

**IN RE ARBITRATION BETWEEN:**

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**ISD #196, ROSEMOUNT APPLE VALLEY EAGAN PUBLIC SCHOOLS**

**and**

**SUPPORT STAFF ASSOCIATION OF ISD 196**

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**DECISION AND AWARD OF ARBITRATOR  
BMS Case No. 13PA0061**

**JEFFREY W. JACOBS**

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**November 5, 2012**

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DECISION AND AWARD OF ARBITRATOR

Support Staff Association of ISD 196.

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**APPEARANCES:**

**FOR THE ASSOCIATION:**

Andrew Parker, Esq.  
Mike O'Shaughnessy, Association President  
Dave Weatherford, grievant

**FOR THE DISTRICT:**

Jill Coyle, Esq.  
Jeff Dold, Building Chief at Highlands  
Michael Schwanke, Dir. of Buildings & Grounds  
Tom Pederstuen, HR Director

**PRELIMINARY STATEMENT**

The hearing in the matter was held on September 12, 2012 at 9:00 a.m. at the Rosemount Public Schools District Office in Rosemount, Minnesota. The parties submitted post-hearing Briefs dated October 5, 2012 at which point the record was closed.

**CONTRACTUAL JURISDICTION**

The parties' collective bargaining agreement covering period from July 1, 2011 to June 30, 2013. Article XXII sets forth the grievance procedure. The parties stipulated that there were no procedural arbitrability issues and that the matter was properly before the arbitrator. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services.

**ISSUE**

Whether the School District violated Article VIII, Section 1 of the 2011-2013 collective bargaining agreement when it selected a candidate other than the Grievant for the position of Groundskeeper/Maintenance Custodian at Scott Highlands Middle School/Highland Elementary? If so, what shall the remedy be?

## **RELEVANT CONTRACTUAL PROVISIONS**

### **ARTICLE IV SCHOOL DISTRICT RIGHTS**

Section 1. Inherent Managerial Rights: The exclusive representative recognizes that the School District is not required to meet and negotiate on matters of inherent managerial policy, which include, but are not limited to, such areas of discretion or policy as the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure and selection and direction and number of personnel.

### **ARTICLE VIII JOB POSTING AND PROBATIONARY PERIOD**

Section 1. Job Posting: Job openings will be posted for a period of five days. Job relevant qualifications, as listed on the job posting and seniority are the only factors to be considered in filling posted positions with the most senior candidate to be selected if the listed job relevant qualifications are equal. The Association will receive a copy of each posting. Employees selected for promotions will serve a trial period of 40 days worked. New employees may not apply for a new position until they have satisfactorily completed the probationary period set forth in Section 2 of this Article, unless there are no non-probationary employees who apply. Employees wishing to apply for a position shall submit a written statement to the School District Office. Where there are more than three (3) internal candidates who apply for a position, the three (3) most senior candidates with the necessary qualifications will be interviewed for the open position. The School District shall notify the exclusive representative of the person selected by the administration.

### **ASSOCIATION'S POSITION**

The Association took the position that the District violated the provisions of Article VIII set forth above when it selected a junior individual over the grievant and that the District failed to follow the contractually mandated process for interviewing and selecting candidates for the open position involved in this matter. In support of this the Association made the following contentions:

1. The Association pointed to the history of the language of Article VIII and noted that since 1991 the language has become more and more restrictive and clearly favors seniority as a factor in determining who is awarded such open positions within the District. The Association noted that over time several clauses have been added to this language that limit the District's discretion and prescribes a very specific set of criteria to be used as the basis for determining qualifications.

2. In the 1991 contract, the Association proposed and the District accepted the language in Article VIII as follows: “with the most senior candidate to be selected if qualifications are equal” to the end of the relevant candidate-selection sentence. See, Association Exhibit 1 .

