

IN THE MATTER OF AN ARBITRATION

BETWEEN:

AGASSIZ SCHOOL DIVISION NO. 13
(hereinafter referred to as the "Employer" or the "Division")

- and -

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1618
(hereinafter referred to as the "Union")

AWARD

(I) GENERAL COMMENTS AND IDENTIFICATION OF ISSUES

This Grievance came before me under the provisions of the 1998 - 2001 collective agreement (the "Agreement") (Ex. 1) between the Employer and the Union. The hearing was held in Winnipeg, Manitoba on December 11, 2000.

At the outset, I advised the parties I had taken the required Oath of Office. Exclusion of witnesses was sought and ordered.

The parties agreed that I had been properly appointed as arbitrator under the Agreement and had jurisdiction to determine the matters at issue.

As the outcome of this arbitration could adversely effect Ms. Elana Sytnick's ("Sytnick") appointment to a position with the Employer, I was advised and am satisfied that Sytnick received reasonable notice of the hearing and her right to participate therein, with or without counsel (Ex. 4). Sytnick did not appear.

The parties agreed that I need only deal with the question of liability on the issue presented and if the Union was successful, in whole or in part, then the parties would, if the Award required it, attempt to resolve the question of compensation/implementation between- -themselves but failing agreement, I would remain seized of jurisdiction to resolve any outstanding issues.

On September 3, 1999, Ms. Sandra David (the "Grievor") filed a Grievance (Ex. 2) in which she alleged that the Employer had misinterpreted, misapplied or violated certain provisions of the Agreement as well as Section 80(2) of *The Labour Relations Act* (the "Act") because the Employer did not hire her:

"... as Full Time Secretary as per Bulletin Board Notice 1099. I am the most Senior applicant and meet the qualifications for the position."

As to remedies, the Grievor requests a declaration that the Agreement has been violated; that she be placed in the position of Full Time Secretary at Centennial School in Lac du Bonnet; and that she receive appropriate monetary redress on a retroactive basis.

The Employer denied the Grievance (Ex. 3).

On June 8, 1999, the Employer posted a vacancy notice for a full-time Secretary at Centennial School (Ex. 6) (hereinafter sometimes referred to as the "Posting"). The Grievor, among others, submitted an application in a timely manner. The Employer appointed Sytnick to the position. It is common ground that Sytnick was an external candidate in the sense that she was not a member of the bargaining unit covered by the Agreement whereas the Grievor had been employed by the Division since October of 1991 in two part-time positions, the details of which will be explored in this Award.

The Union asserts that, in selecting an external candidate over the Grievor, the Employer violated, *inter alia*, the promotion provisions of the Agreement (Article 8), both procedurally and substantively. The Union asserts that the Posting did not give notice of the qualification(s) or criteria upon which the Employer ultimately made its decision; that the Employer violated a provision in Article 8 under which employees within the bargaining unit must be "...considered prior to" applications from external candidates; that the Employer failed to follow the criteria in Article 8.02(b) and, further, that the manner in which the selection process (in particular, the interviews) was conducted, was unfair and unreasonable. Further, the Union alleged that the Grievor ought to have received the position by reason of certain lay-off and recall provisions set forth in Article 24 of the Agreement due to the fact that the Grievor had been laid-off from one of her part-time positions in early June of 1999 and Sytnick's appointment violated a stricture in the Agreement which states that new employees could not be hired if there were any employees on lay-off with the "...necessary ability, qualifications and skill to perform the work".

For its part, the Employer asserts that it acted within its rights in bypassing the Grievor for the position because she did not possess a key qualification and, not meeting this initial (threshold) criterion, the Employer was free to appoint an outside candidate. Mr. Simpson initially took issue with the fact that the Union was raising the issue of lay-off -recall because this was not an Article which was referred to in the Grievance. After a brief adjournment, Mr. Simpson stated that the Union did raise this issue during the Grievance Procedure but he asserted, whether the Grievor is to be awarded the Secretary position, on the basis of a recall or a promotion is immaterial because, from either perspective, she was only entitled to the position if she met the required qualifications.

(II) RELEVANT PROVISIONS OF THE AGREEMENT

In order to put the evidence and arguments in a meaningful context, I will reproduce the salient provisions from the Agreement at the outset.

Article 3.01 - MANAGEMENT RIGHTS - states, in part, as follows:

"Subject to the provisions of this Agreement, the operation of the schools and direction of the staff... including the right to hire, suspend or discharge for just cause, to assign to jobs, to classify, to promote, to transfer for cause, employees among the schools, to increase, decrease or re-organize the staff, both permanent and temporary... is clearly a function of management and is vested exclusively in the Board. The Board agrees that it will not exercise any of the foregoing rights of this Article in a discriminatory manner. The specific terms of this contract shall be the source of any rights that may be asserted by the Union against the School Division."

Article 6 addresses SENIORITY. Article 6.01 recognizes two types of seniority, namely, bargaining unit wide seniority and seniority by classification, as defined in sub-provisions of that Article. Classification seniority governs in the case of lay-offs and recalls but bargaining unit wide seniority (i.e. the length of continuous service in the unit since last date of hire) is to be recognized as a factor in promotions.

Article 8 is entitled **PROMOTIONS AND STAFF CHANGES** and states, in its entirety, as follows:

"8.01 When a vacancy occurs or a new position is created inside the bargaining unit, the Employer shall post notice of the position in the Division Office, all schools and Bus Garage for a minimum of five (5) days so that all members will know about the vacancy or new position. Applications by present employees shall be in by the sixth (6th) working day after the initial posting of the position. In the posting, the notice shall contain the nature of position, location, qualifications, required knowledge, skill, and wage rate or salary range. The Union shall be notified of the name and position of the successful applicant for the bulletined position.

8.02 a) Both Parties recognize the principle of promotion within the service of the Employer. Therefore employee applications will be considered prior to applications from outside the bargaining unit.

b) In selecting employees for vacant positions, the Division will consider the following factors in the order listed:

- 1) qualifications
- 2) ability
- 3) skill
- 4) employment history

When in the sole discretion of the Employer the above noted criteria are equal seniority shall prevail.

8.03 The successful applicant shall be placed on trial for a period of three (3) months. Conditional on satisfactory service, the employee shall be declared permanent after the period of three (3) months. In the event the employee proves unsatisfactory in the position during the trial period, or if the employee is unable to perform the duties of the new position, he shall be returned to his former position without loss of seniority, wage or salary rate. Any other employee promoted or transferred because of the arrangement of positions shall also be returned to his former position without loss of seniority, wage or salary rate." (My emphasis)

Article 24 - LAYOFF AND RECALL - prescribes that lay-offs must be done in reverse order of seniority by classification, providing the remaining employees possess the necessary ability, qualifications, skills and employment history to perform the work. Article 24 prescribes that the

Employer must give an employee written notice of lay-off "...at least thirty (30) days before the date on which he/she is to be laid-off or in the absence of such notice shall grant pay in lieu thereof."

Articles 24.04 and 24.05 state:

- 24.04 Employees shall be recalled in order of their classification seniority provided that the person recalled has the necessary ability, qualifications, skills, and employment history to perform the work.
- 24.05 New employees shall not be hired if there are employees on layoff with the necessary ability, qualifications and skill to perform the work."

The various classifications and accompanying salary ranges are contained in Schedule "A". The generic classification CLERICAL WORKERS includes Secretary, School Secretary and Secretary/Administrative Assistant. The generic classification or category of TEACHING ASSISTANTS contains four categories of Teacher Assistants, including "Teacher Assistant - Clerical". The generic category LIBRARY WORKERS is comprised of three classifications, namely, Library Technicians, Library Clerk I and Library Clerk II.

The limitations on an arbitrator's jurisdiction are found in Article 12.06, as follows:

"The parties agree that an Arbitration Board set up under this Article shall not have the power to add to, delete from, change, or make any decision contrary to the provisions of this Agreement, and the Arbitration Board in rendering its decision shall be governed solely by the provisions of this Agreement."

(III) THE EVIDENCE

The Union called:

(a) Ms. Jackie Hampshire ("Hampshire") who, since 1981, has been employed as a Bus Driver by Division. Since 1982 or 1983 she has held a number of positions with the Local Union and she was President of the Local when the Grievance was filed and processed through the grievance procedure; and

(b) The Grievor who, as noted, commenced employment with the Division in October of 1991. Since that time until June 30, 1999, the Grievor occupied two parttime positions (.5 EFT each). One was a Teacher Assistant - Clerical position and the other was a Library Clerk II position.

The Division called Mr. Douglas Craig ("Craig") who has been employed by the Division for some 27 years and who has been the principal of a school for the last 21 of those years. He was the principal at a school in Whitemouth, Manitoba for 7 years and, since that time, has been a Principal in Lac du Bonnet itself, principally at Centennial School.

Arising out of the testimony of all witnesses and the Exhibits filed, many of the material facts are not in dispute. Accordingly, before turning to the individual testimony of each witness on more contentious points, these material facts may be summarized as follows:

1. Within the geographic confines of the Division, there are currently two schools in Lac du Bonnet itself. The Lac du Bonnet Senior School covers Grades 6 to 12. Centennial School covers Kindergarten to Grade 6;
2. Approximately 330 students attend Centennial School. In terms of full-time equivalent positions, Craig said that Centennial's staff consists of 21.5 teachers; 8.5 Teacher Assistants; 1.75 Clerical; 1.75 Custodial; 1.0 Library; and 9 Bus Drivers. There is also a Day Care facility which is part of the School and this facility has some 60 slots. There is a Director of the Day Care who supervises 12 staff persons;
3. After Sytnick's appointment, there are 1.75 (EFT) Clerical personnel at Centennial School. There is a School Secretary (.75). I am satisfied that the person occupying this position performs duties of a more managerial nature given the fact there is no Assistant Principal at Centennial. Her duties involve the areas of financial matters, the scheduling of work, the ordering of supplies and bookkeeping functions. Secondly, there is the Secretary of the School (i.e. the contested position). For the sake of clarity, whenever the expression "Secretary" is used in this Award, it may be taken to be a reference to the position in dispute here;
4. In terms of the geographical set up of the School's office, Craig has his own private office. In the outer office, there is what he characterized as an alcove where the School Secretary occupies a desk. Craig said the purpose of this alcove arrangement is to afford the School Secretary more privacy. The Secretary's desk is in a central location and is the first contact when a student, teacher or member of the public enters the office area. Near where the Secretary sits there is a bench where parents or students or any member of the general public may sit when they come to the Office.
5. There is also a separate room which is known either as the "Prep Room" or the "Photocopy Room". This room is located some 100 feet away from the main office area. The Prep Room houses shelving, a book collator, various school supplies and a photocopier. The Prep Room also contains what are known as Teacher slots. A teacher will place any assignments or photocopying which the teacher wishes the Clerical Teaching Assistant to do in his/her own slot. At the beginning of each school year, Craig allots each Teacher access to the Clerical Teaching Assistant on a rotating schedule to ensure that Teachers have equitable access to her services. This rotating schedule is posted and each Teacher receives a copy,

recognizing that Teachers may trade-off, as circumstances dictate. Craig said more time is allotted to the Kindergarten and Grades 1 and 2 Teachers because they need more clerical assistance;

6. From at least 1991 through to June of 1999, the full-time Secretary in Centennial's Office was Ms. Janice Halliday ("Halliday"). She reported directly to Craig. Prior to the Posting, Craig said that Halliday handled both secretarial and managerial duties and I am satisfied that, given the pressures of the workload, a decision was made to appoint Halliday to the School Secretary ("Business Manager") position and her taking this position resulted in the full-time Secretary vacancy in June of 1999;
7. Until the fall of 1999 and at all times material to the Grievance, Ms. Lynn Braiden ("Braiden") was the Secretary Treasurer of the Division. Braiden was involved throughout the Posting and selection process. However, Braiden is no longer with the Division;
8. Braiden prepared the Posting (Ex. 6) without Craig's involvement. The Posting was posted on June 8, 1999 and directed applicants to submit a resume to Braiden. After stating that present employees must submit applications by the sixth working day after the initial Posting (see Article 8.01, supra) and after identifying the position as SECRETARY -CENTENNIAL - FTE 1.0, the body of the Posting states:

"WRITTEN applications will be received by the undersigned for a Secretary for Centennial School, with duties to commence August 23, 1999.

