IN THE MATTER OF AN ARBITRATION PURSUANT TO THE SASKATCHEWAN TRADE UNION ACT R.S.S.1978, c. T-17, AS AMENDED

AND PURSUANT TO A COLLECTIVE BARGAINING AGREEMENT

BETWEEN:

TERRY LEES

GRIEVOR

AND:

YORKTON REGIONAL HIGH SCHOOL BOARD

RESPONDENT

A W A R D

Chairperson:	W. Robert Pelton
Grievor's Nominee:	Ted Koskie
Respondent's Nominee:	Bonnie Ozirny
COUNSEL:	Richard Yaholnitsky - Counsel for the Grievor
	Bill Wells - Counsel for the Respondent

A W A R D

I. Preliminary

This Grievance arises out of Mr. Terry Lees having been unsuccessful in bidding on a posted vacancy for the position of Caretaker at the Yorkton Regional High School in January 1993.

At the outset, the parties acknowledged that the Arbitration Board had been properly constituted and that it had jurisdiction to hear and determine the grievance. Further, the parties agreed that the matter of compensation, if any, would be left in the first instance to the parties, with the Arbitration Board retaining jurisdiction should they be unable to agree.

The successful applicant for the posted position, Mr. Keith Kucher, was given notice of the Hearing and participated in it.

II. Relevant Portions of the Collective Bargaining Agreement

The relevant portions of the Collective Bargaining Agreement (Board Exhibit 1) are:

ARTICLE 2 RECOGNITION AND NEGOTIATION

2.2 Management Functions:

> Subject to the provisions of this Agreement, the Union recognizes the right, duty and responsibility of the Employer to organize the operation of the work-force employed in the Yorkton Regional High School to maintain order, discipline and efficiency and to manage and direct employees in their duties.

ARTICLE 10 SENIORITY

10.1 Definition of Seniority

> Seniority is defined as the length of service in the bargaining unit and shall include service with the Employer prior to certification or recognition of the Union. Seniority shall be used in determining preference or

priority for overtime, promotion, transfer, demotion, layoff, permanent reduction of the work-force and recall as set out in other provisions of this Agreement. Seniority shall operate on a bargaining unit-wide basis.

ARTICLE 11 VACANCIES, PROMOTIONS, STAFF CHANGES AND TRAINING

11.1 Notice:

All vacant and new positions shall be posted internally and may be advertised externally. All positions shall be posted so as to provide employees with at lease five (5) working days in which to make application. A list of the applications shall be forwarded to the Union immediately upon closing of the posting. Posting for vacancies during the summer months shall be placed on notice boards at the school and at the School Administration Building.

11.2 Criteria for Selection:

The Employer shall attempt to fill vacant positions from within the membership of the Union. Criteria for selection of candidates for vacant positions shall be:

(a) qualifications
(b) ability to perform the required duties in the new assignment
(c) seniority

Where two (2) or more applicants for a position are deemed to be equal with respect to criteria (a) and (b), seniority shall then be the determining factor.

ARTICLE 26 PAY

26.4 Job Classification and Reclassification

(a) Job Description

Both parties agree that the job classifications and job description derived from the 1986 - 87 job evaluation will become the recognized job classifications and job descriptions for which the union is bargaining agent. It is also recognized that the Rating Manual used for the Job Evaluation and the job descriptions will be supplemental to and form part of the collective agreement as Schedule A.

(b) No Elimination of Present Classifications

Existing classification shall not be eliminated or changed without prior agreement between the parties.

(c) Changes in Classification

The Employer shall prepare a new job description whenever a job is created or whenever the duties of a job are changed. When the duties of any job are changed or increased, or where the Union feels a job is unfairly or incorrectly classified, or when a new job is created or established, the job duties and rate of pay shall be subject to negotiations between the Employer and the Union. If the parties are unable to agree on the reclassification, the duties and rate of pay for the job in question shall be submitted to grievance and arbitration for determination. The new rate shall become retroactive to the time the new position was first filled by the employee or the date of change in job duties.

III. Facts

The Yorkton Regional High School, a large comprehensive high school serving Yorkton and the surrounding area, has a student body population of approximately 950; employs 51.5 full time equivalent teachers; and 26.5 full time equivalent support staff.