3. In the 1993-95 CBA the Association was successful in getting agreement to the language “job relevant qualifications” in place of simply “qualifications.” This too, according to the Association, narrowed the District’s discretion to decide which applicant to place in an open position and further strengthened the Association’s position with respect to seniority and to further prevent cronyism in hiring. The language stayed in place until it was further strengthened in 1999.

4. At that time the language was changed to limit the job-relevant qualifications that could be considered to those listed on the job posting. See, Association Exhibit 1 (1999-2001 Contract language). The parties also added the word “only” to the requirement that only job relevant qualifications and seniority would be used to fill such positions. That language has remained unchanged since the 1999 CBA

2. The Association acknowledged that the District does get to determine what the qualifications for a position are but that the *only* factors to be considered in filling posted positions are “Job relevant qualifications, as listed on the job posting.” The District may not go beyond that and may not use anything other than those job relevant qualifications and seniority.

3. The Association argued most strenuously that the evidence in this case shows that the District failed to follow that clear contractual language. The person responsible for the hiring and who did the interviews admitted that he went well beyond the qualifications listed on the job posting when determining the qualifications of these applicants. That he is not allowed to do and the decision must be overturned on that basis alone.

4. The Association further acknowledged that seniority is used only when job relevant qualifications are equal but argued that in this matter the grievant's qualifications were far superior to that of the individual who was selected and that in fact if one examines the grievant's job history and education it is apparent that the grievant's qualifications were far better for this position than Mr. Rose.

5. The Association noted that the grievant owned his own company for years and is well versed in mechanical matters as well as customer service and dealing with the public. Prior to that he spent 25 years in the general construction industry as a carpenter and superintendent. He knows how to perform this work and how to manage people. Mr. Rose, while having some experience in these general areas as well was not nearly as qualified for the job relevant duties. The Association examined both the men's resumes and original applications to the District when they were hired (something that apparently Mr. Dold failed to do) and asserted that there is little question that the grievant is far more qualified for this position. At the very least, the qualifications must be said to be at least "equal" since there was no question that Mr. Rose in no way possessed better qualifications. Thus the grievant's seniority should have been used to grant him the job.<sup>1</sup> See Association exhibits 7 & 9.

6. The Association noted too that this position required no special licensure or job experience. In fact, no licensure is required even though in other very recent postings, such licensure was listed on the job posting. No such listing was present here and should not have been considered. The Association noted that this particular position required no special skills or licensure.

7. The Association asserted too that it was clear from the interviews that the grievant scored very well. The notes on Mr. Dold's interview sheet showed that the grievant was a valued, very competent person who was prized for his skills and work ethic. Yet at the hearing he was characterized as "arrogant" despite the fact that no such comments appear anywhere on the notes.

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<sup>1</sup> As discussed below, there were more senior applicants to the grievant – he was not the most senior person to apply for this job. However, as discussed more below, the grievant was the only person to sign on to this grievance. It was not clear on this record why the other more senior people did not sign on or appear at this hearing.

8. The Association asserted that the entire process appears to have been tainted by the intervening of another District employee who can be assumed to have told Mr. Dold that he wanted Mr. Rose in the position rather than anyone else. The Association argued that seniority clauses are inserted into CBA's to disallow this very sort of abuse.

9. The Association pointed out that the interviewer had not even looked at the grievant's resume or prior submissions to the District regarding his qualifications, despite being specifically asked to by the grievant. It was clear that Mr. Dold went well beyond the job relevant qualifications to hire Mr. Rose in clear violation of the CBA. He thus never reviewed the job relevant qualifications and further, went well beyond these listed on the job posting, as noted above. The Association characterized the process as a sham.

10. The Association further argued as a separate prong of its argument that the process is also closely prescribed and requires that "when there are more than three internal candidates who apply for a position, the three most senior candidates with the necessary qualifications will be interviewed for the position." This language was added to the 2009-2011 CBA and was, significantly, proposed by the *District* so it would not have to interview all applicants for an open position, only the three most senior applicants. The Association asserted most vehemently that when this was proposed the clearly stated and implied contractual intent was to limit the interviews to the three most senior applicants for an open position whenever there were more than 3 who applied.