Beyond the experience as a Secretary and the responsibilities it holds, the successful candidate will have experience using MacSchool, or wide experience on a data base. A background in secretarial/office management is preferred. Must be highly organized, professional with staff and caring with children. The successful candidate will take responsibility for the duties assigned to the office.

This position offers 35 hours per week.

Starting salary dependent on level of experience as per CUPE Collective Agreement.

Applications close June 17, 1999 at 12:00 noon.

Further information may be obtained from Doug Craig, Principal of Centennial School."

9. By letter dated June 14, 1999, the Grievor submitted a letter of application to Braiden (Ex. 9), as follows:

"I am interested in working in Centennial School in the position of Secretary. I am highly organized with over 9 years of experience to offer.

Since I have started at Centennial School, I have been responsible for a number of jobs as Clerical Assistant, which has given me the experience necessary to carry out the job of Secretary. In addition, to substitute as secretary in the office.

As Secretary, I would bring a focus on my organizational skills and computer knowledge which is required for fulfilling the position."

10. The following resume accompanied the Grievor's application:

Objective: Secretary of Centennial School

Experience: 1991-1999 Centennial School Lac du Bonnet, MB

Clerical Assistant

- Data input into computer, typing, photo copying and filing.
- Substitute Secretary in the office.
- Reception desk and answering phones.
- Intercom use
- Word Perfect, Work, Microsoft Office, Mac School
- Time Sheets, purchase orders

1991-1999 Centennial School Lac du Bonnet, MB

Library Clerk II

- Maintaining a automated circulation procedure (Mandarin)
- Typing and general secretarial work, filing, ordering materials
- Planning and management of the budget.
- Supervising volunteers

1975-1978 City of Winnipeg, Winnipeg, MB

Office Clerk

- Invoicing and typing
- Time sheets, Month End Reports
- Photocopying, filing and general office duties.

Education: - 1974 - Lac du Bonnet Senior School
- Graduated Grade 12
- Courses through Red River Community College: Introduction to Micro Computers, Word Perfect, Introduction to the Internet

References: - Doug Craig - Centennial School

- Terri Usackis - Lac du Bonnet Senior School

Current: - Library Clerk II, Clerical Assistant"

Applications were also submitted by Sytnick and Ms. Darlene Lamoureux ("Lamoureux"). Lamoureux is an employee of the Division. She has less seniority than the Grievor (Ex. 12). According to the seniority list, Lamoureux is a Special Needs Teaching Assistant;

11. Sytnick's application was filed as Ex. 19. In her covering letter to Braiden, Sytnick stated:

"I offer a solid background in proficient computer skills, as well as practical experience in office procedures. You will see that my resume demonstrates a person with numerous qualities efficiency and drive."

The following resume was also submitted by Sytnick:

SUMMARY OF QUALIFICATIONS

- Flexible, and experienced as a team member.
- Organized, competent and adaptable.
- Friendly, enthusiastic, and energetic.
- Skilled in Microsoft Office Or. 97, Simply Accounting 4.0, Internet.
- Proficient keyboarding skills 60-65 wpm.
- Introduction to Mac School 4.0 program.
- Experienced use with all types of office equipment

WORK HISTORY

Jan/97-June 1999

Library/Clerical Su. / Lunch Hour
Supervisor

- Centennial School, Lac du Bonnet, MB.
- Typed letters, memos, documents, school supply lists, attendance.
- Prepared school class lists using Mac School 4.0
- Performed clerical duties as requested for principal and teachers.
- Experienced with Mandarin System/Library
- Contacted applicants to set up and confirm interview times
- Maintained a safe and quiet eating atmosphere in classrooms.
- Supervised children on outdoor playground.

Nov 1997-1998

Office Clerk I Receptionist

- Provincial Helicopters Ltd. Lac du Bonnet, MB.
- Utilized Calm database maintenance tracking system for individual helicopters (8 in all).
- Composed inventory database using Access 97, and designed a numerical system for inventory storage.
- Invoicing, receiving/shipping.
- Restructured and maintained filing system. Updated manuals.
- Created tables and charts for specific plans.
- General office procedures and duties as assigned.

1988-1992

Enumerator/Deputy Returning Officer

- Elections Canada, Lac du Bonnet, MB.
- Involved in Federal and Municipal Elections.
- Enumerated, prepared and typed voting lists.
- Open and close the Polls, complete paper work for D.R.O.

EDUCATION

1997

Accounting II - Simply Accounting Software, Version 4.
New Directions Store Front School, Lac du Bonnet, MB.

- 1996 Accounting Theory I.
New Directions Store Front School, Lac
du Bonnet, MB.
- 1995 Introduction to Computers.
Adult Education Center, Beausejour, MB.
- 1978 Grade 12 Diploma, Major - Accounting.

Lord Selkirk Comprehensive High
School, Selkirk, MB.

** I have also volunteered for book fairs, classroom activities and school field trips."

12. It is unclear whether there were any other applications for the Posting. Craig said that Braiden was responsible for the process and he really did not know how many applications were received. It was his understanding that Braiden would look through the resumes submitted and then arrange interviews. The interviews were to be conducted by Braiden and Craig. Interviews were initially arranged for Monday, July 5, 1999. The three persons scheduled to be interviewed on this Monday were Sytnick, Lamoureux and the Grievor. However, it is common ground that the Grievor was not interviewed on this day. The Grievor said that when Braiden called her to set up the interview, she explained to Braiden that she could not make the Monday interview because she had no vehicle. Her interview was rescheduled for Wednesday, July 7, 1999 in the morning. When he attended for the other two interviews Braiden told him that the Grievor could not come on that Monday and that she would interview the Grievor herself. So, on the Monday, Braiden and Craig interviewed Sytnick and Lamoureux. On the Wednesday the Grievor attended for her interview with Braiden only. The Grievor said she was advised by Braiden that Craig would not be at the interview but gave no reasons. The Grievor said she initially thought that Craig would attend at the interviews because this had been made known to her when the first interview was tentatively arranged;
13. Following the three interviews, Braiden called Craig and the two of them discussed the interviews, following which a decision was made to offer the position to Sytnick. Craig said it was to be Braiden's responsibility to communicate this decision to the Grievor;
14. The Grievor received notice that she was unsuccessful in her application by a letter dated July 12, 1999 from Braiden (Ex. 15). This letter simply advises the Grievor

that the position had been awarded to Sytnick. A copy of this letter was forwarded to Craig. According to the Grievor, she had made some attempts to get in touch with Braiden in the latter part of June and later in July but was unable to reach Braiden. The Grievor did not receive the July 12 letter until July 28, 1999 (see the posting date on Ex. 15);

According to the Grievor, she got in touch with Braiden later in August to ask her why she did not receive the position. The Grievor said Braiden advised her that this had been a "...group decision" and told the Grievor that she should speak to Craig. The Grievor said that she did speak to Craig who, in turn, referred him back to Braiden. She never called Braiden because the Grievor said "...I was not getting any answers";

15. By letter dated August 6, 1999, a Union Representative wrote to Braiden requesting a list of all candidates who were interviewed for the Posting; a written outline of the abilities, qualifications, skills and experience of the successful candidate; and a list of which Employer representatives were present at each applicant's interview (Ex. 16). A further letter was sent to Braiden on August 27, 1999 (Ex. 18) requesting the same information. The Grievance was ultimately filed on September 3, 1999.

The Lay-Off and Recall Issue

16. By letter dated June 8, 1999 from Braiden to the Grievor (Ex. 5), the Grievor was advised as follows:

"Dear Sandra The Agassiz School Division Board of Trustees passed a motion reallocating secretarial / clerical allotments. .25 FTE Secretarial time is being allocated to Centennial School from the allotment normally given to Lac du Bonnet Senior School.

Because this reallocation of resources will have an impact on the staffing in Centennial School, the .5 position of Clerical Teaching Assistant you currently hold will cease June 30, 1999. This letter serves as notice of lay off from that position.

A full-time secretarial position will replace the clerical TA position. Pursuant to the CUPE Collective Agreement, this position will be posted for six working days. You are invited to apply for the position."

17. On August 23, 1999, the Grievor wrote to the Division (Ex. 8) stating:

"I received a letter stating my layoff from the position of .5 Clerical Assistant in June /99. As of now I will only be working in the position of .5 Library Clerk II. According to article 24 of the CUPE collective agreement (layoff and recall) I am entitled employment due to my seniority.

As I am now .5 Library Clerk II and have more seniority, I would like a full time position in the library as there are two (.5) positions. If this is not possible full time employment is still requested."

18. On August 25, 1999, the Grievor wrote to Craig (Ex. 17) as follows:

"I am writing in response to our conversation on August 25. You wanted to know if I would like to work full time in the library this year. I have written a letter to Mr. Klassen requesting full time employment as a Library Clerk II.

As you know Mr. Craig, my first choice was to work full time as School Secretary. I can't understand why you would not accept me for the position. With the qualifications I have and the time I have spent in the Office over the last number of years should show you that I would do the job with the best of my ability. I would like to know who made the final decision and what the reasons were as to why I was not hired for the position. I am a hard worker and very dedicated to my job, and feel very hurt and disappointed that someone else that you felt was more qualified for the position, and outside the CUPE bargaining unit was hired for the position.

I initiated my rights as a COPE Employee with regard to article 24 (layoff and recall) of the CUPE Agreement by writing a letter to Mr. Klassen as I earlier stated requesting employment as Library Clerk II full time since the position of School Secretary is already filled.

I will be waiting for a written response stating his decision in this matter. If you have any questions please contact Mr. Klassen."

19. By letter dated September 1, 1999 from the Division (Ex. 7), the Grievor was advised:

"This letter is to confirm your appointment of 1.0 x f.t.e. Library Clerk II at Centennial School in Lac du Bonnet.

Your position begins August 30th, 1999 and ends on June 30th, 2000."

I pause to note that, generally speaking, all appointments to positions in this bargaining unit are for 10 months. They run concurrently with the School Year, exclusive of the summer vacation period. It is common ground that since August 30, 1999, the Grievor has occupied a full-time Library Clerk II position at Centennial School.

Job Descriptions

20. Filed as Ex. 10 was a Job Description entitled "Clerical Assistant". While there was viva voce testimony given during the hearing in respect of the applicability of this job description it is useful to set it out in its entirety. Given its length, I have simply reproduced this description on the next ensuing three pages of the Award.

=====

Agassiz School Division #13

JOB DESCRIPTION: CLERICAL ASSISTANT

Under the direction of the administrator, the School Secretary will perform duties which may be classified under the following general headings:

- general responsibilities
- keyboarding and photocopying:
- office organization
- finances and accounting
- reception duties

Not all duties and responsibilities would necessarily be assigned to any one secretary. The listing that follows is not meant to exclude any other related tasks that may be assigned.

1.0 General Responsibilities:

- 1.1 Contribute toward achievement of Division and school goals and objectives.
- 1.2 Maintain confidentiality related to students, their families and staff.
- 1.3 Demonstrate positive and co-operative working relationship with students and staff.
- 1.4 Participate in ongoing professional development.

2.0 Keyboarding and Photocopying:

- 2.1 Type and produce letters, memos, reports, forms, agendas, and other school Division or teacher materials.
- 2.2 Record student information, attendance records, class and option lists, student marks, and student and teacher timetables on computer.
- 2.3 Ensure the safety of school data by providing backup disks for each day's work.
- 2.4 Photocopy and collate reports, teachers' materials and forms.
- 2.5 Produce report cards.
- 2.6 Produce and compile school newsletter and brochures.
- 2.7 Complete assigned reports and standardized forms from previously prepared copy.
- 2.8 Compile list and type requisitions and purchase orders for general office and general school supplies.

