

**IN THE MATTER OF AN ARBITRATION**

**BETWEEN:**

**SEINE RIVER SCHOOL DIVISION NO. 14,  
(hereinafter referred to as "the Board")**

**- and -**

**THE SEINE RIVER CUSTODIAL STAFF OF THE  
MANITOBA GOVERNMENT EMPLOYEES' UNION (I.E.U. COMPONENT)  
(hereinafter referred to as "the Union")**

BOARD OF ARBITRATION: P.S. Teskey, Sole Arbitrator  
DATE OF ARBITRATION: December 10, 1996  
LOCATION OF ARBITRATION: Winnipeg, Manitoba  
APPEARANCES: R.A. Simpson, Counsel to the Board  
B. Buckley, Representative of the Union  
R. Encontre, Grievor

**AWARD**

This matters concerns a selection grievance. The incumbent in the position had been given notice of the hearing but did not appear. The parties agreed that I was properly appointed and had jurisdiction to hear and determine the matter in question and I was also requested to reserve as to the issue of quantum of damages should same prove necessary.

The grievance was tendered as Ex. 2 and the relevant portions of same state as follows:

"Issue in dispute: Selection Dispute – denied position of Caretaker I at Ile des Chenes School.

Article Violated: 8.03

Redress Requested: that I be given the position I have applied for and that I be reimbursed for all lost wages."

The letter (also part of Ex. 2) accompanying the grievance read as follows:

"I am writing this letter of grievance regarding the hiring of Mr. Wilfred Beltowski over Mr. Rene Encontre.

Mr. Encontre has been a member of the Seine River School Division staff for several years, and is a member of their union. He has been acting as temporary Caretaker Class 1 for the Ile Des Chenes School since August of this year (1995). He was asked to take on the job then, and has since been extended twice, and has worked until Nov. 25/95. He was obviously sufficiently

qualified to do the job these months. There were also verbal commendations and recommendations regarding Mr. Encontre.

Mr. Encontre was notified on Nov. 21/95 that Mr. Beltowski was getting the job, even though he has no experience or seniority with the Seine River School Division or its union.

Since it was decided that there was no need for a maintenance person at the Ile Des Chenes School and the job was then down-classed to a Caretaker Class 1, why is it that you have gone outside the Division to hire an overqualified Maintenance Engineer for a Caretaker position that was being filled quite sufficiently by a qualified division employee?

From what I understand, Mr. Encontre's abilities and qualifications are sufficient, therefore his seniority should prevail!"

Article 8.03 of the Collective Agreement (Ex. 1) reads as follows:

"In filling a vacant position or in the event of a lay-off of staff and a subsequent rehiring of employees, ability to meet the requirements of the position shall be the main criterion. When ability and qualifications are sufficient, seniority shall prevail."

The initial response to the grievance from Mr. N. Hastings (his evidence will be discussed shortly) was tendered as Ex. 3 and indicates as follows:

"I have received your letter of grievance dated December 1, 1995. You are advised that the grievance is denied at Step 1 in accordance with Article 10 of the Collective Agreement. Article 8.03 states "ability to meet the requirements of the position shall be the main criterion". The minimum qualifications as per the job description of a Caretaker Class 1 states "the incumbent must have a minimum of four (4) years of practical experience in a related environment". The minimum qualifications have not been met."

Mr. D. Verrier, the President of the Local, responded on December 6, 1995 (Ex. 4) as follows:

"Due to the rejection of our grievance in Step 1, we have no alternative but to move forward to Step 2 in accordance with Article 10 of the Collective Agreement.

In response to the letter of reply that was given to Mr. Encontre and Mr. Verrier on December 4, 1995 (Dated Dec. 1/1995), Mr. Hastings stated that he thought Mr. Encontgre did not meet the requirements as stated in Article 8.03 of the Collective Agreement. Article 8.03 also states that "when ability and qualifications are sufficient, seniority shall prevail". Mr. Hastings stated that the reason that Mr. Encontre was not chosen for the position of Caretaker Class 1, was the fact that he had only worked at the school since May/1993, which is not 4 years as stated in the job description. That being the case, the applicant chosen has absolutely no experience being that he has not worked for the school at all. Looking at "all" Mr. Encontre's experience we would most definitely see that he meets or exceeds all requirements stated on the job description. Therefore seniority should prevail as stated in the Collective Agreement."