11. The Association asserted that it was a violation of the contract to interview more than 3, here there were 9 such applicants interviewed, and that to do so not only was a clear violation of the CBA but smacks of favoritism in order to get to a preferred applicant who was not in the top three. The Association's argument is that, irrespective of Mr. Rose's qualifications, he was not in the top three most senior applicants and never should have been interviewed in the first place.

12. The Association further noted, and it was undisputed, that there were nine applicants for the Highlands position and that Mr. Rose was not in the top three most senior applicants.<sup>2</sup> Despite that clear requirement, the District chose to interview all nine of the non-probationary applicants and then gave three, not including the grievant, a second interview.

13. The Association pointed to the bargaining history between these parties, the fact that the District proposed this language to prevent this very scenario, (i.e. to disallow more than the top 3 applicants from being interviewed) and the commonly understood meaning of these words as supportive of its position. The Association pointed to several statutory sections where similar language is used that have always been interpreted to mean “only” the top three. Thus, even though the word “only” is not in this language (nor is the phrase “at least” either) the well-understood meaning, when taken in context of how and why this language got into the CBA, supports the claim that only the 3 most senior people should have been interviewed. The Association asserted too that the grievant is the third most senior person to have applied and should thus have been granted the position.

14. The Association pointed out that the parties could have used different language had they intended to grant the District the discretion to interview more than three but did not. The Association has at all points since the insertion of this language been led to believe that only the top 3 most senior applicants would be granted an interview and that the District’s discretion was limited, not expanded by this language.

15. Further, the Association cited the well-established interpretive maxim that any ambiguity must be construed against the drafter of the language. Here the District proposed and drafted this language and led the Association to believe through negotiations that this was a further limitation on its discretion on whom to hire for such positions. Under these circumstances the language, even if found to be ambiguous, must be construed against the District.

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<sup>2</sup> There were actually 10 applicants but that one was a probationary employee and the parties agreed that under the clear terms of the CBA he was not entitled to an interview.

16. The Association countered the District's claim that the grievance must somehow establish that there was bad faith or arbitrary or capricious action by the District. The Association asserted that this is unnecessary and that what is required of the Association to meet its burden to show that there was a violation of the CBA. If the evidence shows that the District used more than the job relevant qualifications as listed on the job posting – and the Association argued that it does – then the grievance must be sustained.

17. Moreover, if the evidence shows that the District violated the CBA by interviewing more than the established number of applicants as required by Article VIII, then the grievance must be sustained. The Association also asserted that the District's actions were arbitrary and capricious and argued that making a decision while ignoring the most pertinent information when explicitly asked to review it, is the very pinnacle of arbitrary and capricious.

18. The Association also countered the claim that the District has unfettered discretion granted to it by the Management Rights clause and asserted that this is specifically limited by the terms of the remainder of the CBA, especially Article VIII as it pertains to this case. That clause sets forth not only the only criteria to be used to determine qualifications but also the process by which the selection for an open position is to be done. The Association noted that this is both about the qualifications of the applicants and about the process used and that the contract must be upheld irrespective of whether Mr. Rose is doing a good job or not.

19. The essence of the Association's claims are that the District failed to follow the interview procedure and that it failed to consider the relevant job related criteria for selection. The Association argued that these facts, when viewed in the light of the other facts here, show that this was a preferential hire.

The Association requests that the Arbitrator sustain the grievance and find that the District violated the contract and ordering that the grievant be awarded the position of groundskeeper/maintenance at Highlands.

## **DISTRICT'S POSITION:**

The District's position is that there was no contract violation. In support of this the District made the following contentions:

1. The District pointed to the Management Rights clause and noted that unless otherwise specifically limited, the District retained any and all rights to both determine qualifications for a vacancy and to determine whether various applicants possess the necessary skills and qualifications for a job. The District further asserted that it, not the Association, gets to determine whether one applicant is better qualified for a vacancy.