3.0 Office Organization:

- 3.1 Organize office filing system.
- 3.2 File office and Division materials such as reports, forms, correspondence, personnel data, and student records.
- 3.3 Prepare time sheets for all support staff.
- 3.4 Receive, open, sort, and direct incoming mail, process FAX information.
- 3.5 Mail outgoing correspondence, fax, courier.
- 3.6 Research and compile data for reports.
- 3.7 Distribute keys and maintain a key inventory.
- 3.8 Train and supervise student assistants.

4.0 Finances and Accounting:

- 4.1 Maintain office-based accounting records related to school accounts, including accounts payable and receivable.
- 4.2 Compile, balance, and deposit to the bank all school-activity generated funds.
- 4.3 Prepare receipts for funds received.

4.4 Maintain locker list and handle distribution of lockers and collection of fees.

5.0 Reception Duties:

5.1 Act as liaison providing information to school and Division personnel, students, parents and the community.

5.2 Answer multi-line telephone, respond to inquiries, route calls, and take and deliver messages.

5.3 Operate a public address system to page staff and students, make announcements, and opening and closing exercises.

5.4 Coordinate interviews with possible applicants for vacant positions.

5.5 Prepare Parent/Teacher/Student conference times.

MINIMUM QUALIFICATIONS:

- Effective interpersonal and communication skills.
- Proficient writing skills.
- Proficient in keyboarding and use of computers.
- Ability to answer complex inquiries verbally and in writing, search for, compile and analyze data.
- Ability to work with a large degree of independence.

=====

21. Filed as Ex. 11 was a Job Description (undated) for the SECRETARY POSITION. The Grievor said that this was the position for which she applied. Craig confirmed that this was the job description for the position in question and he characterized it as a "...relatively new job description". He did not have any involvement in its preparation. This job description states:

- "1. The Secretary shall act as a receptionist to the general public, staff, students, parent(s), guardian(s), Social Worker(s), and R.C.M.P., etc.
2. The Secretary shall have a good knowledge of general office procedures. This is to include necessary Agassiz School Division reports as assigned, correspondence, newsletters, and teacher/student related correspondence, along with software and keyboarding skills as required by the Agassiz School Division.
3. The School Secretary shall maintain a complete date base on past records, correspondence and

filing for all staff, students, and divisional records in his/her school.

4. The Secretary will perform such other various duties as assigned by the Principal and or the Office Business Manager.
5. The Secretary will be responsible for updating school supply inventory, and maintaining the photocopier."

Other Matters

22. Filed as Ex. 13 was a number of cards or thank you notes given to the Grievor in April of 1999 by Craig, members of the school staff and Halliday, thanking the Grievor for her efforts and work. Filed as Ex. 14 was a Certificate of Appreciation given to the Grievor (signed by Craig) on April 21, 1999. Based on Craig's evidence, I am satisfied that a large number of Certificates of Appreciation are awarded to volunteers, staff and students on a regular basis and I am also generally satisfied that Craig gives notes and/or cards to other staff as positive reinforcement;
23. The Posting (Ex. 6) requires that the successful applicant have experience using "MacSchool" or wide experience on a database" (para. 8, supra). The MacSchool is a computer program which records and tracks information pertaining to students. There are some 7 components to this program, although two of them do not apply at Centennial (evid. of Craig). One of the purposes of the MacSchool is to keep track of students' attendance. Attendance data is recorded on the computer each day. Other student information (such as health records) is also kept on the MacSchool program. According to the Grievor, there is restricted access to this program because of the confidential nature of the information. The Grievor said that Halliday was also trained on the MacSchool but no one else was. The Grievor said that she had been recording the attendance information on the computer since 1991 on a daily basis.

The Lac du Bonnet Senior School Position

24. Some short time prior to the Posting there was a posting for a similar secretarial vacancy at the Lac du Bonnet Senior School, located approximately a quarter of a mile away from Centennial School. The Grievor and Lamoureux also applied for that position. It was ultimately awarded to an external candidate. The Grievor did not grieve the denial of this position. The Grievor said that she was interviewed for that position by Braiden

and the Secretary who was leaving the Senior School.
The Grievor said that she submitted the same resume (i.e. Ex. 9) for the Senior School position.

In her direct examination, Hampshire said that she spoke to Braiden in May of 1999 in respect of the Division establishing a School Business Manager position. This initial discussion was general in nature but Hampshire understood it would entail changes in the Office at Centennial School. In a later conversation with Braiden, Hampshire said Braiden told her that the changes would mean a greater number of hours for the Grievor in the Office and the Grievor would no longer have to work in the Library. This was because Halliday, the existing secretary, was to be moved up to the Business Manager position. Hampshire said she faxed a job description for this latter position. Hampshire said she told Braiden that the Secretarial position would have to be posted if it entailed an increase in hours. Hampshire said that Braiden told her that this would "...just be a formality and Sandra's hours would be increased in the office". Hampshire said she understood that the Clerical Assistant position would no longer exist at the end of June and said "...I took it that Sandra would be the Secretary in the Office". She said that this conversation would have been early to mid-May of 1999. Hampshire said she received a copy of Ex. 5 and the Posting was received a day or two later. After ensuring that the Grievor applied for the Posting, Hampshire said she had no further involvement until the third week of August when she assisted the Grievor to file the Grievance.

On cross-examination, Hampshire said that she believed the Grievor worked half days in the Office because "...I've seen her there". She added "...I believe she assisted the Secretary in the Office". The basis for her view was that she had seen the Grievor in the Office and had talked to her there.

In her testimony, the Grievor said that Ex. 10 (i.e. the Clerical Assistant Description) accurately reflected her duties except that she did not perform any of the Finances and Accounting duties listed in para. 4.0. She said her only financial responsibility was to collect money from the lunch program. The Grievor also said that she did not perform the duties recorded in para. 3.6 (i.e. research and compiling data for reports) and neither did she do the duties enumerated in para. 3.7.

The Grievor has additional responsibilities for the laminating machine because she is the only person trained on the laminator. This machine had been purchased some five years ago and she has supervised training of others on this machine. She would clean the rolls in the machine; make sure regular maintenance was done; and would train anyone who needed to use it, be it parent volunteers, other staff or teachers.

The Grievor said that "...the administrator" referred to at the outset of Ex. 10 was the Principal of the School.

The Grievor said that she performs duties in the Prep Room. The Grievor said "...that is where I did the work which needed to be done by the teachers such as typing and reports". After she finished performing her duties for teachers in the Prep Room, the Grievor said that she would provide assistance to Halliday. The Grievor said that "...I would keep track of student attendance on the computer each and every day (i.e. the MacSchool - see para. 23, supra). While she would do this task on a daily basis, the Grievor said that when Halliday was either sick or on vacation she would "...substitute for her". When she did this the Grievor said that someone else would be brought in to substitute for her in the Library position. The Grievor said that the practice of filling in for Halliday has occurred a number of times over the last six years.

The Grievor said that she was familiar with a database known as Access which is part of the Microsoft system in the Office. She said a Mandarin III system is used in the Library and it, too, is a database

program. As to who assigned her work, the Grievor said that "... it depends". In respect of the Clerical position she said she would usually ask "...Janice" for assignments. The Grievor confirmed that she worked at the City of Winnipeg, as disclosed in her resume (Ex. 9).

The Grievor has not taken any secretarial course but has completed computer upgrading courses through Sturgeon Creek Regional School. This was on Microsoft and "... a number of other programs". She said she listed Craig as a reference because "... I figured I would get a good reference from him because I had worked for him".

The Grievor said that there had been no performance evaluations done over her eight years with the Employer. The Grievor was asked if she had ever been told that there had been any problems with her performance and she answered "...there were none".

When the Grievor did attend for her interview on Wednesday, July 7, 1999, she met Braiden outside of the school. Braiden told her that it "...would not be a long interview". The Grievor said Braiden advised her that she had 6 standard questions to be asked in the interviews. Braiden told her "...due to your experience, this is just a formality" and that she would only be asking the Grievor 3 questions. The Grievor said the interview took some 15 minutes and that she was asked 3 basic questions. The first was why she had applied for the position. The second was what the Grievor would do to bring more parent volunteers into the School and the third was if there were no administrative personnel present then would she be able to make a decision. The Grievor said she asked Braiden what the wage scale would be. She said Braiden told her she would get back to her the following Monday. The Grievor said that her resume was not reviewed during the interview and neither did Braiden go through the Job Description (Ex. 11) to ascertain if the Grievor could do the functions enumerated.

The Grievor said that she knew Sytnick because Sytnick had substituted for her before in the Library. At or about the time of the Posting, the Grievor said that Sytnick was brought into the Office to "...do extra work for Doug in the office". The Grievor said she did not know of Sytnick's background in terms of doing any clerical work in the School and that Sytnick had only substituted for her in the Library that previous year.

On cross-examination, the Grievor agreed that, as a Teacher Assistant -Clerical throughout her employment, her role was to assist the teaching staff. She was the only person in this position. She agreed that she worked in the Library in the mornings and during the afternoons she was to be available for Teachers. In fulfilling this function, she spent most of her time in the Prep Room. She said that when she went to the Prep Room in the afternoons there would be a series of assignments for her in the teachers' boxes. The assignments were to be completed by her on a "...period by period" basis with each teacher being assigned a designated period. She agreed that an individual assignment from a teacher could consume the whole period and, if it did, then she would move on to the next assignment. She agreed that she might not complete all of the assignments on some days but, for the most part, she was able to finish the assigned work. The Grievor said that she would do other general assignments in the Office and would ask Halliday if the latter needed any help. The Grievor said that she was in the office every day. The Grievor agreed that Halliday was "...basically" responsible for the records on the MacSchool and that her own basic task was to enter attendance records of students. It was suggested to the Grievor that this task only took five or ten minutes at most. The Grievor said that it "...sometimes took longer".

The Grievor agreed that the School encourages employees to take their vacations either during the summer vacation period or during Christmas and spring break. She had no idea of Halliday's attendance record. The Grievor confirmed that she would see Craig on a daily basis and agreed that he would be aware of what she was doing and what was going on.

In respect of Ex. 10, it was put to the Grievor that this Description was not a description for a Teacher Assistant - Clerical. The Grievor said that, except for the tasks she earlier excluded, she did all of the work in this description. It was suggested to the Grievor that Ex. 10 was a job description for a Secretary. The Grievor said "... it says a Clerical Assistant".

It was put to the Grievor that the job which a Teaching Assistant - Clerical does is essentially outlined in para. 2.0 of Ex. 10 and that the essence of the tasks done for the teachers is outlined in para. 2.1. The Grievor said that this was correct. She added that para. 2.4 also related to work for teachers. The Grievor agreed that each afternoon she went through the assignments left to her but added "...sometimes there were no assignments and I spent a lot of time in the Office". The Grievor agreed that she did not do the tasks outlined in paras. 3.6, 3.7 and 4.0. As to how often she produced report cards (para. 2.5 on Ex. 10) the Grievor said she did this "...every term". As to the particular task she performed, the Grievor said "...I photocopied and typed on the cards for each teacher". She said that she typed in the attendance records on the report cards as well as the name of the students and some other information. When the Grievor was asked whether report cards are prepared by the School Division itself, the Grievor said "... I just did what the teachers asked me to do and they filled in the rest of the information".

The Grievor said that she never coordinated interviews with possible applicants for vacant positions (para. 5.4 of Ex. 10) and that arranging parent teacher conference times was done by the teachers themselves (para. 5.6).

In terms of her Library duties, she agreed that she reported to Craig. She agreed that any one of the teaching staff could provide her with assignments.