Mr. A.J. Chaput, the Secretary-Treasurer of the Division, responded to Mr. Verrier on January 17, 1996 (Ex. 5) as follows:

"This is further to your correspondence dated December 6<sup>th</sup>, 1995 and the School Division's correspondence dated December 21, 1995. The grievance filed on behalf of Mr. R. Encontre was presented to the Trustees at their January 9th, 1996 regular Board meeting.

After serious consideration, the Board decided to deny the grievance on the basis that the minimum qualifications required for the position of a Class 1 Caretaker had not been met by Mr. Encontre. "The incumbent must have a minimum of four (4) years of practical experience in a related environment. Journeyman's papers or a 5<sup>th</sup> Class Power Engineer's certificate is an asset."

You will recall, Denis, that the job description including the minimum qualifications attached to these job descriptions were reviewed by a committee composed of employees (MGEU Custodial) and employer representatives (Trustees and administration). Some modifications were made and both groups (Union and School Division) approved same."

The matter then proceeded to arbitration.

It might be noted that the Collective Agreement provides for four classifications of maintenance positions (the highest paid of which is referred to as a "Maintenance Person") and the next highest is the Caretaker 1 position. The grievor is employed presently as a Class 2 Caretaker after starting as a Class 3 in the fall of 1992. He has worked consistently at the Ile des Chenes School and was appointed on a temporary basis to the Class 1 position at the school and held same from August 29, 1995 through November 27, 1995 albeit the original appointment was only until October 13 but was extended since the filling of the position took longer than expected. The position was also only four hours per day although he also continued his responsibilities as a Caretaker Class 2 during that interval. He was removed from the Class 1 position when Mr. Beltowski was selected as the successful applicant for the posting.

A number of job descriptions were tendered throughout the hearing and it is of some utility to reproduce same as follows:

### **"Caretaker Class 3 (Exhibit 13)**

#### Summary

Under the supervision of the Director of Operation or the School Principal, the incumbent provides custodial services of a repetitive nature, following prescribed format.

#### Duties

The caretaker may be required to do the following:

- to wash, clean, sweep and keep in safe and sanitary condition, all rooms, stairs, halls, furniture, fixtures, glass and equipment, including lavatory in allotted areas;
- to scrub, strip and refinish floors;
- cater to public using and renting space in school;
- lock and secure all doors and windows at termination of shift;
- to dispose of all refuse either by incineration or in exterior containers;

- clean all equipment at termination of shift;
- do a thorough job of housecleaning offices including dusting of furniture, counters, etc.;
- perform other related duties as may be requested by the Director of Operations or the School Principal.

#### Minimum Qualifications

The incumbent must be conscientious and capable of performing the required work after limited instruction.

#### **Caretaker Class 2 (Exhibit 7)**

##### Summary

Under the supervision of a Maintenance Supervisor or a School Principal, the incumbent provides custodial services of a repetitive nature, following prescribed format.

##### Duties

The Caretaker may be required to do the following:

- to wash, clean, sweep and keep in safe and sanitary condition, all rooms, stairs, halls, furniture, fixtures, glass and equipment, including lavatory in allotted areas;
- to scrub, strip and refinish floors;
- cater to public using and renting space in school;
- lock and secure all doors and windows at termination of shift;
- to dispose of all refuse either by incineration or in exterior containers;
- clean all equipment at termination of shift;
- check and put on security system when leaving school;
- do a thorough job of housecleaning offices including dusting of furniture, counters, etc.;
- perform other related duties as may be requested by the Maintenance Supervisor or School Principal.

#### Minimum Qualifications

The incumbent must be conscientious and capable of performing the required work after limited instruction.

#### **Caretaker Class 1 (Exhibit 12)**

##### Summary

Under the general supervision of the Director of Operations or the Principal, the incumbent provides custodial services of a repetitive nature, following specific guidelines or detailed instruction.