2. The District pointed then to the specific provisions of Article VIII and argued that nothing in that language grants the Association or an arbitrator the power to determine qualifications for vacancy. Further, seniority is to be used only as a "tie-breaker" when and only when the qualifications of applicants are equal.

3. The District pointed out that this language is not a so-called minimum ability clause where seniority must be used if the senior applicant possesses minimal ability to perform the work. This is rather an equal ability clause whereby seniority is used only in the very rare circumstances when the applicants have equal ability.

4. Here the District asserted that the qualifications of the grievant and the person selected were in fact not equal at all and that the person chosen had far greater skills and qualifications for this position.

5. The District noted that the job posting was sufficiently broad to allow for the decision to be made based not only on the interview, in which Mr. Rose frankly did better, and on the application forms submitted by the applicants. The listed qualifications were as follows:

- Must have a good working knowledge of horticulture and lawn care procedures.
- Ability to handle and repair all types of grounds equipment.
- Knowledge in operation and repair of sprinkling systems.
- Knowledge of all sports played in a school system.

- Knowledge in operation and repairs to building systems (HVAC, boilers, electrical, plumbing, welding).
- Must be a self-starter, follow instructions and able to work without supervision.
- Must have the desire to work in a cooperative manner in a team environment.
- Must have good attendance record.
- Must have positive work performance evaluations and no recent disciplinary actions.
- Must conduct a positive interview and receive a good reference from current and previous supervisors.

6. The District also went through the qualifications both the grievant and Mr. Rose, the successful applicant, had and asserted that while the grievant is a valued employee, the simple fact is that he did not have equal qualifications. While on some of the listed qualifications the two were equal, they were not equal in them all and Mr. Dold determined Mr. Rose was more qualified.

7. The District noted that after reviewing the applications and the interviews it determined that Mr. Rose had better qualifications in the areas of plumbing, sprinkler systems, boiler operation and repairs, electrical systems, welding, HVAC systems and grounds equipment all of which are essential for this position. The grievant did not have as many years of experience in these specific areas nor in the licensures he possesses. See, Joint Exhibit 2. Accordingly, seniority never came into play here and the Association's reliance on the language of Article VIII was misplaced.

8. Further, the District asserted that Mr. Dold, who conducted the interviews, had never even met either Mr. Rose nor the grievant before conducting the interviews. Thus there was no evidence of any sort of arbitrary or capricious actions on his part. The interviews were conducted fairly and objectively using the same questions for each applicant. Even though the grievant had some ability to do the job, Mr. Dold simply determined that Mr. Rose would be more suitable. More importantly, that decision as to which of the two men were more qualified rested solely with Mr. Dold and the District.

9. The District fervently denied any collusion or undue influence by another District staff and asserted that there was no evidence whatsoever that Mr. Dold was swayed by the comments of another supervisor as to whom to hire. As noted he had never met either the grievant or Mr. Rose and made his decision solely on the basis of the qualifications he knew he needed for the position as well as the interviews.

10. The District also asserted that the Associations claim that there was a fatal flaw in the interview process was wrong. Here Mr. Rose chose to add some additional information regarding his background, licensure and experience that the grievant did not. There is no obligation to go beyond that either in practice or in the language of the contract.

11. Further, the language regarding the “top three” relied upon so heavily by the Association does not limit the number of applicants that may be interviewed. Here all nine internal applicants who were entitled to an interview were interviewed. The process was thus eminently fair and excluded no one. That is all the language requires – i.e. that at least the top three would be interviewed. There is no limiting language or implication that “only” the top three be interviewed.

12. Moreover, there is further no language at all regarding who is to get a second interview. That decision rests again solely with the District. The District asserted most strenuously that the grievant did not interview as well as Mr. Rose did and that this was the determinative factor in which of the two men to hire. That decision must rest with the District.

13. The District noted too that even after the decision was made and the grievant raised a concern, Mr. Schwanke was willing to meet with the grievant and explain to him why he had not been selected and what the process was. The District went over and beyond its contractual obligations here and demonstrated amply that there was nothing capricious or untoward about the entire process.

