one employee was more qualified than another by a "substantial and demonstrable margin". In *Re Island Telephone* the approach used was "clearly outweighs" which, in my view, is similar. To put it another way, in order for a junior person to get a posted job in a competition under this Article, at a minimum the junior person has to be superior on factor (b) (skills, competence, efficiency, reliability, training, experience and past work record with the Employer) by a "substantial and demonstrable margin". Otherwise the candidates are "relatively equal" on factor (b) and seniority governs.

I do not think that the panel members operated with this interpretation when they were considering who was the best candidate for the position. I first look to the documentary evidence, and note that the Applicant Summary Chart used by the three panel members at the interview indicated that the purpose was to "determine the best choice candidate". I was also provided with a document produced by the Waterloo County Board of Education called "factors considered for promotion". This document apparently has been in use for some time and is an elaboration of the factors listed in clause (b) of Article 10.01. The concluding sentence in this document reads as follows: "All the above being equal, seniority shall prevail".

Before 1993 the collective agreement used "equal". I repeat that Mr. Arnold who acted as chair of the panel in this case testified he had not changed the use he made of seniority in recent years from his approach when the agreement used "equal". A review of the testimony of the panel members also suggested that the three panel members did not apply this notion of relative equality when they were considering the applicants. I am of the opinion from their testimony that they were seeking the best candidate, but their view of the best candidate was the person who scored the highest on the Applicant Summary Charts with which they had been provided. When they had reviewed their Charts each had Mr. Fritz ranked as

number one. However, Mr. Wiens, for example, had Mr. Fritz with a score of 25 points and Mr. Eby, another candidate who was more senior than Mr. Fritz, at 24 points. Both scores were out of a maximum score of 28. If Mr. Wiens had used the concept of "substantial and demonstrable margin" I would have expected him to conclude that two candidates with a one point difference on a maximum 28 point scale were "relatively equal". Mr. Fleming ranked the top three candidates with scores of 22, 21 and 20. Both the second and third candidates were more senior than Mr. Fleming's first choice. Again I would think that this one point difference, when the total possible score was 28, was relative equality.

The collective agreement requires that the job be awarded to the senior candidate unless the junior candidate is, at a minimum, superior on "skills, competence, efficiency, reliability, training, experience and past work record with the Employer" - that is on factor (b) - by a "substantial and demonstrable margin". The panel members did not operate on that basis and I conclude that the Employer did not correctly apply the relative equality provision.

c) The criteria used

The Union also raised a concern as to the criteria used by the panel when it considered factor (b). The collective agreement requires a consideration of those items listed under factor (b) - skills, competence, efficiency, reliability, training, experience and past work record with the Employer. The job posting listed other qualifications. They are related, but they are not the same. The Applicant Summary Charts used in the interview listed different skills and abilities. I reproduce here the matters listed in the agreement and in the Applicant Summary Charts:

Collective Agreement

1. skills
2. competence
3. efficiency
4. reliability
5. training
6. experience
7. past work record with the Employer

Applicant Summary Chart

1. Technical (cust./maint.)
2. Problem Solving
3. Supervisory
4. Reliability
5. Communications
6. Planning/Organization
7. Experience (past work record)

While the skills and abilities in the Chart differ from the criteria in factor (b) of the collective agreement, I am of the view that they all relate, in at least a general way, to the criteria listed in the collective agreement. The words used are not the same but I conclude, with one exception, that the skills and abilities listed on the applicant summary chart, reproduced above, and used by the panel members in this competition are substantially the same as those listed in the collective agreement.

The one exception in this instance is "supervisory". Factor (b) - skills, competence, efficiency, reliability, training, experience and past work record with the Employer - does not expressly indicate that supervisory experience or skills are to be assessed. One of the criteria, one of the skills and abilities, in the Applicant Summary Chart was "supervisory". The panel members indicated that considerable importance was placed on the supervisory skills and experience which Mr. Fritz had obtained, especially as lead hand.

In my view the items listed as part of factor (b) in the collective agreement must be interpreted in light of, or in the context of, the particular position being considered. The Head Custodian at North Wilmot School does not supervise any other custodians. There was thus no supervisory responsibility associated with this position. While Mr. Fritz's

supervisory experience would be properly considered as part of his "experience" or "skills" and as part of his "past work record with the Employer", the importance which the panel members placed on "supervisory" was out of proportion to the actual importance of supervisory skills needed in the position which was to be filled in this situation.