##### Duties

The Caretaker Class 1 may be required to do the following:

- security of the school building
- heating plant of building
- maintenance for cleaning of all mechanical and electrical equipment
- checking of room thermostats
- cleaning of all entrances and sidewalks (ice and snow in winter)
- cleaning of all blacktop play areas and parking lot
- cleaning of chalk brush erasers
- cleaning and sweeping of classrooms, stairs, furniture, fixtures, floors and equipment including lavatories and ensuring that they are kept in a sanitary condition
- safety of building and grounds
- watering and caring of lawns, shrubs, flower beds, etc.
- replacing burnt out light bulbs in the entire building (interior, exterior and exit lights)
- putting up and removing flag
- checking and cleaning of air filters
- catering to public using and renting school building
- make minor repairs to furniture, building and equipment
- notify police and Director of Operations of any vandalism or break-ins
- do minor painting when designated
- check crawl space, roof, and roof mounted equipment periodically (weekly recommended) and report to the Director of Operations of any defects
- check fire extinguishers weekly
- cleaning of glass in entrances both interior and exterior
- receiving and storing school supplies
- setting and removing of chairs and tables where necessary
- perform other related duties from time to time as requested by the Director of Operations or the Principal

#### Minimum Qualifications

The incumbent must have a minimum of four (4) years of practical experience in a related environment. Journeyman's papers or a 5<sup>th</sup> Class Power Engineer's certificate would be an asset."

The grievor's resume (provided with his application for the position) was tendered as Ex. 9 and Mr. Beltowski's resume was tendered as Ex. 17. It is not necessary to reproduce those documents but I do note that Mr. Beltowski's experience clearly places him within the range of being "qualified" in the sense of having experience within a related work environment (in his case, Portage Place Shopping Centre). The issue is whether Mr. Encontre also met the minimum qualification level and, pursuant to Article 8.03, ought properly to have been awarded the position.

Although I will shortly come to the Union's evidence (which was presented through the grievor and Mr. D. Verrier), I intend to deal first with the evidence of the Division which was presented through Mr. Hastings, the Director of Operations. His resume and job description were tendered as Exs. 14 and 15 respectively but also need not be reproduced.

Mr. Hastings has held his present position since December, 1994.

It was his testimony that, within the Division, there were some three Maintenance Persons (Class 4's), five Class 1 Caretakers, fourteen Class 2 Caretakers, and approximately 16-18 Class 3's.

The difference between the Maintenance Person and the Caretaker 1 was being responsible for a larger geographic area. Class 2 and 3 Caretakers were basically cleaners and Class 1 and the Maintenance Person involved more than simply cleaning.

Ile des Chenes School runs from Kindergarten to Grade 8 and has an enrolment of some three hundred students. The history of the custodial component was that there were generally two Class 3 Caretakers, one Class 2, and one Class 1, all half-time. Until recently, the School had shared a Maintenance Person with another school in the area and that individual had been assigned half-time to each school. That situation had continued until 1994/95 but it was determined in the summer of 1995 that the sharing arrangement was to be discontinued. The Class 4 position at Ile des Chenes was to become a Class 1 on a half-time basis.

The posting had first been issued in June but then cancelled because of the summer recess and the appointment of a new Principal at the School. It was re-bulletined in the fall after time was taken to assess what was needed in the school and what level of staff was required. In the interim, the grievor had been offered the Class 1 position and Mr. Hastings had recommended that although it was only to be on a temporary basis.

It appears there was some discord between the grievor and Mr. Hastings concerning the hours of work in the summer of 1995 (which essentially involved certain changes to the grievor's previous schedule) but I do not find it necessary to canvass all of that evidence as there is an insufficient basis to establish that it played any role in the process. That also applies to the evidence of some discord between Mr. Encontre and the Principal of the School, Ms. G. Dyck-Hacault.

While the grievor was working in the Class 1 position, he did have the assistance of the maintenance employee in the area (who is a skilled tradesperson).

It was Mr. Hasting's view that the grievor had experienced some difficulties in terms of certain of the work that he was expected to perform, particularly with drywalling repairs in a particular classroom.