20. The District asserted that it is not for an arbitrator to determine these qualifications; that decision must rest with the District. Indeed, the District noted that it is a “dangerous journey” for an arbitrator to embark on when the arbitrator rather than the employer gets to determine the qualification for a position and whether an individual has them or not. That is not within the arbitrator’s expertise and is also a decision left entirely to the District.

21. The District also countered the Association’s claim that the process was tailored to Mr. Rose because of a recently updated resume. The District asserted that the resume used was only slightly different from the original one provide to the District upon Mr. Rose’s hire and that there was nothing to prevent him from updating his resume in anticipation of applying for a new job.

22. The essence of the District’s argument is that the grievant was not equally qualified for this position and that seniority would not even apply. Further, the District followed the prescribed procedure set forth in the agreement for selecting the applicants and that here is no limitation on the number of individuals who can be interviewed for such a job as long as at least the top three are interviewed – here they were. Thus no contract violation occurred.

The District seeks an award denying the grievance in its entirety.

## **MEMORANDUM AND DISCUSSION**

### **FACTUAL BACKGROUND**

The grievant was hired in 2009 as a custodian. With the retirement of a custodian at the Highlands school<sup>3</sup> there was an opening for a position of Groundskeeper/Maintenance Custodian. This was a daytime position with hours overlapping significantly with those of the Building Chief, Mr. Jeff Dold. The evidence showed that the position required somewhat greater technical skills than a typical custodial position, and thus paid an additional \$0.27 per hour per the contract. See Joint Exhibit at page 5. The evidence did however show that the job was not so technical so as to require special licensure or skills.

The evidence further showed that the grievant was qualified to perform the duties of the job and that he met the qualifications as listed on the job posting. Certainly so did Mr. Rose, who was eventually chosen to fill the job. That, as discussed below, is not the question presented in this case. The question of whether the grievant was “qualified” is not directly in issue. Rather the question is whether his qualifications were in fact equal to those of Mr. Rose such that seniority should be used to break that “tie.”

The parties spent considerable time at the hearing comparing the relative qualifications of the grievant compared to the person who was hired for the open position at Highland, Mr. Rose. It was clear that both had experience in cleaning, lawn care and maintenance. Certainly some had strengths the other did not. As will be discussed below, whether one was more qualified than the other was largely immaterial to the consideration of this grievance since it was more about the process followed rather than whether one as more qualified than the other.

The Association claimed that the grievant was far superior in the job relevant qualifications than was Mr. Rose. They noted that the grievant has some 32 years’ experience in the building and trades, 25 of which were in a managerial or supervisory role. The Association pointed out that he has extensive experience in plumbing, electrical, equipment repair, welding, maintenance of HVAC systems and outdoor grounds equipment and sprinkler systems as well as extensive knowledge in lawn care, horticulture and erosion control. He has also operated and managed his own business. See also Association Exhibit 7, listing the grievant’s experience and applicable training and/or licensure.

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<sup>3</sup> The parties agreed that there is both an elementary and a Middle School at the Highlands site. For ease of reference the school will be referred to here as “Highlands.”

The District on the other hand asserted that Mr. Rose held licensure that was deemed more desirable to the position and that he did much better in his interview with Mr. Dold and was therefore considered far superior in both qualifications and “fit” into the job. His qualifications were thus not “equal,” they were better and seniority did not apply. Specifically, the District pointed to Mr. Rose’s boiler license, his electrical certification, his RPZ license and his journeyman plumber’s license demonstrated the required knowledge.

Further, he had experience working as an HVAC installer, welder and sprinkling system installer that the grievant did not possess. Further, his experience doing maintenance and grounds work within the School District at Diamond Path Elementary School was important and considered when deciding which candidate to select. Moreover, the fact that he had filled in for the Building Chief at Diamond Path Elementary School and took over those duties was very important to several of the qualifications on the posting. Mr. Rose’s demonstrated positive attitude and superior interview were all considered and were relevant to the qualifications on the posting as well.