Thus the inclusion of "supervisory" in the applicant summary chart and its equal weighting with the other listed items was an error in the selection process for this particular competition.

Summary

In summary then, the interview panel in this instance did not properly apply the requirements of Article 10.01 of the collective agreement. In particular they did not use seniority as one of two factors in their initial assessment, and they did not properly apply the concept of relative equality. In addition they improperly relied upon Mr. Fritz's supervisory experience or abilities and placed excessive weight upon "supervisory" for this position which did not call for any supervisory work.

2. Alleged Procedural Errors

As I indicated above, the Union raised a number of concerns about the process the Employer followed in this job competition. Some of those allegations have been considered already and I will not repeat my analysis of those in this section.

The Union argued that it was a mistake and a procedural flaw not to consider seniority in comparing the candidates. For the reasons which I have given above, I agree.

In a related submission, the Union also argued that it was a mistake and a procedural flaw for the Employer not to consider the criteria in the collective agreement, but rather to simply apply the skills and abilities listed on the Applicant Summary Chart. In addition the Union argued it was a mistake to rely on supervisory skills as the job required no supervision of other employees. I have addressed these issues above and for the reasons given earlier I agree in part with the Union position. I have concluded that the Employer placed excessive reliance on supervisory skills in this competition for a job which did not involve any supervisory responsibilities.

The Union argued that the Employer failed to properly apply the standard of "relatively equal". For the reasons given above, I agree.

Each of the above three issues relate to specific language in the collective agreement. Most of the remaining issues in this section do not involve particular language of the agreement. The collective agreement does not give any clear direction as to how the Employer should conduct these job competitions. It does not say, for example, that there should be an interview, nor indicate who should conduct the interview. However, in my view, it is implicit in Article 10.01, an article which is intended to give employees security, that the Employer is not free to conduct job competitions in any manner it prefers. Instead I conclude that the Employer is required to conduct the competitions in a fair and reasonable manner. The remaining allegations of the Union in this section are reviewed on that basis.

The Union argued it was a mistake to allow Mr. Mills, who had not participated in the interviews, to make the decision. I have concluded above that the interview panel, as opposed to Mr. Mills, made the decision.

The Union made reference to the Employer's Procedure Manual. The Employer did not

follow its Procedure Manual and the Union submitted that this was an error. In my view nothing turns on this. The Employer's obligation is not to follow the requirements of its Procedure Manual, but rather to follow the requirements of its collective agreement.

The Union then challenged the composition of the interview panel. As noted above, Bruce Fritz had worked for all three panel members and included with his application package were letters of reference from each of the members of the panel. (There were two letters from Mr. Arnold.) The Union argued that this biased the interview panel as they were all familiar with the work of Mr. Fritz and not familiar with the work of Mr. Gerry.

I agree that the panel members were familiar with Mr. Fritz's work. The Employer's general practice had been to constitute panels consisting of Mr. Mills, the Manager of Plant Operations, along with the Supervisor of Custodial Services for that family of schools and the Principal of the particular school involved. Mr. Mills was not available in this instance and Mr. Arnold took his place as Chair. Mr. Fleming, the Assistant Supervisor, replaced Mr. Arnold as a member of the panel. While it was usual for a Supervisor of Custodial Services from another family of schools to serve as the third member on a panel when Mr. Mills was unavailable, I do not find that constituting the interview panel in this manner was for the purpose of securing a particular outcome nor do I find it to have been a flaw in the process. Responsible officials from the Employer have to apply the collective agreement and make such decisions and I do not find anything inherently improper in constituting as the panel the Principal of the school involved, the Supervisor of Custodial Services, and the Assistant Supervisor of Custodial Services.

It appears to have been common practice for candidates to have provided letters of reference from their superiors and thus from, for example, their Principal and their Supervisor of Custodial Services. In this situation, the fact that Mr. Fritz had letters from all three

members of the panel would have required the panel to take steps to ensure that the panel fully and fairly considered the applications from all of the candidates. But I do not find the fact that all the panel members provided letters to Mr. Fritz to be a sufficient basis to make the composition of the panel a flaw in the process, in and of itself.