The Class 1 position involved some 75% of the employee's time on building maintenance, fixing and repairing, etc. as opposed to the essentially cleaning positions which were 75% unskilled.

Ile des Chenes School has several different types of electrical heating systems.

Mr. Encontre had been the only internal applicant (of the eight applications received) for the position. Mr. Hastings and the Principal were the selection committee which was the normal Division practice. They reviewed the applications and interviewed only three applicants after short-listing those who had applied. Those interviews took place on November 9 and included the grievor.

The "Interview Guide" used for all of the interviews was tendered as Ex. 16 and contains the following questions:

- "1. Why are you applying for the position?
2. What experiences do you feel that you possess that would be an asset to this position?
3. How do you work as a member of a team?
4. What abilities do you feel that you possess in the area of public relations?
5. Are you conscientious and capable of performing the required work after limited instruction?
6. Are you a self starter that can work with a minimum amount of supervision?
7. What are your career plans for the next 3-5 years?
8. Do you have any questions?

The applicants were told to talk about themselves and were provided with an opportunity to ask questions at the end of the interviews.

Mr. Hastings was not entirely clear in his recollection of precisely what had been said by the grievor during the interview but did recall that reference had been made to his resume, his responsibilities as a Class 2 Caretaker, and the grievor had indicated that he felt he was well experienced in plumbing, electrical, and carpentry work. However, when he was asked to demonstrate where he had received that experience, his response had not been clear. He had indicated that he had done some of that work either previously or at his own business but Mr. Hastings felt that was not to be considered as a "related" environment. Apparently, Mr. Encontre had also made some comment about not believing in formal education but that he was self taught.

At the end of the interview, Mr. Hastings had been left with the impression that there was some concern that the grievor did not have the abilities to do the job although it was clear that he was willing to try. He reached the determination that Mr. Encontre had not met the minimum qualifications. In his view, related environment meant either a similar position in a school, a shopping mall, a large apartment complex, or some other large facility which included responsibility for care and maintenance of a large building.

Working with a heating plant was a significant element of the job, and at least some level of electrical experience was required (although not at the actual level of being an electrician), and the preventative maintenance aspect of the job was also important. He did not feel that Mr. Encontre had the practical experience with respect to mechanical equipment, nor was he able to make the necessary repairs to the building as had been demonstrated by his difficulty in patching the wall.

Since the safety of the students, the staff, and the building was the first priority, he felt that the job could not be filled "just by a handyman".

When Mr. Hastings and Ms. Dyck-Hacault reviewed the grievor's interview, they were aware that seniority was an issue and that Mr. Encontre should receive first consideration and that if he could do the job, he should get it. However, the determination was that he was not sufficiently qualified and, following that, they considered the two external applicants.

In cross-examination, Mr. Hastings agreed that such work as repairing the roof of the school was generally done by an outside contractor as were other major repairs. At least one school within the Division had neither a Class 1 or 4 Caretaker assigned to it and the Division Electrician was responsible for the preventative maintenance.

He agreed that it was fair to say that, if an employee had worked within the School Division as a Class 2 or 3 Caretaker, at least some practical experience would be gained and he could not dispute that the other caretakers within the Division had "worked their way up" as Mr. Verrier had testified. He felt that some demonstrated interest in training or education would be useful in terms of progressing up the ranks.

If an unusual problem arose, generally the Class 1 Caretaker would contact Mr. Hastings and he would assign whatever was necessary. However, the Class 1 Caretakers were expected to be able to at least diagnose the problem although not necessarily repair it themselves.

After the posting had initially been withdrawn, it was determined that what was necessary for the School was a Class 1 Caretaker upon a four hour per day basis.

While Mr. Hastings agreed that it was in the best interest of the Division to hire the most qualified employees possible, he also felt that it was equally in the Division's best interest to operate within the terms of the Collective Agreement.

As a temporary Class 1 employee, the grievor was expected to perform all of the duties of the position and had done so except for the drywall incident.

Mr. Hastings had checked at least one of Mr. Beltowski's references but had not spoken to any of the grievor's.