The Grievor said that Craig had not meet with her from time to time to discuss performance issues. She agreed that she did meet with Craig on occasions, at his initiation, but these meetings primarily related to Library matters. She agreed that he had concerns with overdue Library books but disagreed that he had any concerns with the manner in which she communicated to students or parents on this issue. The Grievor said that Craig did not raise concerns with her regarding the denial of Library privileges to a student if books were overdue. She said he never discussed teacher concerns with him regarding this issue. The Grievor said that she sent notes to teachers regarding overdue books.

It was put to the Grievor that Craig had met with her regarding her communication skills and attitude in respect of dealing with staff, students and parents. The Grievor said such meetings did not take place and did not happen.

She agreed that the Secretary's desk is the first desk in the Office area and that the Secretary would be the first person seen by anyone entering the Office.

In terms of her interview with Braiden, the Grievor agreed that Braiden was the same person who had interviewed her for the Lac du Bonnet Senior School position. The Grievor acknowledged that she was not surprised that her interview with Braiden for the Centennial position was a short one. She understood that the "group" decision had involved Braiden and Craig. The Grievor agreed she was disappointed she did not receive the position and that she grieved the denial this time.

On re-examination, the Grievor said that she did recall times when Halliday took holidays during the school year when she filled in for Halliday. She would do things like answer the phones at the front desk. The Grievor said she never received anything in writing from Craig regarding any concerns in respect of her attitude or communication skills with parents or others.

On his direct examination, Craig said that the main tasks of the Secretary are to greet people coming to the Office and to deal with staff and students on a regular basis. He characterized the position as °... a

people job" because there was constant communication with staff and students and the Secretary is also required to "...meet the general public".

Craig said that the School Secretary (now Halliday) would give tasks to the Secretary such as enrolling Educational Informational Services (EIS) into the computer. This data is used as a basis for the School's funding (i.e. student enrolment).

Craig has known the Grievor since 1991. Craig said that his direct involvement with the Grievor in her Library position would depend on the time of the year. At or around budget time he would discuss book purchases with the Grievor. He would discuss the book fairs with her in February or March of each year. He would also discuss the question of overdue books with her from time to time. As to whether he saw the Grievor regularly, Craig said that "...I always said good morning" but his involvement with her would vary from day to day. Craig confirmed that he made up the teaching schedules at the beginning of each school year and his expectation was that the Grievor would follow this schedule by doing the assignments left by teachers. Craig said that the Grievor would ". ..mostly" get her work from the teacher boxes. Craig said that "...the staff kept her very busy and that she would use almost all of her afternoon time completing these tasks". He felt that most of her work was photocopying. In terms of completing the attendance work on the MacSchool in the Office, Craig said that this was a small component of the Grievor's work and should take no more than fifteen minutes each day.

Craig said that the Grievor would spend fifteen minutes or so in the Office area each day but most of her time was spent in the Prep Room or the Library. Craig said that Halliday's attendance as a Secretary was very good.

In her capacity as a half time Teaching Assistant Clerical, Craig said that the Grievor would perform the following duties listed on Ex. 10 - paras. 2.1; 2.2 as to attendance records; 2.4; 4.3 ("probably"); and some of 5.3. As to 5.3 the Grievor said this would be done in the main Office but these tasks are usually done by the Secretary.

As to the duties listed on the Secretary's Job Description (Ex. 11), Craig said that the first duty (see para. 21, supra) would comprise 75% to 80% of the job, especially in an elementary school. This is so because many people such as parents or guardians come to an elementary school. The Secretary must respond to various questions from parents. Duty #1 would be the "...most time consuming" of the duties listed. The Secretary would spend most of her time with students, staff and the general public. As to the Posting itself, Craig said that he put the most emphasis on being "... professional with staff and caring with children". The Secretary in the Office provides the first impression of the school, especially for new parents. He said that Halliday spent the majority of her time meeting with the public and liaising with social workers and other people. These duties were increasing.

Craig said that Sytnick was known to him because she had done some substituting work at the school as well as some volunteer work. He also knew Lamoureux. When the Grievor was unable to attend the initial interview, Craig said that Braiden told him that she would interview the Grievor because she had interviewed the Grievor before regarding the Senior School's secretarial position.

Craig said that the basis for his decision was the ability to communicate with staff and members of the public because this was very important to the position. He said it was important for the Secretary to exude a positive attitude/atmosphere to all persons with whom he/she dealt. Craig said that this was the criterion he used for the selection. He said that the Grievor did not meet this criterion and he felt that, based on feedback from staff and his working with the Grievor over these years, that she was deficient in this area. He said that Braiden had never worked in a school. Craig said that Braiden had not recommended the Grievor for the Senior School position and told him that she had not changed her recommendation for the Secretary position at Centennial.

As to his own rationale for the decision, Craig said that he did not believe the Grievor had the positive personal communication skills to do the job. As an example, Craig referred to the fact that the Grievor, in the spring of 1999, had sent overdue book notices to parents of students and had drafted the notice on the basis that student(s) would not be allowed to borrow books for the next year unless the overdue books were returned. Craig said that he told the Grievor that she should deal with this issue in a positive way by encouraging students to return the books rather than not allowing them to take out additional books. He said he felt that this approach was "...too harsh" and that parents should be called informally in advance. He said he communicated these concerns to the Grievor "...only after I found out notices were sent". He said he told the Grievor she must communicate in a more positive fashion rather than simply send paper notices all the time. Craig said she also sent similar paper notices regarding overdue books to teachers as well. When asked whether he could recall any other instances regarding the Grievor's communication deficiencies beyond these events, Craig said "...I can't recall any". Craig added that he had some concerns with the manner in which the Grievor interacted with a Can-Copy person (i.e. copyright) and that her interaction with teachers on this issue did not work well. He agreed that the Secretary must deal with outside personnel like Can-Copy employees, social workers and the R.C.M.P. In an elementary school setting, the Secretary must deal on an "...immediate, upfront and constant" basis with parents. The Secretary must be positive with parents and may, on occasion, have to calm them down if they come to the School upset over a particular issue. In this regard, Craig said that his concerns with the Grievor was that she did not have the necessary communication skills to work with staff, students and parents because concerns or problems "...had to be dealt with in a positive manner". Craig concluded "...those were my concerns".

Aside from these concerns, Craig admitted that he was generally appreciative of the Grievor's work. He said he also made the decision that Lamoureux was not qualified and, in the end result, Sytnick was offered the position.

On cross-examination, Craig agreed that Sytnick would "...casually" fill-in in the Library from time to time. Craig did not know the basis upon which Braiden "...pre-screened" the applicants who were to be interviewed. He agreed that all 3 of the applicants who were interviewed were considered together. As to Lamoureux, Craig said "...we felt she did not have the necessary experience or experience on the MacSchool". It was Craig's understanding that Sytnick had some experience on the MacSchool but did not know if she had to be trained by the Grievor after she got the job. He agreed that the Grievor would have greater experience with the MacSchool in terms of the Library and attendance components of this database program. He agreed the Grievor had experience with other databases. He confirmed that Lamoureux had no experience as a secretary and confirmed that Sytnick had no experience as a secretary in a school but "...she had worked for a helicopter company". He was not sure when this was because he did not have her resume at hand. Craig did not agree that the Grievor had greater experience working or functioning as the Secretary of the School. He also agreed that Sytnick had not functioned or substituted in this position before. He believed Sytnick did some secretarial work for Halliday in the period immediately following the Posting when she worked in the Office for some two weeks.

Craig agreed that, in addition to doing the attendance records, the Grievor would have done other tasks in the Office, as assigned by Halliday. Craig confirmed that he was out and about in the School over the course of a school day and that he did not supervise Halliday on an hour to hour basis. He expected Halliday to get the job done. He agreed that the Library Clerk operates independently most of the year, expect for the budgetary function. In the Library Clerk position, he agreed that the Grievor would spend most of the time in the Library with students and that she would also interact with staff. He agreed that the Grievor would interact with the teaching staff in the clerical position.

It was suggested to Craig that it was standard practice from 1991 to 1998 to send notices of "...overdue books" to parents. Craig acknowledged that this was the standard practice but not the manner in which the 1999 wording was crafted. Rather, the notices would simply be reminders of overdue books. He

agreed the policy changed in 1999. He agreed that parents could be called and reminded that lending privileges might be revoked for students if books were not returned. He agreed that this was the policy and that it was a reminder what "...could be" undertaken in a given circumstance.

Craig acknowledged that he participated with Braiden in the interviews of Sytnick and Lamoureux. Braiden prepared the questions to be asked and "...we asked the same questions of the two candidates". Craig was not aware of the questions which Braiden asked the Grievor. Craig said he did not advise Braiden of his concerns regarding the Grievor's communication skills and said that communication issues were not raised with the other two candidates. He said there were no discussions between he and Braiden regarding the Grievor's communication skills prior to the interviews. It was put to Craig that there was nothing in Exs. 6 and 11 regarding "communication skills" or "attitude". He agreed that the words "...communication skills" did not appear in these Exhibits. As to "attitude", he referred to Ex. 11 and the reference to being "...professional with staff". Craig agreed that he had never spoken to the Grievor of her being "...unprofessional with staff" in the Library position in the sense that he never used the word "unprofessional". He has spoken to the Grievor regarding her being more positive. He agreed that he had never spoken to the Grievor regarding any "...lack of care" with children.

Craig believed that Sytnick had some experience on databases and that she had listed them in her resume. He acknowledged that the Grievor had experience on different databases as well. Craig acknowledged that the Grievor would answer the Office phone from time to time. He was not sure if the Grievor was familiar with Office procedures outside of any work that had been given to her by Halliday. He said that the two of them were together in the Office from time to time over the years. When it was suggested to Craig that the Grievor would have greater familiarity with the Office procedures than Sytnick, Craig said that "...all she did would be the attendance record" but acknowledged that Halliday did give the Grievor some other duties from time to time. When asked whether it would be fair to say that the Grievor would be more familiar with Office procedures than Sytnick, Craig said "...I would say she knew some of them but also Sytnick would be familiar with some as well". This issue was again put to Craig on the basis that the Grievor would be more familiar with these procedures by reason of her 8 years at the School rather than Sytnick's 2 weeks experience in the Office, Craig said "... in that context, I would say yes".

When asked whether it would be fair to say that the Grievor had more knowledge than Sytnick in respect of the items listed in para. 2 of Ex. 11 (para. 21, supra), Craig said "...that would be fair on some of the items listed there, yes". He agreed that para. 3 of Ex. 11 referred to the MacSchool. As to the duties listed in para. 5 of Ex. 11 (para. 21, supra), Craig acknowledged that the Grievor would have experience with these duties and that Sytnick would have had no knowledge or experience in these areas as of June, 1999.

As to para. 2.8 on Ex. 10, Craig said that he was not sure what the term "purchase orders" encompasses but agreed that the Grievor would have had some experience with the ordering of school supplies.

Craig said that the Grievor may have been given direction by teachers to put information on report cards. He agreed she would file, type correspondence and answer the phones from time to time. When he filled in for Halliday, the Grievor would have done the duties listed in paras. 3.2 to 3.5 in the Office (Ex. 11). She would perform the phone functions listed in para. 5.2 of Ex. 11 when she relieved for Halliday and Craig agreed she could have well have done all those tasks.

In respect of para. 3.8 of Ex. 11, Craig said that "student assistants" are trained and supervised by the teachers but that the Grievor has trained parent volunteers who have assisted in the Library. He agreed that Ex. 10 contains a listing of the minimum qualifications for the Clerical Assistant job which the Grievor had performed for eight years. He agreed that all of the functions listed in Ex. 10 may not be

performed by one secretary. Craig said he was not aware of Lamoureux's seniority in comparison to the Grievor's.

Craig said that he did not consider the relative seniority of Lamoureux and the Grievor nor the relative seniority of the Grievor and Sytnick. Craig said that he was aware that the Grievor would be laid-off in June of 1999 and he had asked Braiden to look after this. He never spoke to Braiden to ascertain if the Grievor could fill the job of Secretary as part of a recall from lay-off. He agreed the Grievor was the only person who did laminating work and that Sytnick had no training on this machine prior to June of 1999.