As discussed below, the arbitrator on these facts and with this contractual language is both not qualified nor infused with the jurisdiction to determine which of the candidates were better qualified or not. That decision remains exclusively with the District. As noted in the *ISD 191 and SEIU 284*, BMS 09-PA-0165 (Jacobs 2009) matter cited by the District, it is indeed a dangerous journey for an arbitrator to trek down the path of trying to determine which person’s experience and training for such a position is better.<sup>4</sup> Arbitrators have certain expertise that of course varies with each individual, their training and experience. However as noted by many arbitrators over the course of many years, those qualifications typically do not extend to determining such technical matters.

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<sup>4</sup> It should be noted too that the issue in the *ISD 191* matter cited above was somewhat different than that involved here and proceeded on very different language and facts.

The Association made much of the fact that the notes regarding the grievant's interview were not consistent with the testimony about it at the hearing. Indeed, there were some inconsistencies in that Mr. Dold indicated that the grievant was "somewhat arrogant" in his interview, or words to that effect, yet no such notation appears on the notes. There were also some very positive comments about the grievant on the interview notes and it was clear that he is a highly motivated, competent and experienced employee whose current supervisor gave him high marks. That however does not end the inquiry. The question of which person did better in the interview is left in the District's discretion and cannot be for an arbitrator to disturb. Thus while it was a bit troubling to hear the comments made at the hearing in light of the notations, that evidence did not carry the day for the Association.

Having said that, this case is not about whether the grievant was or was not equally qualified or better qualified, but rather whether there was a contractual violation in the process that was used and the considerations taken into account in selecting these candidates. Suffice it to say at this point that both were qualified but that the District made a determination that Mr. Rose was better qualified.<sup>5</sup>

Moreover, there was no evidence of arbitrary or capricious action by the District in the decision to select Mr. Rose. The Association argued that another building manager who it alleged has considered influence within the District essentially directed Mr. Dold to hire Mr. Rose. There was no direct or even circumstantial evidence of that. Moreover, there is nothing to prevent the District or the interviewer from asking around, checking references and inquiring of other people in the District regarding internal candidates. The fact that such a conversation may have even happened did not taint the process in any way – at least not on this record. Thus there was no showing of any undue influence or arbitrary action by the District or any of its employees in this matter. The question thus turns on the contractual language, the process that was used, the bargaining history and the contract language.

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<sup>5</sup> There was considerable dispute after the hearing as to whether the grievant was the second most senior person or the third most senior person to apply for the vacancy at Highlands but on this record and given the dispute, that distinction did not materially affect the decision. It was clear that the grievant was more senior to the person who was eventually hired and that he was not the most senior person to apply.

## **BARGAINING HISTORY**

The evidence presented showed the history of the clause going back some 20+ years and further demonstrated that it has changed over the course of time to limit the otherwise unfettered discretion of the District to select candidates for open positions.

Initially all the language provided was as follows: “Qualifications and seniority will be considered in filling posted positions.” See Association Exhibit 1, 1989-91 CBA. Later the language was amended to add the words “with the most senior applicant to be selected if qualifications are equal.” See Assoc. Exhibit 1, 1991-93 CBA.

Later still the language was amended to further limit the District’s discretion by defining the term “qualifications” to mean “job relevant qualifications.” 1993-95 CBA. This language was again amended in 1999 to add the requirement that the qualifications be limited to those listed “on the job posting” and that “only” to consider seniority and the job relevant qualifications were to be considered.

The evidence showed that the Association proposed these changes and they were included in the contract at their request. This was relevant in determining the contractual intent and added weight to the Association’s claim that there has been a slow and quite deliberate effort by the Association to limit the District’s discretion and to strengthen seniority rights.