I have already concluded that the panel did not conduct the selection process properly. Had I not already reached that conclusion, the composition of the panel and the letters provided by all the panel members would cause me to scrutinize the decision with great care. In that situation I would have wanted to be confident that the panel members' prior views did not improperly bias the outcome. For example, the panel felt that Mr. Fritz performed better than the grievor in the interview itself and believed that he had provided more complete answers. Mr. Fritz knew all the panel members and had letters of reference from all the members. In such a situation I would expect that Mr. Fritz would be more relaxed and at ease than the grievor and I would have to consider whether the difference noted was simply due to their greater familiarity with Mr. Fritz as opposed to being a reflection of the criteria expressed in factor (b). However in this case, as I have already concluded that the panel made other errors, I have not attempted to isolate the prior views of the panel members so as to determine what effect those views had on the selection.

The Union also submitted that the process was flawed as the members of the panel had in essence prejudged the matter. I leave that aspect of the submission to be dealt with in section 4 of these conclusions.

The Union submitted it was a mistake in the process that the panel members failed to familiarize themselves with the criteria and weighting of the various factors and particularly those factors used in the Applicant Summary Chart. Clearly it would have been preferable if the panel members had conducted a discussion of the criteria, and the relative weighting

they would apply to these criteria. I am unable, however, to conclude that this failure to familiarize themselves with the criteria and the weighting of each, or to agree upon the criteria and weighting, affected the outcome in this case. It was not, therefore, a procedural flaw which would have the effect of invalidating the decision and was not, in this instance, a violation of the collective agreement.

The Union argued that the Employer's failure to prove that the questions asked of the various candidates were of importance, and its failure to prove that the questions tested the applicants for the job, were flaws. However, none of the questions was specifically in dispute between the parties and the Union raised no specific concerns, nor made any specific allegations, about any question. If there had been an allegation that a question sought information that was irrelevant to the position being filled or that a question did not in fact secure from the applicants the information which the Employer thought it provided, then there might be some merit to this argument. In this instance, however, I do not find any indication that the questions were inappropriate or irrelevant. The hearing lasted nine days without the parties having dealt specifically with these issues. I do not think the Employer had any obligation in this situation to lead evidence to explicitly justify its questions or the importance of the questions beyond that which it did. The Employer counsel inquired of each of the three panel members as to why they selected the questions they asked of the various candidates. I conclude that the questions were reasonable questions.

Of greater concern was the Union's allegation that the Employer's failure to investigate qualifications of the applicants was a flaw in the process. The Union argued that this was so particularly in light of the fact that the panel members were very familiar with Mr. Fritz, who was chosen as the successful candidate, and had no similar familiarity with the grievor and his qualifications. The Union noted in particular that the interview panel did not refer to any employee performance appraisals. The interview panel did not contact any

supervisors, except of course where the supervisors were themselves serving on the interview panel. In addition the panel did not contact any of the referees listed by the candidates. Finally the Union argued that it was a mistake not to do any objective testing of the candidates.

The Union argued that the failure to contact referees in this instance was particularly important as the grievor had included as one of his referees the Principal of his school, John Spinak. The grievor did not, however, include a letter from Mr. Spinak as Mr. Spinak was of the view, as he testified before me, that it was preferable to have the interviewers contact him directly. He believed that an assessment given in that fashion carried greater persuasive weight. In his testimony before me Mr. Spinak provided a very positive evaluation of the grievor.

The Employer's failure to do one or more of these things would only be of importance if I were of the view that it affected the result. I do not think that the failure to do objective testing had any impact on the result. Nor do I think that the failure to look at performance appraisals would have affected the result. I am confident that both Mr. Fritz and the grievor performed their respective jobs well and, in this instance, the grievor had positive performance appraisals. Mr. Fritz did not have any performance appraisals in his file, but if an appraisal were to have been done I am confident that it too would have been positive. Nor do I think that the failure to contact custodial supervisors would have affected the result. The grievor included with his application package a letter from his direct supervisor, that is his Head Custodian, as well as the Supervisor of Custodial Services for his family of schools. Their views were thus available to the panel.

The failure to contact other referees, and in particular Mr. Spinak, is another matter. The application form which all candidates are asked to complete, and which the grievor

completed, includes the following heading:

References: (Only those references listed may be contacted. Contacts may be made prior to the interview.)