Craig acknowledged that Halliday did take some sick leave from time to time over this 8 year period and that the Grievor would have filled in for Halliday on these occasions. He was also aware that Halliday had taken a cruise one winter during the school year and that the Grievor had filled in for Halliday at that time.

On re-examination, Craig was directed to Sytnick's application (Ex. 19) which discloses her experience with the helicopter company.

In respect of Ex. 19 (on further cross-examination), Craig said that Sytnick would have used the MacSchool during the two weeks in June of 1999 when she worked in the Office. Most of her prior experience disclosed on Ex. 19 in relation to Centennial School would have been as a lunch hour supervisor for one hour a day. He agreed that Sytnick substituted in the Library on a very casual basis. As to her typing experience in the School, Craig said that this would have been a reference to the two weeks in June of 1999. Craig was not sure if Sytnick would have worked more time as a Library substitute given the two week period in June of 1999 but, excluding that period, he agreed that Sytnick would have worked less time in the Office, although he added "...I'm not really sure of that one". As to Sytnick's experience as an Office Clerk/Receptionist with Provincial Helicopters Ltd. (Ex. 19), Craig said that this had been a part-time job- Craig said that it would be fair to say that, overall, a school office would be busier than a helicopter office during a year. He said he did not know for certain if Sytnick was the only person performing these functions with Provincial Helicopters.

As to her previous experience at Centennial School, Craig confirmed that the last two duties listed on Ex. 19 for January/97 - June 1999 would have been associated with lunch room supervisor duties. As to Sytnick's experience "...setting up interview times", Craig said that this might have been a reference to helping a teacher set up an interview time. He said the Grievor might well have done this as well. He agreed the reference to the Mandarin System is the system located in the Library and he guessed that Sytnick would have been trained on this system by the Grievor.

(IV) POSITIONS OF THE PARTIES

(a) The Union

Ms. Matthews Lemieux first addressed the matter of "lay-off and recall. It was submitted that when the Grievor first received a notice of lay-off in June of 1999 (Ex. 5), a determination should have been made under Article 24.05 as to whether the Grievor had the necessary ability, qualifications and skill to perform the work for the vacant Secretary position. This provision prohibits new employees from being hired until such a determination is made. It was submitted the Grievor had the ability and qualifications to do the job in question. She had received a lay-off notice. It was also submitted that the lay-off notice itself was not timely because 30 days advance notice was not given and the Grievor was entitled to claim 8 days wages. In Ms. Matthews Lemieux's view, the Grievance was broad enough to encompass the lay-off issue and notice of this issue was (by admission) given during the Grievance Procedure.

However, it was submitted that whether the matter is characterized as a lay-off or is determined under the promotion Article, the Grievor had the necessary qualifications and ability to enable her to claim the Secretary position. As to the Posting and the subsequent procedure followed by the Division, there were substantial and procedural flaws.

Article 8.01 gives the Employer a clear direction that the notice "...shall contain the nature of the position, location, *qualifications*, required knowledge, skill...".

The obvious purpose of this clear direction is to enable applicants to know the nature of the position for which they are applying, thus enabling them to structure their resume accordingly and prepare for any interviews. While Craig said the deciding criteria related to communication skills and attitude (i.e. the ability to interact with students, teachers and parents), neither of these qualifications are outlined on the Posting (a requirement of Article 8.01) or in the Job Description itself (Ex. 11), if it is determined that the Description itself is incorporated by reference into the Posting.

Further, Article 8.02(a) requires that existing employees must be "...considered prior to applications from outside" the bargaining unit and Ms. Matthews Lemieux submitted this was clearly not done in this case. There was no separate determination made. The Employer ought not to have entertained Sytnick's application at all and it is the Grievor's and Lamoureux's applications which must be considered first, independent of any outside applicant. It is only after a "proper" determination is made on the criteria outlined in the Agreement that there is no qualified candidate from "within" that the Division can then consider any external candidate.

As between internal candidates, Article 8.02(b) outlines the factors which must be considered and in what order. It was submitted that, on the evidence, there is no doubt the Grievor possessed the required qualifications and ability for the Secretary position. She had filled in for Halliday as Secretary and had interacted with parents, students and teachers in both of her positions. As the process was ultimately run, an 8 year seniority employee was "compared" to a person from outside the bargaining unit who had only done "casual" tasks for a period of less than 2 1/2 years. When one adds the Grievor's previous City of Winnipeg experience, then she obviously has greater experience than Sytnick who only worked part-time with Provincial Helicopters.

However, Ms. Matthews Lemieux emphasized that one only gets to a comparison of two candidates if the conclusion is reached that the Grievor was not qualified at all and that the Division was entitled to go outside the unit. In so far as the two internal candidates were concerned, the Grievor had much greater seniority than Lamoureux and it was Craig's evidence that Lamoureux was not qualified on the MacSchool system and simply did not have the same degree of clerical or secretarial experience as the Grievor. As between the Grievor and Lamoureux, the Grievor clearly meets the threshold requirements of the Posting and the Job Description and, on the evidence, no question of equality arises. Even if one could argue the two candidates were equal, the Grievor's application must prevail based upon seniority.

Under Section 80(2) of the Act, the Division has a responsibility to administer the terms of the Agreement reasonably, fairly and in good faith. The management rights provision is of no assistance because those provisions are "subject to" the specific provisions contained in the Agreement.

Ms. Matthews Lemieux referred to the following authorities:

1. Excerpts from Palmer, *Collective Agreement Arbitration in Canada* (3rd ed.), particularly the references at p. 529 and 535 in respect of the importance of seniority in

promotion and job selection cases. At p. 135 the author states "...cases suggest the qualifications set out in the posting and only those to be considered in the evaluation of applicant's cases." Here, the job description does not reference the very factors which Craig considered when he "preferred" Sytnick over the Grievor, itself a violation of the Agreement;

2. Re J. Montemurro Inc. and Travailleurs Unis de L'Alimentation et du Commerce (1987) 32 L.A.C. (3^d) 389 (Frumkin), particularly the following remarks at p. 393:

"...for one thing, the qualifications established must be relevant to the position and the operational requirements of the company to be accommodated by the incumbent in that position. For another, the qualifications must be generally known to all applicants for the position, either through established policy or through the terms of the posting where such qualifications are not in themselves inherent requirements for successful performance of the duties and responsibilities of the posted position itself.

In this case, the company would have been bound to select Mrs. Morin as the most senior applicant for the position if she possessed the qualifications for the position. The company has rejected her candidature on the ground that she lacked motivation and potential for advancement beyond the posted position, based upon her declared reluctance to ultimately accept a managerial position beyond the bargaining unit. Lack of such a qualification would have in no way impacted in a negative sense upon Mrs. Morin's satisfactory performance in the posted position itself.

This qualification, or the lack of it, can by no stretch of the imagination be considered an inherent requirement of a position of "assistant - gerant", in an establishment such as the one operated by the company."

I pause here to note that this case and its ultimate resolution was primarily based on the arbitrator's finding that the employer was not entitled to make the ability of an employee to qualify for some other position as a relevant qualification for the posted position itself. There was no lock step progression from one position to another contemplated by that collective agreement.

However, Ms. Matthews Lemieux's point was that the selection process was similarly tainted here because the qualifications which Craig relied upon when making his decision were not set forth in any of the seminal documents, thereby giving applicants the required advance notice. Ms. Matthews Lemieux submitted that even if the communication skills and attitude criteria could be implied, the Grievor met the qualifications, given her work history over 8 years and the two positions she had occupied;

3. Re Peterborough Civic Hospital and Ontario Nurses' Assoc. (1986) 24 L.A.C. (3rd) 335 (Davis), particularly the remarks at p. 339 where the arbitrator, in the context of that case, stated that if the communication skills in dealing with the general public (other than patients) was a major and reasonable qualification for the job then it should have been included in the job posting. Similarly, in the instant case, Ms. Matthews Lemieux submitted that if communication skills comprised 75% of the job then the Posting should have spelled this out. Further, the qualifications of Lamoureux and the Grievor ought then to have been considered first prior to any consideration being given to Sytnick;
4. Re: Elgin County Roman Catholic Separate School Board and London and District Service Workers' Union, Local 220 (1992) 26 L.A. C. (4th) 204 (Rose) where an employee grieved the denial of a posted position at an elementary school. The grievor had been a secretary at a high school. She was denied the position under a competitive clause. In the context of that decision, the following comments appear at p. 217:

"...the failure of the employer to specify items such as organizational skills, people skills and communication skills in the job posting raise serious doubts as to their relative value to being able to perform as secretary in the elementary school. It appears from the evidence that the employer chose to elevate the relative importance of these skills. It concluded from the Grievor's interview that she was deficient in these skills and experience. My review of the evidence suggest the employer effectively asked itself the wrong question and, in doing so, failed to adequately consider the Grievor's qualifications, skill and experience."

The arbitrator also found at p. 218 that the school division largely ignored the best indicator of that grievor's skills, namely, her previous experience with that

school board at a senior school in a secretarial position;

5. Re Halton Adolescent Support Services and Ontario Public Service Employees Union, Local 262 (1994) 44 L.A.C. (4th) 129 (Simmons) where, in a job selection dispute, the sole internal candidate was not granted an interview (as were others) resulting in a finding that the selection process was flawed. In the result, the arbitration board ordered that the process be redone in compliance with the collective agreement;
6. Re Toronto Star Ltd. and Toronto Newspaper Guild Local 87 (1976) 12 L.A.C. (2nd) 128 (Arthurs) where the relevant clause in a collective agreement read:

"Consideration will be given first to employees who have applied pursuant to the procedure outlined herein before the employer seeks a suitable candidate from outside the company."

On the evidence in that case, the arbitrator concluded that an outside applicant was promised the disputed job of a columnist prior to the posting for existing employees. On the rather peculiar facts of that case, the arbitrator found a violation but at p. 151 stated the following:

"The "consideration" contemplated by art. 902 is clearly consideration with an open mind and free of extrinsic elements unrelated to the merits of the applicants. Those considered must have a genuine opportunity of affecting the employer's decision by demonstrating their abilities and qualifications to him."

Here, Ms. Matthews Lemieux submitted that the interview process was flawed. Two candidates, including an external candidate, were interviewed by Braiden and Craig. The most senior internal candidate was only interviewed by Braiden and it is not enough to say that Braiden had previously interviewed the Grievor for a different position;

7. St. Boniface Hospital and Manitoba Nurses' Union [1994] MGAD No. 7 (F. Steel), particularly the comments at pp. 38 to 40 where the learned arbitrator (as she then was) found that concerns which the selection panel had in respect of a particular candidate were never raised with the candidate during the interview, meaning that the candidate had no opportunity to know if any concerns were relevant or not. Ms. Matthews Lemieux submitted that what Craig characterized as the "deciding factor(s)" in his mind were neither raised with Braiden prior to the interviews nor were they discussed during the

interview process itself. This is separate and apart from the deficiencies in the Posting;

8. Re Inventronics Limited and United Steelworkers of America Local 917 (Grievance of G. McDonald) [1996] MGAD No. 78 (Chapman), particularly the references in paras. 23 and 46. Ms. Matthews Lemieux said that the Grievor was not aware of the basis for the Division's decision until the hearing itself; and
9. Re New Flyer Industries Limited and CAW, Local 3003, Grievance of C. Desjardins [1999] MGAD No. 24 (A. Peitz). In the context of that case (i.e. an appointment to a Lead Hand position), the arbitrator states at para. 84:

"In my view, fairness dictated that at some appropriate stage during the article 24.3 process if not earlier, the grievor should have been told, bluntly perhaps, that he had a people skills problem, and that until he addressed it satisfactorily and showed an ability to handle people more effectively, he would not likely be successful in achieving Lead Hand status. Such notification would also have allowed the grievor to respond in timely fashion with his own version of events (if he wished to do so), to assert that he could and would change his attitude if given the Lead Hand position, or to argue that he could still adequately perform the Lead Hand role, despite his personality type. In parlens of the common law rules of natural justice, the grievor should have had a fair opportunity to know and meet 'the case against him'."