He felt that the grievor's experience as indicated on the resume and as discussed at the interview indicated only limited experience with trucks, roofing and a backhoe operation.

Being self-taught would not necessarily be a disadvantage and there was no minimum education requirement within the job description. Farming experience might be considered as a related environment depending on what work was actually performed.

If Mr. Encontre had met the minimum qualifications, he would have received the position but it was simply felt that he had not demonstrated the equivalent of four years related experience or the listed skills and abilities required of the position.

Upon my questions, Mr. Hastings indicated that the grievor had been the last applicant interviewed and that consideration had not been given to interviewing him first and then determining whether he met the qualifications. While he thought that might be a good idea, he was clear that would not have changed the end result in his view and he did not hire Mr. Beltowski simply because he had more qualifications or perhaps more potential to perform more duties.

Unfortunately, while he had kept notes of the interviews, those notes had been lost and he had been working from memory at the hearing.

In his evidence, Mr. Encontre testified that he had no previous difficulties performing any of the functions of the caretaking positions he had held within the Division. Part of the Class 2 Caretaker position involved certain duties of the Class 1.

In direct examination, he testified that he did not recall receiving any "negative feedback" while in the temporary Class 1 position and he had performed all of the duties within the job description. A considerable amount of detail was provided in terms of those tasks but need not be repeated here.

His recollection of what had been discussed at the interview was also somewhat sketchy. He recalled that Ms. Dyck-Hacault had only been there for half of the interview. With respect to his previous experience, he did recall that there was discussion concerning same and, in addition to the previous employers mentioned in his resume, he thought that he had mentioned previous employment at a construction company involving plumbing, electrical and landscaping work. His own business which he presently runs was discussed briefly. There had also been some discussion about his plumbing experience and he felt that same was sufficient for what would be required at the school. He did not remember there being any conversation about how he acquired the necessary skills. At the time of the interview, he had not been aware of the four year experience requirement but felt that his abilities qualified him to do the job because he was "quite handy" and there was nothing he had not been able to repair. That had been discussed with Mr. Hastings but he could not recall providing any specific examples.

The references provided with his resume would have covered his experience from approximately 1985 onwards and would have been familiar with his work and abilities.

The grievor has a Grade 9 education and does not hold Journeyman's papers or a 5<sup>th</sup> Class Power Engineer Certificate which is referred to as an asset in Ex. 12. However, he did feel that he met the minimum qualifications for the position which was why he grieved.

In cross-examination, Mr. Encontre agreed that he had begun his permanent employment as a Class 2 Caretaker in May 1993 and that the Class 3 work had been on a casual basis prior to that. It was further agreed that the Class 2 and 3 positions were essentially cleaners and that the only difference was that Class 2 was required to turn on the security system when leaving the school.

His Class 2 experience had also been on a part-time basis and, during that time, he had worked as a backhoe operator.

When Mr. Hastings had offered him the temporary Class 1 position, it had been stated that it was only to be until somebody permanent could be found.

He agreed that the maintenance work performed in his own shop involved a location much smaller than the school (approximately 640 feet compared to 30,000 square feet) although, conceptually, he considered it to be much the same type of work. He had also been involved in maintenance of buildings in some of his previous experience.

At the interview, Mr. Encontre agreed that there had been an opportunity provided to him to tell the Selection Committee anything that he wanted them to know about his previous experience but he felt that he did not see any particular need to persuade the Committee that he had the relevant past experience.

His difficulty with the dry walling assignment had simply been as a result of a lack of time, not of ability. His own private business also involved some plumbing and heating maintenance.

Mr. Verrier is a Class 4 Maintenance Person and does hold his 5<sup>th</sup> Class Power Engineer's Certificate. He had previously been a Caretaker 1 for approximately six months.

In direct examination, it was his very strong view that the Class 1 position could have been performed by the grievor if he was trained while on the job and that any external assistance that might be required would normally be provided by the Division. Class 1 Caretakers were not expected to do sophisticated repairs and the other individuals holding the positions in the past had learned from experience while on the job.