On the back of the form which has as a general heading "For Office Use Only" is the following:

Remarks from Reference:

Beside "Remarks from Reference" there is space left with four lines which appears to have been intended as a space in which to record the remarks of the referees. The application form thus suggests that referees will be contacted and that the contact might be in advance of the interview.

The opinions of school principals are given considerable weight in the selection of Head Custodians, and thus, for example, Mr. Wiens was included on the panel. It was clear in this instance that the failure of the grievor to include a letter from his Principal was seen by the panel as a negative. The panel members testified to that effect and the notes prepared by Mr. Arnold in advance of his telephoning the candidates include the following comment regarding the grievor - "No letter from Principal?" In actual fact Mr. Spinak held very positive views of the grievor and his work. If the panel members had contacted Mr. Spinak, as I think was implicit on the application form would be done, they would have received a very positive evaluation of the grievor. In particular, Mr. Wiens considered this absence of a reference from Mr. Spinak as a negative. It is quite possible that if the panel had contacted Mr. Spinak, the grievor's Principal, then Mr. Wiens, himself a Principal, would have evaluated the grievor more highly.

On this point, the Employer referred to the *OPSEU (Peters)* case. In that case the Grievance Settlement Board held that a failure to consult referees was not a violation as "we are satisfied that the decision . . . would have remained the same" even if the employer had

consulted the referees (page 31). I agree with that approach but, as I have indicated, I am unable to conclude that the decision would have been the same if Mr. Spinak had been consulted. In this instance therefore, I find that the failure to contact Mr. Spinak was a procedural flaw which might have affected the outcome, and was thus a violation of the collective agreement.

If the Employer does not wish to contact referees then the Employer should not suggest to applicants on the application form which the Employer requires applicants to complete that their referees will be contacted.

The Union argued as well that it was improper for the Employer to place reliance on the experience which Mr. Fritz had gained as Acting Head Custodian at North Wilmot. The Employer had the authority to make acting appointments, and appears to have done so frequently. The collective agreement says that the following factors shall be considered in promotions and then includes a list of matters to be considered as part of factor (b). I do not see anything in Article 10.01, or anywhere else in the collective agreement, which indicates that a candidate's work as an Acting Head Custodian in the same school for which a candidate is applying as Head Custodian should be excluded from an evaluation of factor (b), or excluded in factor (a). In fact it appears that the explicit references to experience and past work record would make it mandatory that the Employer consider Mr. Fritz's experience as Acting Head Custodian in its consideration of factor (b). It should also be included as part of his seniority under factor (a). Thus I do not find the reliance on Mr. Fritz's work as Acting Head Custodian to be a procedural flaw.

If Acting Head Custodian experience was not to be considered in an evaluation of candidates, it would require a change in the collective agreement.

Finally, the Union argued that it was a mistake not to disclose to applicants the job description or the method to be used in evaluating the candidates. This may be an important consideration in competitions for some positions, but I do not think that when custodians employed by this Employer are applying for positions as Head Custodian there is any confusion as to what that job entails. The criteria to be used in assessing the candidates are established by Article 10.01 and are known to the candidates. I am also confident that the method by which the interviewing panel assesses the criteria, that is through the use of an interview and the application packages, is known, and thus need not be specifically disclosed to candidates in advance of the interview. In particular I find that the grievor knew what this job entailed, knew of the criteria in the collective agreement, and knew of the use of an interview. He had applied for similar jobs in the past. As a result I do not find the failure to disclose a job description or method of evaluation to be a flaw in the Employer's process in this competition.

3. Comparison of the grievor and Mr. Fritz as candidates

To this point I have concluded that the Employer did not properly apply the criteria in the collective agreement, failed to obtain the views of Mr. Spinak, placed excessive reliance on supervisory skills, and made certain procedural errors. I now move to a consideration as to what the result would have been had the selection been done in accordance with the requirements of the collective agreement.

The parties disagreed as to the appropriate test or standard of review. The Employer submitted that I should apply a reasonable standard. The Employer approach is based on the notion that there is a range of conclusions which reasonable people might reach in applying the criteria in the agreement in good faith in an assessment of the applicants for the position. In effect, the Employer said I should accept the Employer's decision if it falls within this

range. The Union submitted that I should determine whether or not the Employer was correct. In effect, the Union argued that there was a right or proper outcome when the applicants were assessed on the criteria specified in the collective agreement and that I should ensure that the Employer's conclusion was that proper outcome, not simply that it was one in a range of reasonable outcomes.