Extrapolating from this case, Ms. Matthews Lemieux said that Craig testified to two concerns which he had regarding the Grievor's deficiencies in communication skills and attitude. His evidence on these points was less than satisfactory. As to the overdue book issue, Craig agreed that there had been a policy of writing parents and this included the possibility of warning that Library privileges "could" be withdrawn if overdue books were not returned. He also admitted that the polices were changed after he spoke with the Grievor on this issue in 1999. The Grievor had no basis to believe that such exchanges reflected an ongoing concern that could possibly affect her chances for promotion.

In summary, it was submitted that the integrity of the Agreement, both procedurally and substantially, had been violated on a number of grounds. The Grievor should be awarded the position of Secretary effective the beginning of the last school year.

(b) The Division

Mr. Simpson submitted that this was not a grievance relating to a lay-off. Rather, according to its terms, the Grievance is a promotion grievance. Shortly after receiving notice of lay-off, it was decided to post the position and the Grievor was encouraged to enter the competition (evid. of Hampshire). The Grievor went through the promotion process and, having been unsuccessful, exercised her right to grieve.

On the issue of the promotion, it was submitted that attempts were made to convince me that the Teacher Assistants (Clerical) position was almost an "Assistant Secretary" position and that the Grievor worked "...alongside" of Halliday. Mr. Simpson said that this is simply not in accordance with the evidence. Her Teacher Assistant (Clerical) position was only a half time position. This clerical position consisted of reporting to the Prep Room and, on a rotation basis, provides specific services to the teaching staff. The Grievor only went to the main Office on a regular basis for no more than 15 minutes per day to enter attendance records into the MacSchool. The Grievor's primary function was as a Teaching Assistant (Clerical). She was not an Assistant Secretary, although there is no question if she finished all of her assigned tasks then she would go to Halliday to see if she could provide some assistance.

Mr. Simpson emphasized the fact that 75% of the Secretary's duties is comprised of being a Receptionist to the "...general public, staff, students, parents, guardians, Social Workers and R.C.M.P, etc." (para. 1, Ex. 11). Craig was not challenged on this evidence nor his assertion that it is "... a people position". Further, the Posting (Ex. 6) expressed the requirement and expectation that one would be "...professional with staff and caring with children". The Job Description (Ex. 11) would also have been available to be reviewed by potential applicants.

It was submitted that the Clerical Assistant Job Description (Ex. 10) refers primarily to the duties of the School Secretary and this is evident by the list of Minimum Qualifications on the last page, particularly the reference to "...effective interpersonal and communication skills". This Description encompasses much more than the Grievor's Clerical Assistant position. Mr. Simpson commented on the Montemurro case, supra, (particularly the comments at p. 393) where Arbitrator Frumkin referred to a qualification being considered "... as an inherent requirement of a position". Here, said Mr. Simpson, there is no secret the Secretary sits in the outer office and is the first encounter which any outsider will have with the School. It can come as no surprise to any potential applicant that dealing with people is an important part of the job and is "...inherent to it".

Mr. Simpson submitted that no comparison takes place between the Grievor and Sytnick until it is established that the Grievor is qualified for the position in question.

Mr. Simpson referred to the management rights provision and noted that the "... right to promote" is only fettered by the express provisions of the Agreement. Under Article 8.02, when the Division examines internal applicants and reaches the conclusion that no such applicant is minimally qualified for the position then the Division is free to appoint whom it pleases without regard to seniority, even if the successful appointee is external to the bargaining unit.

The evidence establishes that there were 3 applications for Secretary, 2 internals and 1 external. While it is arguable that Lamoureux and the Grievor ought to have been interviewed first and the interview of Sytnick delayed, one must examine this fact in light of the whole process. Craig has been a Principal for over 20 years. He has been at Centennial School throughout the Grievor's entire tenure of employment. Craig testified that Lamoureux did not meet essential qualifications at the time of the interview in terms of technical and mechanical skills. It was also his evidence that the Grievor was not qualified or lacked the requisite skills for a qualification which comprised 75% of the position - i.e. her suitability and

communication skills in dealing with parents, students, staff and the community at large. So, 2 internal candidates did not meet required qualifications. Mr. Simpson said he was not suggesting there must be a competition between two unqualified candidates. Once this threshold question is decided then the Division can appoint without regard to seniority. The length of the Grievor's interview came as no surprise to her. It is of significance that one month earlier she had applied for a secretary position at the Senior School, was passed over, and did not grieve when an external candidate was appointed to that position. Craig testified that Braiden told him that her own interview with the Grievor did not "...disclose anything different". The failure to follow a lockstep procedure is not fatal here because the result would be the same.

Mr. Simpson said that the issue of comparison between individuals was not part of the Division's case. Exploration of this issue and the submission of Ex. 19 was submitted into evidence in response to questions asked of Craig on cross-examination.

It is the Division's position that in order to function as the Secretary, the successful applicant must possess the ability to be the upfront and centre person in Centennial School. The job description makes this the number one priority. It is inherent to the position.

The Agreement itself contemplates that outside candidates can be considered and Article 8.02 only comes into play when internal candidates are qualified.

Mr. Simpson referred to the following authorities:

1. Excerpts from Brown and Beatty, Canadian Labour Arbitration (3rd ed), particularly the comments at para. 6:3000 where the following appears:

"...together with the requisite seniority, an employee claiming entitlement to a particular job must possess the necessary ability or qualifications to perform that job. Such a limitation is critical not only because it may be determinative as to who of several competing applicants will succeed to a particular job, but also because the vast majority of arbitrators have taken the view that if none of the applicants is capable of satisfying the requirements of the job, an employer is free to ignore the seniority provisions in the agreement to appoint whomever it desired to the job, whether from within its workforce or from the labour market, so long as it acted fairly and without discrimination."

Reference was made to Para. 6:3300, particularly in respect of the principle that management has the prerogative to determine initially what standard must be met by an employee who seeks a particular job. As to communication skills and aptitude, reference was made to para. 6:3330 where factors such as suitability and aptitude can legitimately be considered by an employer if these factors are relevant to the job;

2. Re Seneca College of Applied Arts and Technology and Ontario Public Service Employees' Union (1996) 52 L.A.C. (4th) 129 (Schiff) where a grievor and another member of the bargaining unit applied for the vacant position of program co-ordinator in a faculty's computer studies program. The selection committee concluded that neither internal applicant met the minimum qualifications. The college subsequently hired an external candidate from outside the bargaining unit. The Article in question required the college to look to "...the qualifications, experience and seniority of the applicants in relation to the requirements of the vacant position." Other provisions in the agreement contemplated consideration of applicants outside the unit after the assessment of internal applicants is finished. At p. 130 the board notes that "...arbitrators have long said that, if no internal applicant meets the minimum of necessary qualifications, an employer is free to go outside the unit and that we conclude is what sections 17.1.1 and 17.1.4 are about." At p. 131, the board notes that in the exercise of management rights (absent a provision to the contrary) the employer has the right to determine in the first instance the specific qualifications needed for a particular position. The board upheld the selection board's decision that the grievor was not minimally qualified on a number of objective criteria and a motion for non suit was allowed. This case stands for the proposition that an employer is entitled to go to external applicants in such circumstances. Mr. Simpson submitted that the onus is on the Grievor to establish that Craig was wrong in his assessment of a required qualification;

3. Re Hamilton Teachers' Credit Union Ltd. and Office and Professional Employees' International Union, Local 343 (1989) 5 L.A.C. (4th) 62 (Verity) where an employer determined that there were no qualified applicants for the position of accounting clerk/secretary from the bargaining unit and awarded the job to an unqualified candidate who could be trained in the shortest period of time. The clause in this agreement was threshold in nature and that the most senior applicant was entitled to the position provided he or she had the "...ability, efficiency, technical knowledge and other necessary skills to perform the job". After noting that there was no evidence of the employer acting in bad faith or in a discriminatory manner, the board noted at p. 67:

"Where no applicant satisfies the requirements for a position and in the absence of any provision in the collective agreement to the contrary there is no obligation to appoint the senior employee who

is unable to perform the work without training. The parties agree that the collective agreement does not provide for a training period."

4. Re York University and York University Staff Association (1992) 27 L.A. C. (4t") 403 (Dissanayake) which involved a job selection dispute in respect of an Inquiries Clerk position in the Registrar's office. On the posting the qualifications required included "...ability to deal courteously, tactfully and effectively with people" as well as good communication skills. The employer conducted a competition process and considered applications from two internal candidates (including the grievor) and concluded that neither was qualified. Ultimately, an external candidate was hired. The relevant clause provided that the members of the bargaining unit "...have priority for all bargaining unit positions over persons outside the bargaining unit..." and further provided that only where two or more qualified applicants are relatively equal with respect to skills and demonstrated abilities shall seniority become the determining factor. The qualifications were found to bear a reasonable relationship to the job to be performed and the arbitrator found that the grievor was not qualified for the position. The evidence revealed that in the year and half prior to his application, the grievor had difficulty dealing with people in his position (i.e. he was abrupt and "standoffish"). The arbitrator found that these shortcomings had been brought to his attention on several occasions and the evidence also suggested that the grievor did not have much consideration for his co-workers interests. The arbitrator found the grievor exhibited such deficiencies in his testimony. At one time during his interview, that grievor had expressed a cavalier attitude in response to certain questions such as "...irrelevant question, next question please". This case supports the validity of such qualifications, argued Mr. Simpson. Further, Craig concluded that the Grievor here did not have the necessary communication and people skills for the Secretary position and his conclusion in this regard ought not to be lightly interfered with by an arbitrator.

In the result, it was submitted that the Division had the right to seek an external candidate after it reached its conclusion regarding the two internal candidates as it had done one month prior. While it might be argued the process could have been done better, no fatal flaw in the process has been disclosed.

As to the remedies claimed, Mr. Simpson frankly conceded he did not know what to say in respect of the claim for 8 days wages due to the admitted deficiency in the lay-off notice except to say that during that notice period the Secretary position became open and the Grievor applied for it. This specific relief was not claimed in the Grievance. If I determine there was a flaw in the process (not admitted but denied)

then any flaw would potentially affect all internal candidates who had applied and I was not in a position to single the Grievor out. There never had been a competition and if this was the determination then the matter had to be remitted to the Employer on terms and directions. However, on the main argument, it was submitted the Grievance ought to be dismissed.

(c) **Reply of Union**

There had been no fair or reasonable assessment of the Grievor. She had many contacts with students, teachers and the public over 8 years and it was not fair or reasonable for Craig to select the two minor incidents he referred to in his testimony to deny the Grievor the position. The Union has met its onus that the assessment process was wrong. The evidence is to the effect that the Grievor did seek other jobs in the office from Halliday when she finished her teaching assignments.

Further, it is not fair to take into account that she was interviewed for the High School position. There could have been any number of factors considered in that situation and they are not before me.

The factors listed in Article 8.02(b) must be examined to see if an error was made in the first instance. While the Union was not saying a person occupying the disputed position can be discourteous or tactless, the fact is that if such elements comprise 75% of the position then it should be clearly identified and if there is a problem then any such problem should be drawn to the attention of the Grievor, at least at the interview process, if not earlier.

On the evidence, there is no basis to order a second competition.

(V) **DECISION**

Promotion or Lay-off/Recall

In my view, this Grievance stands to be resolved under the promotion provisions of Article 8 rather than the lay-off/recall provisions of Articles 24.04 and 24.05. The fact is that the Grievor applied for the posted Secretary position well *within* the notice period for the lay-off (whether deficient by 8 days or not). Hampshire advised Braiden that the position must be posted because of the accretion of hours to the Secretary position. It is mandatory that the Division post a vacancy or new position. Further, the Grievor was never actually laid-off or had her hours reduced. She exercised her seniority rights under Article 24 and by the time the 1999 - 2000 School Year started, she had been confirmed in a full-time Library Clerk 11 position.