Finally, and significantly, in the 2009 contract the District added the clause that reads “Where there are more than three (3) internal candidates who apply for a position, the three (3) most senior candidates with the necessary qualifications will be interviewed for the open position.” The evidence showed that the District proposed this language and did so for the very reason that arose here – i.e. so the District would not have to interview more than three internal candidates.

Based on this record there was merit to the Association's claim that they were led by the District, and the language it proposed, to believe that only the top three candidates by seniority would be interviewed for an open position under the circumstances presented here. This will be a significant factor later in the decision of the case and is based not only on the credible and persuasive testimony of the Association's witnesses but also upon the history itself of how this language has evolved over time.

Further, for whatever reason, there was no evidence of how this language has been applied since its insertion into the labor agreement in 2009. Whether this was because there has not been any openings or whether it is based on the fact that there have not been situations where more than three internal qualified candidates have applied for an open position or on some other set of facts was not clear. The fact remains that there was no evidence on this record that aided in the determination of what the parties intended with this language.

#### **ANALYSIS OF THE GRIEVANCE**

It is against this factual backdrop that the case proceeds. As in any matter involving contractual interpretation, the starting point is the language itself. As noted above, the clear history is that the parties have been limiting somewhat the District's discretion as to the process and the criteria for filling vacant positions. The evidence also showed that the seniority rights of the Association have been getting strengthened over time.

Having said that though, the language in no way limits the District's discretion to set the qualifications for a vacancy – that is left to the District's managerial power and is not disturbed by this language. Likewise, there is nothing in the language of Article VIII limiting the District's discretion or power to determine which of the candidates are better qualified or to determine which of the candidates are equally qualified. That too is within the District's power and is not disturbed by this language.

There was no evidence of arbitrariness or capriciousness by the District on this record and the question of whether the language is somehow limited by that need not be reached. The question though is whether it followed the contractually mandated process for filling this vacancy. As will be discussed below, the record reveals that it did not and that the decision to hire the current incumbent must therefore be overturned.

The language of Article VIII prescribes the process by which the selection is to be done and it is there that this case is decided. That language further limits the discretion the District would otherwise have to determine which candidate to hire.

The Association's claim rests on essentially a two-pronged analysis. First there is the argument that the candidates were equally qualified (even that the grievant was better qualified) for the job. Thus, the argument goes, seniority must be used to decide which candidate to hire. As discussed some above, the question of which candidate is "better" qualified or which candidate best meets the needs of the District is best left to the employer and subject perhaps only to the determination of whether the employer truly acted arbitrarily or even in a nefarious way to hand pick a junior candidate. There was no evidence of this whatsoever.

Further the Association's claim is that the District used selection criteria that were outside of the "job relevant qualifications *as listed on the job posting.*" (emphasis added.) In support of this the Association went through an exhaustive analysis of the grievant's qualifications and the criteria Mr. Dold used to determine the relative qualifications of three two men invalid in this matter. The totality of the record supports the District's position on this point. The Association did note that Mr. Rose possessed different licensure than the grievant did and that these were at least referenced on the job posting. Bullet point #5 of the job posting cited above was relevant in this regard in that it does specifically reference HVAC and boiler systems etc.

While there is no specific reference to particular licensure required (as there was in other such listings) these requirements are broad enough to cover the question of whether these were A. job relevant qualifications – they are; and B. whether they were listed on the job posting – again, they were. Thus on this question the District’s arguments prevail.

There remains however the final question of whether, despite his qualifications and experience, Mr. Rose should ever have been interviewed at all for this job. It was clear that he was not in the “top three” by seniority. It was also clear that all of the internal candidates who were entitled to an interview were interviewed. The question is whether the contract language on these facts limited the District from doing that

As discussed above, the language itself and the bargaining history supports the Association on this question. First, the language itself seems to strongly imply that “only” the top three candidates will be given an interview and be considered for such a vacancy. The District argued that the language does not contain that word – and it does not – and that one should not read it into that language. The difficulty is that there is a latent ambiguity in this language. It does not say “only” but neither does it say “at least” or some other clarifying language.