The disagreement over a "reasonable" versus "correct" standard of arbitral review has been an on-going one. This disagreement does not relate to the interpretation of the *language* of the collective agreement. On matters of the interpretation of the language of the collective agreement an employer has to be correct - there is no room for a reasonable, but incorrect, employer interpretation of the collective agreement itself. Thus, for example, it has no application to the questions on the use of seniority and the meaning of relatively equal which I addressed above.

The reasonable versus correct dispute applies to an employer's *assessment* of the facts. The disagreement relates, in the context of this case, to the Employer's assessment of the applicants on the criteria in factor (b). The assessment of an applicant's "efficiency" or "reliability", to use two examples, is a difficult task and often involves a large measure of subjectivity. Because of the difficulty in assessing concepts such as "efficiency" and "reliability" there are some who argue that as long as the employer has made a reasonable assessment, that is sufficient. Others argue that, as is the case in the interpretation of the agreement itself, an employer has to be correct.

Some arbitrators and most unions prefer "correct"; some arbitrators and most employers prefer "reasonable". In part the differences flow from different language in various collective agreements. Some agreements use language such as "when, in the opinion of the employer, . . ." and arbitrators have concluded that, as the parties have contracted for the exercise of

discretion by the employer, where that discretion was exercised reasonably the decision should stand. This has now become the "reasonable" approach.

Other arbitrators have dealt with collective agreements which do not specifically include an element of employer opinion or discretion - there is, for example, no express reference to the employer's opinion. Arbitrators have decided that those parties have not contracted for the same latitude in decision making and thus the employer decision has to be "correct".

I find that the debate, and the arbitration decisions on this point, generally fail to assist me in resolving the issues in this grievance, in part because what is meant by "reasonable" as opposed to "correct" frequently lacks clarity. I also find that beginning with the issue of correct versus reasonable tends to move the process away from the real issue before me - did the Employer follow the requirements of this particular collective agreement. The approach I prefer and which I will follow here is the one suggested in the *Great Atlantic and Pacific* case. The Court in that case dealt with this issue, in a similar context, in part, as follows:

The [arbitration] board as a creature of the collective agreement must then see to it that the provisions of the collective agreement have been complied with; its role cannot be more or less than this. (at pages 14,534 -14,535 C.L.L.C.)

By focusing on the requirements of the particular agreement I find it easier to address the task at hand.

This was a competition for the position of Head Custodian at one of the Employer's many schools. There were many applicants. The applications were screened and the number of applicants was reduced to a manageable number, in this instance seven, for the purpose of the interview process. The interviews for the position all took place on the same day. It appears that the interviews each lasted some 20 to 30 minutes. The panel members had available to them the candidate's application package which, in the case of the grievor and Mr. Fritz, consisting of a brief one-page resume and various letters of reference. In addition,

the candidates had completed a one-page application form in which they listed their name, address, phone numbers, seniority start date, present location, position applied for, background experience with the Board, outside interests, courses that would be an asset to the position, the names of referees and a two-line statement as to why they applied for the position. The panel members were required to assess each of the seven people and make a decision. I, on the other hand, have had the benefit of eight days of evidence and an additional day for argument and the parties agreed from the first day of the hearing that, at most, I should consider the top three candidates.

In assessing or reviewing the Employer's decision, and in particular the process followed and decision reached by the selection panel, I have considerably more information available to me regarding the candidates than the panel members had available to them. On the other hand the panel members had a fuller understanding of the day-to-day role of the Head Custodian.

To repeat, I characterize my task as one of determining whether or not the Employer has fulfilled its obligations under the collective agreement. If the Employer has done what it was required to have done under the collective agreement, that is sufficient and will dispose of the grievance.