In Re St. James-Assiniboia School Division No. 2 and the Canadian Union of Public Employees, Local 744., Grievance of D. Nickel (unreported, December 10, 1997), I had occasion to discuss the interrelationship between a mandatory job posting procedure and lay-off/recall provisions in a collective agreement. In that case, the parties had addressed the interrelationship between these provisions in very specific terms because the collective agreement not only stated that employees who were on lay-off had to be recalled in order of their seniority provided the employee was qualified and had the ability to perform the "available work", but it also stated that, in such situations, "...the posting procedures for the vacant position to which the laid-off employee is being recalled shall be by-passed". No such provision exists in this Agreement. Further, the prohibition against hiring "new employees" when there are employees on lay-off (Article 24.05) who possess the qualifications, skill and ability to do the work closely parallels the "prior consideration" which must be given to internal applicants under Article 8.02(a). The test to be applied under Article 8.02(a) is "threshold" in nature (i.e. as to internal candidates) and the test in Article 24.04 is also a threshold one. Given the position taken by the Division

that the Grievor was not even minimally qualified for the position, I agree with what I perceive to be the common view of both counsel that whether the issue is decided under Article 8 or Article 24 is rather immaterial in any case. Further, Article 24.04 states that lay-offs and recalls are on the basis of classification seniority, as does Article 6.01(b). This latter Article outlines 7 general classifications and the vacant position of Secretary falls within the generic classification Clerical Workers whereas the 2 part-time positions which were occupied by the Grievor prior to June 30, 1999 were in the general classifications of "Library Workers" and "Teacher Assistants".

The Interpretive Principles Governing Article 8

Under Article 8.02(a) there can be no doubt that the parties have prescribed that internal applicants must be "...considered prior to" external applicants.

Indeed, the parties have emphasized this priority in specific terms by mutually acknowledging "...the principle of promotion within the service". In my view, the phrase "considered prior to" entails matching any internal applicant(s) who may apply for a posted position against the "threshold", "necessary" or "minimal" qualifications required for the position. The competitive test in Article 8.02(b) only applies to internal applicants. This is made clear by the use of the word "...employees" in that provision meaning that external applicants, like Sytnick, are not employees for the purposes of Article 8.02(b). There is undoubtedly considerable discretion ("...sole discretion") vested in the Division under Article 8.02(b) in respect of making a decision among internal (and minimally qualified) candidates and this provision allows the Division to select the "best qualified" *internal* candidate. Under such a competitive test, a more senior candidate who possess sufficient qualifications or ability to do the job may be bypassed in favour of a more junior applicant if that junior applicant possesses superior qualifications, ability, skill and employment history, provided this superiority reflects a "substantial and demonstrable margin" or a "discernable material difference" on one or more of the relevant criteria.

However, as noted, Article 8.02(a) is threshold in nature in that, as between an internal and an external candidate, the internal candidate must be awarded the position if he/she meets the relevant and prescribed qualifications for the position and reasonably possess the skill and ability to do the job. The internal applicant must be awarded the position based on this threshold test, notwithstanding that an external applicant may, in the view of some, be able to do the job better.

In giving this prior consideration to existing employees, I believe it is reasonable to say that the Division may well use the factors listed in Article 8.02(b) as guidelines but the primary emphasis must be on the basic qualifications needed to perform the normal requirements of the job.

On a plain and ordinary meaning, the specific direction to the Division to consider internal applicants "prior to" external applicants requires the Division to turn its mind to internal applicants only (at least in the first instance) and not consider internal and external applicants at the same time. In considering the application of Sytnick (especially to the point of interviewing her) at the same time as Grievor and Lamoureux, the Division *prima facie* violated Article 8.02(a).

I agree with Mr. Simpson that any candidate (whether internal or external) must be minimally qualified to do the work in question. If a candidate does not meet the essential prerequisites or necessary qualifications then that candidate may be excluded from consideration. At the end of the day, if no internal applicant meets the "threshold" criteria then the arbitral jurisprudence states that the Division may appoint any candidate it wishes. The authorities referred to by Mr. Simpson (summarized at pp. 45 to 48, *supra*) reflect this principle. This principle was also confirmed by Mr. Perry Schulman (as he then was) in *Blackwoods Beverages Ltd. and United Food and Commercial Workers International Union, Local 330W* (unreported, May 25, 1990) where an external candidate was awarded the posted position of Chain Detail Representative over internal candidates. The relevant provisions in that collective

agreement stated that the company was "...not precluded from advertising outside the Company" and, when filling permanent vacancies or new positions, the factors of (a) seniority and (b) qualifications, skill, ability and reliability were to be considered. After enumerating these criteria the relevant provision went on to state:

"Where among competing applicants the factors in (b) are relatively equal than the most senior employee who applied shall be selected. It shall be the policy of the company that in filling permanent vacancies or new positions current employees who submit applications will be given first consideration". (My emphasis)

On the facts prevailing in that case, Arbitrator Schulman found that the company had violated the agreement. At p. 9 he noted:

"It is clear from Article 13.03 that with the creation of the two positions in question here, employees within the bargaining unit, the eight applicants other than Ms. Prosen, are entitled to be given first consideration for the position. That does not mean that one of these persons is by the agreement guaranteed a position. It does mean, however, that these persons have the right to have their applications judged on their respective merits and without the creation of a competition involving a person outside of the bargaining unit. The provision goes on to create a competition among persons in the bargaining unit. The competition is as to relative qualifications, skill, ability and reliability. In the event that two or more of the applicants are relatively equal, seniority prevails. If no one from the bargaining unit meets the criteria then the Company is free to look outside of the bargaining unit and hire anyone it wants using any criteria it wants." (My emphasis)

The evidence in the Blackwoods case revealed that, for the position in question, the Sales Manager was looking for what he described as "...aggressiveness and stick-to-itness". Ultimately, it was felt the external candidate possessed these qualifications. While these subjective qualifications were challenged by the union, Mr. Schulman found that they were qualities which were essential to the ordinary carrying out of the newly created position. Nevertheless, Mr. Schulman overturned the selection of the external candidate on a number of grounds and awarded the position to an internal candidate. He found that the two grievors did not receive first consideration "... in the full sense of the phrase", as contemplated by the collective agreement. He also found that the procedure was unfair because the posting was inadequate. This was based on the fact that the posting failed to bring the requirements of "aggressiveness" and "stick-to-itness" to the attention of potential applicants.

In the Toronto Star case, supra, the wording which stated that first consideration must be given to internal applicants (see p. 39, supra) was somewhat different than the wording in the Agreement but it is worth repeating the remarks of the arbitrator from p. 151 and 152, where he stated:

"The "consideration"... is clearly consideration with an open mind and free of extrinsic elements unrelated to the merits of the

applicants. Those considered must have a genuine opportunity of affecting the employer's decision by demonstrating their abilities and qualifications to him... (p. 152). It is particularly important that all procedural proprieties be observed. Only in this way will the employer be able to assure existing employees that they have received the "consideration" contemplated." (My emphasis)

This approach was approved by Mr. Martin Freedman in Beverage Services Ltd. and 131 Beverage Workers Association, Grievance of E. Goodman (unreported, March 14, 1998) where he specifically adopted this quotation from the Toronto Star case. The Beverage Service case was somewhat different from the case before me because an internal applicant was not interviewed at all (on the basis of the company's assertion that it well knew of his capabilities and abilities) whereas an external applicant (who had been encouraged to apply) was interviewed twice.

The prior consideration which the Division must accord internal candidates must be done reasonably, fairly and in good faith [Section 80(2) of the Act]. These benchmarks would also apply to the discretion granted to the Division under Article 8.02(b).

So, in the result, the consideration to be given to internal applicants under Article 8.02(a) must be meaningful, *bona fide* and reasonable and, then, limited to an assessment of the internal applicant against the essential (not optimum) prerequisites or requirements of the position.

It is also a requirement of the Agreement that any posting must contain "...the nature of the position, location, *qualifications, required knowledge, skill and wage rate or salary range*" (my italics). The obvious purpose of these mandatory requirements is to ensure that employees are apprised of the essential requirements in order to enable them to craft their applications/resumes in response thereto and to be aware of these factors if and when the Division holds interviews or wishes to assess the candidates in any other manner.

While there is no contractual requirement that interviews be held, it is well accepted that the use of proper interviews does enhance fairness and serves to allow those making a judgement the reasonable opportunity to interact with potential applicants and to assess criteria which are relevant to the position. The fact the environment of an interview may differ from an on the job assessment does not mean the use of interviews is unfair [see the remarks of Mr. David Bowman in Manitoba Telephone System and Communication and Electrical Workers of Canada (1988) 2 L.A. C. (4t") 136 at p. 143). However, if interviews are held (even among candidates who are short listed) then arbitral authority is replete with statements that the interviewer or interview panel should be consistent for all applicants and that if questions are to be asked (especially when a scoring system is adopted - not done here) then all applicants must be interviewed in the same way.

In terms of an arbitrator's jurisdiction, there are cases setting forth standards of arbitral review under both threshold and competitive clauses. No matter what reconciliation one makes of those authorities which, on the one hand, state that an arbitrator is to determine the "correctness" of a decision as opposed to those, on the other hand, would state only the "reasonableness" of the process and decision is to be reviewed, there is common ground in all of these cases that arbitrators will review, and if required, interfere with management's decision if a finding is made that applicants were either judged by an unfair or faulty process or were measured against unreasonable criteria. If a finding is made in the employer's favour on these factors then the distinction between "correctness" and "reasonableness" becomes rather blurred in any event. As to the "caution" against "management by arbitrators", it was stated in Re Health Labour Relations Association of B.C. and British Columbia Nurses' Union (1987) 32 L.A.C. (3rd) 35 (Hope) at p. 51:

"...a reading of the numerous authorities indicates that arbitrators are ad *idem* on the fact that where an employee is established a prima facie case, the employer must establish the correctness of its decision in the sense of having followed the provisions of the collective agreement and having applied its own procedure and criteria to a particular competition. Deference will be shown to the judgment of management in those matters that invoke a judgmental or subjective approach, but management, under either approach, will have to satisfy the arbitrator that it has been procedurally correct, has acted in compliance with the provisions of the collective agreement and has acted reasonably." (My emphasis)

In assessing any selection process, it is generally accepted that the arbitrator must discern whether there were flaws of a significant nature and it is not every small irregularity that will lead to arbitral intervention. See the discussion on arbitral review in the St. Boniface Hospital case, supra, particularly the remarks of arbitrator Steel (as she then was) at pp. 27 and 28. Subjective criteria such as "interpersonal skills", "communication skills" or "ability to deal with others" have been recognized as valid criteria to be assessed, notwithstanding the subjective element inherent in such criteria, provided they bear a reasonable relationship to the work to be done. If such criteria are relevant then they must be assessed but with the caution expressed by many arbitrators that the assessment must be a reasonable one, grounded in objective evidence.

Factual Determinations

The evidence was somewhat divergent in respect of the two Job Descriptions which were filed. In respect of Ex. 10 - CLERICAL ASSISTANT - I basically accept Mr. Simpson's contention that, notwithstanding the title of this description, it really reflects a job description for a secretarial position. It specifically refers to the School Secretary and when one reads this Description in its entirety, the tenor clearly discloses that many of the duties and responsibilities listed do reflect a secretarial position and they go beyond the ambit of the core duties of the Teacher Assistant - Clerical position. Ex. 10 is more in harmony with the various classifications referred to under the generic classification Clerical Workers rather than the four categories of Teacher Assistants under the general Teaching Assistants classification (see Schedule A). During her cross-examination, the Grievor admitted that a number of the items referred to in Ex. 10 did not apply to the Teacher Assistant-Clerical position she occupied. This was somewhat at odds with her more general testimony on direct examination. However, having said this, there is no question that a number of the duties and responsibilities listed in Ex. 10 do apply to the Grievor. As the parties are familiar with this document and as I have summarized the testimony of the Grievor and Craig concerning this Job Description, I am satisfied that the Grievor, as a Teacher Assistant - Clerical did (with perhaps minor variances) performed the duties listed as 2.1, 2.2 (in some respects), 2.4, 4.3 and some of 5.3 when relieving for Halliday. In his testimony, Craig also said that the Grievor may well have had experience with the ordering of school supplies (2.8) and would have performed some of the duties listed in para. 3.0 when relieving for Halliday.