Mr. Verrier has held a number of Union positions for approximately ten years and had been President of the Local for some eight years until 1996. He had been involved in the classification review which was referred to in Exs. 5 and 12. It was his understanding that the four year related experience referred to in the job description would simply mean having done "a little bit of everything" including carpentry, plumbing, electrical and mechanical work. The word "environment" simply meant anywhere where such work would be done although it would be likely that it would be in a building that was somewhat like a school.

In cross-examination, he agreed that the Union and the Division had agreed upon the job descriptions and that the minimum qualifications were different with respect to the different classes of caretakers. Furthermore, it was a "fair step up" to the Class 1 position which involved being basically responsible for the overall maintenance of the school.

During the 1995 review, there had been no discussion within the Committee about any change to the four year related experience qualification.

That concluded the evidence.

In his final submission, Mr. Buckley suggested that the grievor had sufficient qualifications and ability to perform the job and that the Division had not given proper consideration to him. The process utilized had been overly subjective and was not appropriate to the threshold test required under the Agreement. Other than reviewing the resumes and the interviews, no other proper tests or quantitative criteria had been applied. The grievor's references had not been checked and no appropriate determination made as to whether his private business was relevant to the position. However, at least one of Mr. Beltowski's references had been checked.

It was incumbent upon the Employer to take due care to ensure that a proper process was followed but that had not been done in this instance although there was no suggestion of male fides. Accordingly, the grievor had lost the benefit of his seniority.

What had happened was that the "best" candidate had been hired although Mr. Hastings would not admit to that.

The past practice as to what had previously been considered as "sufficient" in terms of minimum requirements could not be ignored.

Mr. Buckley referred me to a number of authorities which (as with those provided to me by Mr. Simpson) will be referred to as necessary later in this Award. They include:

Re Toronto Public Library and Canadian Union of Public Employees, Local 1996 (1989), 5 L.A.C. (4<sup>th</sup>) 192 (Burkett)

Re North York General Hospital and Service Employees International Union, Local 204 (1989), 7 L.A.C. (4<sup>th</sup>) 418 (Mitchnick)

Re Saskatchewan Telecommunications and Communications & Electrical Workers of Canada (1995), 49 L.A.C. (4<sup>th</sup>) 85 (Pelton)

While it might be fair to say that the grievor had not had the best interview imaginable, the Employer could and should have made a further assessment and Mr. Encontre ought to be placed into the position. Mr. Buckley suggested that if the process was flawed, there had been too much "water under the bridge" to provide for another interview process at this stage. Accordingly, the most appropriate remedy was placement into the position.

In his submission, Mr. Simpson suggested that the main thrust of the Union appeared to be an attack on the process, not the decision. He suggested that was wise strategy as there had been no evidence at all to establish that there had been no material deficiency in the selection process itself.

The posting had been in accordance with Article 7.01 of the Collective Agreement and one might have expected that the grievor would have referred to the job description and the minimum qualifications prior to applying for the position or the interview itself.

Mr. Hastings had made clear that he was aware of the Collective Agreement obligations at all times and had followed them. It might have been preferable to interview the grievor first but that was not fatal to the process, particularly given that the grievor was considered initially and in isolation after the end of the interviews.

There had been no evidence that the grievor had not been provided with an opportunity to provide all relevant information at the interview and the onus was upon him to do so. Neither had Mr. Encontre suggested at the interview that Mr. Hastings contact his references; rather, he had only been vague about his related experience.

Exhibit 12 had been agreed to between the parties since 1991 and no change had been made in the further review in 1995. Accordingly, the minimum requirements were the minimum requirements and had to be followed. On that basis, the grievor did not meet the necessary experience for the position. It was not sufficient simply to be "handy".

In addition to reference to pp. 6-37 through 6-40 of Brown and Beatty, Canadian Labour Arbitration, (3<sup>rd</sup> Ed.), the Division also relied upon the following authorities:

Re Hamilton Teachers' Credit Union Ltd. And Office & Professional Employees' International Union, Local 343 (1989), 5 L.A.C. (4<sup>th</sup>) 62 (Verity, Q.C.)