In this job competition the Employer was required to consider the seniority of the applicants as one factor (factor (a)) together with the composite factor (b) set out in Article 10.01 (b) (that is skills, competence, efficiency, reliability, training, experience and past work record with the Employer). If the Employer evaluated or assessed these two factors in a fair manner, there being no express directions as to how the factors and especially factor (b) were to be applied, then the Employer will have done what it was required to do under this collective agreement. In any situation in which factor (b) - skills, competence, efficiency,

reliability, training, experience and past work record with the Employer - are relatively equal between two or more applicants, then the Employer is required to award the position to the senior applicant. If the Employer does this, then again the Employer has done what it was required to do under the collective agreement. I do not, however, read this collective agreement as saying that the Employer must have reached, based on the interview panel's process, the identical decision which I as an arbitrator would reach on the basis of the eight days of evidence I heard on a comparison of a more limited set of candidates. To put it another way, I think that the Employer was required to have made a decision on the basis of a fair consideration of the material they had available to them, or which properly should have been available to them. If the Employer did that, it has followed the requirements of the collective agreement and as arbitrator I should uphold the decision.

Returning to the comparison between the two candidates, Mr. Fritz and the grievor, I have already decided that the interviewing panel, and thus the Employer, did not properly apply Article 10.01 as there was no consideration of seniority. I have also decided that the interviewing panel, and thus the Employer, did not properly apply the "relatively equal" provision at the end of Article 10.01. I have concluded that a number of procedural concerns which the Union raised with respect to the process used by the interview panel were well founded and that there were procedural violations of the collective agreement. Of particular relevance here, I have concluded that in this case the Employer should have contacted Mr. Spinak (the principal of the school where the grievor worked) as one of his referees. As the panel did not do this, the information which was available to the panel was not what it should have been. Finally, I concluded earlier that the panel made excessive use of supervisory skills and experience. As a result of these conclusions it is clear that the Employer did not do what it was required to do.

Did the Employer nevertheless come to the same decision it would have reached if it had

done as it was required to do by the collective agreement? In this case I do not think it wise for me to place any reliance on the ultimate conclusion which was reached by the panel and instead, in answering that question, I will do my own assessment.

I note under factor (a) that the grievor was more senior than Mr. Fritz. In September 1995 the grievor had 7 years seniority and Mr. Fritz had approximately four years and eight months seniority. Thus there was a significant difference on factor (a) in favour of the grievor.

I will assess the various parts of factor (b) - that is skills, competence, efficiency, reliability, training, experience and past work record with the Employer - as one composite factor. In other words I will not try to reach a conclusion on each part of factor (b) - that is I will not attempt to assess the candidates separately on skills as opposed to competence, as opposed to efficiency, as opposed to reliability, etc.

The grievor and Mr. Fritz had both worked primarily on the evening shift. The grievor worked in an elementary school and Mr. Fritz in a high school. The grievor had considerable exposure to grade school children, whereas Mr. Fritz's contact was primarily with high school students. Mr. Fritz had, however, spent a number of weeks working as Head Custodian in North Wilmot School. Mr. Gerry had filled in for the Head Custodian in his school on a number of occasions. The custodial skills of both candidates were not at issue. The grievor had his performance evaluated in a formal way by the Employer during the years of his employment and had received positive performance evaluations. There were no performance evaluations of this formal nature done for Mr. Fritz, or at least none were available at the hearing and none were included in Mr. Fritz's personnel file. I have no doubt, however, that Mr. Fritz did his job well. Both candidates had completed all of the custodial training courses that the Employer offered to custodians. Both candidates had

demonstrated an ability to work with others. The grievor was one of two night custodians at his school and Mr. Fritz was a lead hand with some supervisory responsibility in his school. Although the Head Custodian at North Wilmot does not supervise others, the Head Custodian must nevertheless get along with the other members of the school community - Principal, teachers, students, parents, etc. Both the grievor and Mr. Fritz had demonstrated an ability to get along with others.

Based on the information which was available at the time of the interview process, I would have expected the interview panel to have concluded that the two candidates were quite similar on the criteria in factor (b). In my view some of the interview panel members did. Mr. Fleming, for example, had given Mr. Fritz 22 points, the second candidate (Mr. Eby) 21 points and the third candidate, the grievor, 20. (Mr. Arnold had a bigger difference in the score. Mr. Arnold testified over three different days but at the end of his testimony it was unclear to me as to why he felt Mr. Fritz was so clearly the superior candidate. I do not fault Mr. Arnold in any way - this was one of several similar competitions he had been involved in, it had taken place approximately a year earlier, and the details of the process were not easily recalled.) If the grievor and Mr. Fritz were quite similar on factor (b), then as the grievor had considerably more seniority than Mr. Fritz on factor (a) the position should have been awarded to the grievor.