Second, on this record two things conspire to support the Association. The history and the bargaining on this clause strongly supports the claim that the Association was led to believe that the District would only interview the top three. The history as noted above is quite clear that this is the direction this language has been going for some time – i.e. to strengthen seniority rights. As several commentators have noted, it is the outward manifestations of intent that govern the inquiry. See, Simpson on Contracts West Publishing 1965, “Under the theory of mutual assent which today universally abounds, a contracting party is bound by the apparent intention he outwardly manifests to the other contracting party. To the extent that his real or secret intention differs therefrom, it is entirely immaterial.” Simpson p 8-9.

Further Elkouri notes that parties' mental processes are not relevant. What somebody privately intended is not at all germane. What is relevant, where it exists, is the outward manifestation by that party of the meaning of the language. "Where the parties have attached different meanings to an agreement ... it is interpreted in accordance with the meaning attached by one party if at the time the agreement was made that party did not know or had no reason to know of any different meaning attached by the other, and the other knew, or had reason to know that the meaning attached by the first party." Elkouri an Elkouri, *How Arbitration Works*, 6<sup>th</sup> Ed, at page 432. H

Here the evidence was clear that the outward manifestations made at the bargaining table by the District in inserting this language led to the reasonable belief that the language was to be used to limit the number of individuals to be interviewed and that in the specific situation where more than three internal applicants applied for an open position, the top three qualified candidates would be the only ones interviewed. That is almost exactly the situation presented here in that more than three applied, at least these two involved here were qualified and that the top three should have been interviewed. The problem is that Mr. Rose was not one of the top three.

Further, the language does not provide for a second interview. Certainly the District could decide to grant a second interview if it deemed that necessary but the clear meaning of the language pertain to a first interview. Thus, while the District argued that it could chose to interview all internal applicants; doing so in this instance was contrary to the language and the bargaining history.

Finally, since the District itself proposed this language it finds itself caught on the horns of the well-established interpretive rule that any ambiguity in such language be construed against the party proposing the language. Here that was the District and there is a latent ambiguity in that language. See Elkouri, 5<sup>th</sup> Ed at page 509-510. This rule, while not necessarily controlling in all cases, supports the Association's claim here. The underlying rationale for this is that the proposer of the language can more easily define its meaning and must be clear with the other party about its proposed application at the time it is proposed.

For these reasons, even though the arbitrator fully recognizes that the effect of this is that Mr. Rose must be removed from his position, and the disruption that might cause to the workforce, the contract must be adhered to and complied with and that is the greater principle at play here.

### **REMEDY**

Having determined that the process followed was not appropriate and that the current incumbent should not have been interviewed or considered for the position given the contractual limitations on the District's authority and discretion in this case the remaining question is what to do about it. The Association claims that the grievant must be placed in the position given his greater qualifications and the failure to follow the process. That however is not within the power of the arbitrator to grant – even though there was a violation of the process here that does not necessarily mean that the grievant must be given the job.

The remedy is that the process must be re-done. The District is thus directed to re-post the position using the same posting as was used before.<sup>6</sup> At that point the District must follow the contractually mandated procedure for determining the qualifications of the candidate and interview the top three qualified candidates, as the language of Article VIII requires. It must be emphasized though that the District retains the right to determine whether the candidates who apply are equal in qualifications or not but must consider those job relevant criteria as listed on the job posting. It must be further emphasized that this decision rests on the process that was followed, not the relative qualifications of the applicants or whether one was better qualified or not. Thus, the grievant cannot automatically be placed in the position at Highlands but must go through the process again if he chooses to.

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<sup>6</sup>It is important that same job posting be used to avoid any claim of tailor making the posing now to favor one person over the other.

**AWARD**

The grievance is **SUSTAINED IN PART AND DENIED IN PART** as set forth above.

Dated: November 5, 2012

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Jeffrey W. Jacobs, arbitrator

ISD 196 Rosemount Schools and Support Staff of ISD - Award