Re Fleet Industries and International Association of Machinists & Aerospace Workers, Lodge 939 (1992), 31 L.A.C. (4<sup>th</sup>) 71 (Grey)

Re Public Utilities Commission of City of Sault Ste. Marie and Canadian Union of Public Employees, Local 3 (1994) 44 L.A.C. (4<sup>th</sup>) 286 (Hinnegan)

Re St. Catharines General Hospital and Service Employees Union, Local 204 (1984), 13 L.A.C. (3<sup>rd</sup>) 378 (Teplitsky, Q.C.)

In conclusion, counsel submitted that the grievance ought properly to be dismissed.

**Decision:**

To begin with, and as the most general of propositions, I agree with the comments of arbitrator Teplitsky at p. 382 of Re St. Catharines General Hospital:

"An arbitrator's business is the ascertainment of the bargain and its enforcement. We do not sit as rights arbitrators either to make or ignore bargains."

The difficulty, of course, is in establishing the "bargain" and in assessing the application of that bargain in the circumstances at hand. The authorities referred to me are of assistance in terms of certain of the general principles to be applied but none furnished by either party is exactly equivalent to the particular situation before me.

It is clear that the position was bulletined properly pursuant to Article 7 and that Article 8.03 is to be considered as a threshold clause albeit, there is a certain amount of stress placed by the parties in the wording that "ability to meet the requirements of the position shall be the main criteria". That, however, is balanced by the statement that when qualifications are "sufficient", seniority is the governing factor.

What also distinguishes this case from many of the authorities referred to me is that the parties did mutually agree upon the job description of the Caretaker Class 1 position in 1991 (and it was not changed after further review in 1995) which provides for the qualifications previously mentioned. That fact can not be ignored and is of importance. As was stated by arbitrator Verity in Re Hamilton Teachers' Credit Union Ltd. At p. 67:

"There was no evidence that the employer acted in bad faith or in a discriminatory manner in the appointment of Ms. Kyle. The real dispute between the parties is whether the company was under any obligation to award the position to the grievor as the senior employee.

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."

The evidence of past practice here did indicate that, at least previously, a certain amount of training on the job was allowed within the Division but that must be balanced against the fact that there is not a provision within the Collective Agreement allowing for a training period. Balanced against that must be the fact that the grievor did actually perform the duties of the position for a number of months and, with the exception of the dry walling incident, appears to have been able to perform same and to have allowed the Division considerable time in which to assess its needs while getting the job done at a reasonable level of performance.

It also can not be ignored that the Division chose to downgrade the position required at this particular School from the Class 4 level and, in terms of the "bargain" between the parties referred to earlier, consideration must also be given to the actual job description itself which, while it requires more sophisticated skills than those necessary to the Class 2 or 3 positions, does refer to "custodial services of a repetitive nature, following specific guidelines or detailed instruction". I agree with Mr. Buckley that the "practical experience in a related environment" referred to in Ex. 12 should not be given an overly restrictive or unreasonable interpretation.

However, I also agree with the comments of arbitrator Hinnegan in Re Public Utilities Commission of City of Sault Ste. Marie (although that turned upon a more competitive type of clause) at p. 292:

"A serious job candidate surely must bear some responsibility and accountability in the selection process and, if the information before the selection panel was incomplete in any significant respect, the conclusion is unavoidable that the grievor was the author of his own misfortune in that regard. It would seem that, at least in part, the grievor's attitude was due to his erroneous assumption from the outset that he was entitled to this position and would be appointed to it solely on the basis of his agreement and the mere fact that the senior employee has been awarded positions in the past obviously does not, in itself, mean that seniority will always be controlling. It should be no surprise that a successful candidate for a position based on ability and proficiency may also happen to be the senior employee in many cases."

With respect to Mr. Encontre, it was his responsibility to have put forward the relevant information to establish that he met the required minimum qualifications. I found it somewhat surprising that he had not reviewed the job description prior to his application or interview and, had he done so, he may well have done himself a service.

I also do not disagree with the comments of arbitrator Burkett in Re Toronto Public Library at pp. 202-203:

"It is our view, along with that of arbitrators Rayner and Adams, that absent express language to the contrary, an employer, in determining whether an applicant is, in fact, qualified (that is, meets the qualifications established by the employer), must consider whatever equivalent qualifications are brought to the competition by the individual...