In any event, knowing of the positive assessment by Mr. Spinak (the Principal of the school where the grievor had been working), views which I have concluded should have been obtained by the Employer in this case, and placing a more appropriate weight on the differences in supervisory experience and skills, I conclude that the grievor was the *superior* candidate on the basis of an initial assessment of the two factors listed in Article 10.01 taken as a package and should have been awarded the job on that basis.

The conclusions above are sufficient to resolve the grievance. If the Employer had concluded, as I have, that on the assessment of the two factors as a package the grievor was superior and should therefore be awarded the position, it would not have needed to deal with the "relatively equal" provision. Thus, it is not necessary for me to deal with it either.

However, the parties dealt at length with the issue of "relatively equal" and I will for that reason briefly address the matter. When the interviewing panel considered the concluding sentence of Article 10.01 it was required to consider whether the candidates were relatively equal, that is whether one candidate was superior by a "substantial and demonstrable margin" on factor (b) - skills, competence, efficiency, reliability, training, experience and past work record with the Employer. I have already concluded that the panel did not apply that approach. Had the panel applied that interpretation, I am of the view that the panel would have concluded the candidates were relatively equal and thus the grievor's greater seniority would govern.

In any event, if I were to have to apply the concept of relatively equal to the facts which should have been before the panel, that is when I include Mr. Spinak's views, and placing appropriate weight on supervisory matters, I would conclude that the two were relatively equal. Thus I have concluded that were it necessary to consider the concept of "relatively equal", the grievor should have been awarded the position on that basis as well.

These conclusions are, in my view, supported by subsequent events. The grievor has since been selected to serve as Head Custodian at an "A" rated school, that is as Head Custodian at one of the Employer's largest elementary schools. While I do not have any information with respect to the candidates in that competition, it suggests to me that another interviewing panel concluded that the grievor was a very well qualified candidate for a Head Custodian position. (Mr. Spinak is the new principal of that school and participated in the selection of

the grievor. There was a suggestion from the Union that this simply demonstrated that positions are filled on the basis of who you know, and not on the basis of the criteria in the collective agreement, but there was no evidence to that effect.)

I thus conclude that, on the basis of the material which should have been available to the interviewing panel, the requirements of the collective agreement dictated that the grievor should have been selected over Mr. Fritz to fill the position of Head Custodian at North Wilmot School. In so saying I do not intend to indicate that Mr. Fritz was in any way a poor candidate for the position. I heard considerable evidence about Mr. Fritz and his abilities, and Mr. Fritz testified. I was impressed with Mr. Fritz and his abilities. It is simply a matter that under the criteria in the collective agreement, considered in the context of this particular position, the Employer was obligated to award the position to the grievor in preference to Mr. Fritz.

4. Was the competition a "sham"?

This brings me to the Union's final allegation that the entire process was a sham, was biased in favour of Mr. Fritz from the beginning and that the process was part of a plan designed to place Mr. Fritz in the position of Head Custodian of North Wilmot School. I have already found that the Employer did not apply the collective agreement properly, did not have all the information which it should have had, and that the grievor should have been awarded the position. It is thus unnecessary to address this submission in order to resolve the grievance but it too was addressed at length and I will therefore deal with it in general terms.

The Union submitted that there were a number of points in the evidence which supported this conclusion. The request made by Mr. Mills (Manager of Plant Operations) of Mr. Weiler (President of the Union) in February of 1995 to accept a transfer or a switch between Mr.

Crocker and Mr. Fritz represented the factual start of this concern. The Union would not consent and wanted the positions posted pursuant to the collective agreement.

When the Employer then took the unusual step of having Mr. Fritz, a lead hand, temporarily replace Mr. Crocker in the spring of 1995 the Union felt this provided additional support to its concerns. In addition, there was the statement by Mr. Rudy, the Principal of Waterloo Oxford High School, who announced in June of 1995 that Mr. Fritz was leaving that school to become Head Custodian at North Wilmot. When Mr. Fritz became Acting Head Custodian again in the fall of 1995, Mr. Crocker took over as Acting Lead Hand at Waterloo Oxford High School (Mr. Fritz's old position). The Employer thus, through the use of acting positions, had effectively accomplished what the Union would not consent to on a permanent basis. When the position at North Wilmot was subsequently posted and Mr. Fritz was successful in the competition these various factors taken together quite reasonably raised concerns that the decision was made long before the job was posted.