As to Ex. 11 (see para. 21, supra), I accept that this description reflects the Secretary position at issue (evid. of the Grievor and Craig). However, this Description (as well as Ex. 10) is undated and Craig characterized Ex. 11 as "...a relatively new job description". He did not prepare it. In the result, it is unclear to me as to whether Ex. 11 was prepared at the time the Posting was prepared by Braiden.

Braiden did not testify. Although I was not furnished with any details, it appears to be the case that Braiden did not return to the Division in the fall of 1999 as there was somewhat of a "cloud" surrounding her departure (evid. of the Grievor). During the course of the hearing, I heard testimony from the Grievor, Hampshire and Craig himself as to interchanges which took place between those three individuals and Braiden. While I do not dispute that Hampshire may have felt that the Grievor would simply be appointed to the position and that the Posting was a formality, based on her general discussions with Braiden, this is not a case that falls to be decided on such evidence because Hampshire herself told Braiden that the Posting was required and she also encouraged the Grievor to apply.

The fact that the Grievor applied for a secretarial position at the Senior School; was denied that position and did not grieve it in the face of an external candidate being appointed is not *determinative* of this case. The posting for this other position was not before me and I have no knowledge of what transpired during that discrete process. Further, Craig was not involved in that selection process at all. In my view, no negative inference can be drawn from these facts and the Grievance stands to be resolved on the evidence I heard relating to this process, in the context of the provisions of the Agreement.

The Selection Process - Procedural and Substantive Issues

Within the context of the foregoing framework and the interpretive/arbitral principles I have outlined, it is my determination there were flaws, both procedural and substantive, in this process and that they are of such a nature that the selection of Sytnick cannot stand. It is the cumulative effect of these flaws or concerns that is critical. In reaching this conclusion, I heeded Mr. Simpson's cautionary admonition that any flaws which may have existed were minor in nature and the result would have been the same in any event. However, in my view, the flaws are not of a minimal nature. The concerns which I have identified may be summarized as follows:

1. The consideration of the Grievor, Lamoureux and Sytnick *together* was a flaw in the process. The Division had an obligation under Article 8.02(a) to direct its mind solely to internal applicants in relation to the essential requirements of the Secretary position separate and apart from any consideration being given to Sytnick. Craig candidly admitted that all of these applications were considered together;
2. This concern is exacerbated by the fact that not only was Sytnick's written application considered but she was also interviewed at the same time as internal applicants. And then, both Braiden and Craig interviewed Sytnick and Lamoureux but only Braiden interviewed the Grievor. As noted earlier, if applicants are to be interviewed then fairness and reasonableness dictate that the interviewer(s) be consistent;
3. I accept that Braiden developed a list of six basic questions to ask at each interview (this was not disputed by Craig who participated in two of the interviews) and I accept the Grievor's evidence that her interview with Braiden was very short and consisted of only three questions (p. 22, supra). In my judgement, the three brief questions asked of the Grievor would not reveal the

- Grievor's qualifications for the position in any meaningful way, particularly in the more subjective areas of "communication skills" and "aptitude" that are said to be the critical determinants for this position;
4. While it can be said that communication and interpersonal skills are inherent in this type of position (I generally accept this) and while it can be argued that some of the references in the Posting and Ex. 11 itself (whenever it was prepared) revealed this "inherent" importance, the fact is that, contrary to Article 8.01, the Posting did not give predominant emphasis to these attributes now said to comprise 75% to 80% of the position and which Craig said were the most important aspects of the job. In my judgment, this assertion is at odds with the Posting which, on its plain reading, gives predominant emphasis to technical skills and experience;
 5. Based upon the evidence and my review of the Grievor's resume, I accept that the Grievor met the threshold or essential requirements outlined in paras. 2 through to 5 of Ex. 11 (see para. 21 at p. 18, supra). Her experience over some 8 years at the School, not only in the 2 half-time positions she occupied, but also the experience she would have gained when she assisted/relieved Halliday, supports this finding. In any event, Craig did not raise the Grievor's technical skills and experience as an issue at all;
 6. Given both the manner in which the Posting was worded and the manner in which the Grievor's interview was conducted, I find that the Grievor had no opportunity to address perceived communication inadequacies on her part. In fact, she was unaware that there was any problem (real or perceived) concerning her interpersonal or communication skills. These were certainly not the focus of her interview and I accept that the Grievor was unaware of the fact that these were concerns until the date of the hearing itself. There were no documented concerns of this nature in the Grievor's personnel file and I would expect they would have been they would have been produced by Craig if they existed. Although the factual context was somewhat different, I find certain remarks of Arbitrator Steel in the St. Boniface case to be relevant to the issue I am addressing. At pp. 38 and 39 of that decision:

"Not only was there no discipline but there was nothing placed in writing, no documentation in her personnel file with respect to the event or Smith's role in the incident. The student incident was not mentioned in the interview so Smith had no idea

it was considered a problem. Yet it certainly entered into Rock's (here, Crate's) final decision. Had Smith (here, the Grievor) an opportunity to address the issue, had she known it was relevant, she could have brought out many of the issues raised at the hearing. Smith should have been given an opportunity to respond to their concerns. She may not have satisfied the panel but she would have had an opportunity to defend herself.

It is not relevant whether or not I agree with Rock's assessment of Smith's inter-personal skills. This is a matter of judgement upon which individuals can differ and deference should be given by the arbitrator to the individual who knew the Grievor and whose job it was to make judgments of this nature. However, what is relevant, is that the process by which a decision was made on this issue was unfair to the grievor and that decision was crucial to the selection.

The first time Smith became aware that the administration felt she had a problem with the direct supervision of peers was at the hearing. A person should be made aware by her employer of factors of this nature which will hinder promotion during her career. If not before the interview, then certainly these issues should be raised at the interviews where the candidate has an opportunity of reply and explanation..."

7. I now turn to Craig's substantive concerns regarding the Grievor's communication skills. I must say that the basis upon which he concluded the Grievor was not even minimally qualified in this area was not compelling. While I accept that the Secretary is a "...people position" and is the "...up front" person in the Office, Craig's only concern relating to the Grievor's communication skills or attitude related to the manner in which the Grievor crafted some written notices regarding overdue books in June of 1999 to both teachers and parents, the concern or deficiency being that he thought the written notices ought to have reflected a more positive tone. What is troublesome about his evidence on this point is his admission that for the preceding 8 years the School's policy was that withdrawing a student's Library privileges "...could be" the result of overdue books not being returned. Aside from this incident and his brief reference to the Can-Copy person, Craig was specifically asked on his direct examination as to whether he could recall any other instances regarding the Grievor's

communication or inter-personal deficiencies and his answer was "...I can't recall any". In my view, I must say that these are rather minor incidents in the context of the evidence as a whole and they do not form a reasonable basis upon which to say the Grievor did not possess the minimum or threshold communication skills required of the Secretary. Craig admitted the standard questions developed by Braiden had been asked of the two persons whom he interviewed and he also admitted that the issue of communication skills was never discussed with Braiden prior to the interviews. Neither were these areas explored in the interviews with the two candidates he did interview. To conclude that the Grievor was not minimally qualified in terms of her ability to deal with people and to communicate with others in the face of this evidence is surprising, given Craig's acknowledgment that in the course of performing her duties in her two part-time positions she would have had (obvious) exposure to and dealings with teachers, students and volunteer parents in the Library. Craig also said he had never spoken to the Grievor of her being "unprofessional with staff" in the Library position and had never spoken to her regarding any "...lack of care" with children. For whatever reason, I cannot help but feel that a comparison in these rather subjective areas was indeed done, contrary to the prescriptions in the Agreement and, then, without his interviewing the Grievor; and

8. On balance, Craig acknowledged that the Grievor would be more familiar with both the Office procedures and databases used in the School Office than Sytnick would be. This makes obvious sense to me, given the work experiences of the Grievor over her 8 years at the School.

In the result, I have concluded that Craig had no reasonable basis to conclude that the Grievor did not possess the minimal communication/interpersonal skills for this position, as now emphasized. The evidence was not of such a nature to enable the Division to by-pass Article 8.02(a) of the Agreement and appoint any external candidate it may decide. Further, Article 8.03 provides that a successful applicant [either under Art. 8.02(a) or (b)] - "...shall be placed on trial for a period of three months" and this provision specifically reserves to the Division the right to return an employee who proves unsatisfactory in a position during the trial period to his/her former position. While I recognize that this Article presupposes that an applicant must at least be minimally qualified in respect of core qualifications or possess requisite threshold abilities, it is nevertheless a safety valve for the Division.

For all of the foregoing reasons, it is my conclusion that the Division violated the Agreement. In particular, the merits of the Grievor's application were neither reasonably nor meaningfully "considered prior to" the application of the external candidate, Sytnick. It follows that Sytnick's appointment to the position of Secretary will be overturned. I now turn to the question of remedial relief.

Remedial Relief

As Mr. Schulman did in the Blackwoods case, supra, I have considered whether I should order that the process be redone, on directions, or whether the Grievor is entitled to be appointed to the position effective as of the beginning of the 1999 2000 School Year. I have also given consideration to the issue of whether the Division has the right to apply the competitive test in Article 8.02(b) as between Lamoureux and the Grievor but, on reflection, I find that this really has already been done. The uncontested evidence is that Lamoureux did not meet the basic qualifications regarding work experience or technical competence (e.g. the MacSchool and databases). Indeed, this was Craig's evidence and, given the position occupied by Lamoureux, I can accept that Lamoureux did not possess these core requirements, as disclosed on the Posting itself. Given the Grievor's much greater seniority and the fact that the Division has already ruled Lamoureux out as not being a minimally qualified candidate on objective technical skills, I have determined that this is an appropriate case where the Grievor ought to be appointed directly to the disputed position. I have so determined because, at the hearing, I did hear from Craig as to the sole basis upon which he made his decision and, given the tenor of his evidence, I accept that it was essentially he who made the decision. The basis for his conclusion was tested on cross-examination and has led to my finding that there was no objective or reasonable basis for his conclusion.

So, I make the following orders:

1. Subject to para. 3 below, the Grievor is to be appointed to the position of Secretary effective as of the beginning of the 1999 - 2000 School Year;
2. The Grievor is to receive any difference in wages that she would otherwise have earned as Secretary since that time and the wages she has received in the full-time Library Clerk position since the start of that 1999 School Year; and
3. Effective the date the Grievor actually assumes the position of Secretary following the issuance of this award, she must nevertheless serve the mandated trial period of 3 months (Article 8.03) and will only be declared permanent conditional on her satisfactory service in the position. Subject to the prescriptions of Section 80(2) of the Act, the Division may exercise its rights under Article 8.03 as it may reasonably determine.

In reaching the conclusion that I have, I wish to be clear that I am not attributing any bad faith or malevolence to the Division or Craig in particular. Rather, my determination has been based on the evidence adduced before me and the reasonable inferences which flow therefrom, all evaluated in the context of the mandatory obligations set forth in Article 8 of the Agreement.

I express my sincere appreciation to Ms. Matthews Lemieux and Mr. Simpson for the succinct manner in which the issues in this case were distilled, presented and argued.

Issued at Winnipeg, Manitoba this 22nd day of January, 2001

William D. Hamilton