The requirements of fairness and reasonableness dictate that the employer put its mind to each individual's qualifications with a view to determining if the individual is qualified by reason of having qualifications equivalent to those stipulated. To deny an applicant who possesses equivalent qualifications from consideration on the basis of a mechanistic application of the stated qualifications, where such an approach does nothing to further the business interests of the employer, is the antithesis of a fair and reasonable exercise of managerial discretion...

However, this is not to say that there is no room for a consideration of whether or not an individual's experience, in fact, meets the stipulated needs of the employer. This is especially so in a case such as this where the length of the grievor's experience is at the edge of what is required."

Nor, in general terms, do I disagree with the decisions of any of the other arbitrators in the cases referred to me albeit those cases were also determined upon their particular facts as is normally the case.

Applying all of the above, and balancing the relevant factors before me (which are complicated by the fact that neither the grievor nor Mr. Hastings had any great certainty concerning what actually was discussed at the interview), I come to the following conclusions while keeping in mind that the onus of establishing the grievance is upon the Union which is also an important factor in this instance.

I agree with Mr. Simpson that the evidence presented at the hearing is insufficient for me to make a determination that the grievor ought properly to be placed into the position. I also do not disagree with Mr. Buckley that, given the passage of time, a further interview process would not likely be of great assistance at this point although the more salient points of the Union's attack were regarding process rather than the ultimate decision.

This case is a close one in my respectful view. It is in that sense that the onus becomes of greater importance.

However, in this instance and upon consideration of all of the evidence, it does not appear to me that Mr. Encontre has demonstrated that he has met the minimum qualifications required either at the interview or during the course of the hearing itself. As indicated above, it is difficult to make any determination of precisely what was said at the interview and the only information presented to the hearing concerning the grievor's previous experience was that of Mr. Encontre himself. Mr. Verrier testified as to past practice but did not testify as to any familiarity with the grievor's own work and performance.

While there was some reference to other work experience of Mr. Encontre not mentioned in his resume, and which may or may not have been discussed at the interview, as indicated previously I do find it surprising that the grievor did not refer to Ex. 12 prior to his application or the interview. I also find that the evidence before me, when considered in its totality, does at least give rise to a reasonable concern upon the part of the Selection Committee as to whether the grievor met the minimum qualifications stated in the job description. That is not to say that I do not believe that Mr. Encontre lacks the natural intelligence or skills to be able, ultimately, to perform the requirements of the position but it is only to say that I do not find that has been demonstrated at this point in time.

I do have certain concerns with the process. It would be preferable, both from a perceptual and objective point of view, to have interviewed the grievor first and to have made a proper consideration of his ability to meet the threshold prior to interviewing the other applicants. It is also of concern to me that Mr. Hastings did check one of the references of Mr. Beltowski and not the references of the grievor (although it would also have been open to Mr. Encontre to have provided letters of reference). I would suggest that correction of both the above practices would be preferable in the future. However, I agree with Mr. Simpson that those procedural difficulties are not fatal in this particular instance (and I deal only with this instance) and I also agree with Mr. Buckley that a reconsideration at this point would be essentially an empty exercise.

I also agree with Mr. Simpson that, upon balancing the evidence, it does appear that Mr. Encontre did not make as many efforts as he might have in terms of relating his own experience to the posting and the job description although there is some obligation upon the Employer to make the proper determination and, if necessary, to make the proper investigations to make that determination.

Ultimately, this case falls to be determined upon the basis of onus and I do not find that the Union has met its onus here although, as I have indicated, I do have some qualms about the process. Hopefully, Mr. Encontre will continue to gather experience and will ultimately be successful in his attempt to progress within the system but that is not a question for me to determine at this time.

The grievance is therefore denied.

I wish to thank both Mr. Buckley and Mr. Simpson for their usual able presentations. The parties shall share equally in the expense of the Chairperson.

Dated this 8<sup>th</sup> day of January, 1997.

Paul S. Teskey  
Sole Arbitrator