These facts, together with other matters such as the composition of the panel, would prompt me to look very closely at the decision making process and the selection of Mr. Fritz even if there were no other identifiable violations of the agreement. There were, however, other violations of the agreement.

The Employer's actions in making each of the acting appointments was permissible. It was permissible for the Employer to transfer Mr. Fritz to North Wilmot on an acting basis in 1995. It may have been unusual to assign a lead hand to the position, but the Employer has a freedom to assign custodians to Acting Head Custodian positions. The Employer had raised the matter in February with the Union and indicated its desire to have Mr. Fritz at North Wilmot. Choosing Mr. Fritz to fill in on an acting basis was consistent with its earlier desire to switch the two. The Employer placed Mr. Fritz at North Wilmot on an acting basis

in the spring and again in the fall. When Mr. Crocker acted as lead hand replacing Mr. Fritz, the Employer had effectively accomplished, on an acting basis, both parts of its winter proposed switch but, in doing so, the Employer was acting within its rights.

As for Mr. Rudy's comment at the staff lunch, Mr. Fritz had met Mr. Rudy and had a brief discussion with Mr. Rudy earlier that day in which Mr. Fritz had indicated that he was back from North Wilmot and that he hoped to apply for the position in the fall. While Mr. Rudy was not called to testify, it appears that Mr. Rudy may have been confused as to the state of events. In any event, I do not have any evidence to suggest that Mr. Rudy actually knew that Mr. Fritz was going to move to North Wilmot as Head Custodian.

I have found above that the process was flawed in several ways but I do not find sufficient basis upon which I might reasonably conclude that there was bad faith in the Employer's conduct of this job posting, or that the process was consciously designed as part of a plan to place Mr. Fritz in the North Wilmot position.

VI. REMEDY

The Union asked that I set aside the award of the position to Mr. Fritz and order that the Employer post the position and conduct the selection in accordance with the provisions of the collective agreement.

I note that the grievor has obtained another Head Custodian position and he no longer seeks this position. The second-ranked candidate for this position, Mr. Eby, testified before me that he no longer seeks the North Wilmot position. Mr. Fritz has since left the position and has taken another job with the Employer. A job competition to replace Mr. Fritz began before the hearing in this grievance was concluded.

Any remedy for a violation of a collective agreement should have some practical or useful effect. In these circumstances, I do not think it would be of any value or utility to order the 1995 selection of Mr. Fritz for the North Wilmot position to be set aside. Nor do I think there would be any point in an order that the Employer re-post the position and conduct another selection. To direct that the Employer re-do this job posting when Mr. Fritz is no longer in the position and the grievor no longer seeks it would not have a useful or practical effect. I thus decline to direct that the earlier decision be set aside and I similarly decline to direct that the position be re-posted or that the competition be re-done.

The Union also asked that I provide an interpretation of Article 10.01. I have done so above. Seniority is to be considered in every case under that article. The Employer is to consider the two factors - that is seniority and the composite of skills, competence, efficiency, reliability, training, experience and past work record with the Employer - as part of one package and, having done so, if one applicant is clearly superior on the two factor package combined, then that person should be offered the position. In those situations where a consideration of factor (b) indicates that the two candidates are "relatively equal" on that factor, as "relatively equal" has been interpreted above, the position should be offered to the senior "relatively equal" candidate.

The Union also sought a declaration that the selection process was flawed in a procedural sense. I have dealt with those submissions in greater detail above. I summarize my findings on the procedural flaws in the process as follows:

- The Employer improperly failed to consider seniority.
- The Employer used improper criteria in this case by relying too heavily on supervisory skills.
- The Employer improperly interpreted "relatively equal".
- The Employer improperly failed to contact the Principal of the grievor's school who

was listed as one of the grievor's referees.

Finally, the Union sought a declaration that the selection process was biased or not conducted in good faith and the entire process was designed to select Mr. Fritz. For the reasons given above I have rejected this Union submission. I have, however, concluded that there were other errors in the process and that the Employer came to the wrong conclusion in its selection of Mr. Fritz for the position of Head Custodian at North Wilmot School.

I will remain seized to deal with any issues which may arise in the implementation of this award.

In summary, for the reasons and to the extent indicated above, the grievance is allowed.

Dated this _____ day of November, 1996.

Howard Snow, Arbitrator