Among the support staff are a Supervisor; four Engineers (Boilermen); one Maintenance Man; five Cleaners; and two Caretakers.

The Grievor, Mr. Lees, commenced employment with the Yorkton Regional High School in June 1990 as a temporary Cleaner. In May 1991 he unsuccessfully applied for a posted Caretaker position. The evidence indicated that his application was rejected for essentially the same reasons he was unsuccessful in the present case.

Effective November 1992 Mr. Lees became a full time Cleaner. As a Cleaner, Mr. Lees hours were from 2:30 p.m. to 11:00 p.m. The posting for which Mr. Lees unsuccessfully applied was as a Caretaker. Caretakers work from 8:30 a.m. to 4:00 p.m. and are entitled to a higher rate of pay than are Cleaners.

Job descriptions for both the Cleaner and Caretaker positions were established in 1986 and 1987 as a result of a joint Management Union job evaluation process. As can be expected, neither the Cleaner nor Caretaker positions are highly skilled or technical. The job descriptions for each provide:

CLEANER

JOB DESCRIPTION:

1. Clean and maintain in a safe and sanitary condition the areas of the school assigned. Involves scrubbing, washing, mopping and dusting floors, windows, walls, desks and other objects.

2. Refill toilet paper and soap dispensaries in washrooms.

3. Secure area windows and doors.

4. Supervise student help during summer months.

5. Requires lifting and moving furniture such as desks, chairs.

6. Strip and apply wax finish to floors.

7. Require using mop, bucket, scrubber, vacuum cleaner, wax stripper, abrasive and toxic chemicals.

QUALIFICATIONS:

Ability to read, understand and follow instructions.

HOURS OF WORK:

40 Hours Per Week.

** The above job description reflects the principle functions of the job. Other comparable or transient duties which are within the area of knowledge and skills required by this job description may also be assigned.

CARETAKER

JOB DESCRIPTION:

1. Clean and maintain in a safe and sanitary condition the area of the school assigned. Involves scrubbing, washing, mopping and dusting floors, windows, walls, desks and other objects.

2. Receive equipment, furniture and supplies shipped to the school, and place such material in its area of use.

3. Move and arrange furniture, teaching equipment and supplies as directed.

4. Effect minor repairs to equipment, furniture and building structure.

5. Maintain walkways, fire exits and receiving areas free of snow, debris and anything which could endanger pedestrians.

6. Secure area windows and doors. In July and August, ensure classrooms, shops, laboratories and storage areas are secured.

7. Load truck and haul garbage to the dump.

8. Pick up and deliver mail.

9. Supervise student help during summer.

10. Perform other duties such as cutting grass and assisting the Maintenance Person and Chief Engineer when required.

11. Prepare the Anne Portnuff Theatre for school and public use. Involves setting up sound systems, lighting arrangements, stage.

12. Require using mop, bucket, scrubber, vacuum cleaner, wax stripper, abrasive and toxic chemicals, snowblower, tractor, lawnmower.

QUALIFICATIONS:

Ability to read, understand and follow instructions. Valid driver's licence.

HOURS OF WORK:

40 Hours Per Week.

** The above job description reflects the principle functions of the job. Other comparable or transient duties which are within the area of knowledge and skills required by this job description may also be assigned.

It was acknowledged on behalf of the Yorkton Regional High School that Mr. Lees was able to satisfactorily perform his duties as a Cleaner. Further, it was acknowledged that he had the

"qualifications" for the Caretaker position. Finally, and as regards the duties outlined within the Caretaker job description there was no dispute but that Mr. Lees was able to perform the duties listed in paragraphs 1 to 10 and in paragraph 12 of the Caretaker Job Description. Although there was a suggestion that Mr. Lees did not have the necessary skills to perform the duties outlined in paragraph 11 of the Caretaker Job Description, I am satisfied from reviewing the evidence as to what the Caretaker was actually required to do with respect to preparation of the Anne Portnuff Theatre that Mr. Lees was able to perform those duties, and as a result I am satisfied that Mr. Lees had the mechanical aptitude to perform the duties listed in the Caretaker Job Description. Mr. Ratke, the Director of Education and Chief Executive Officer for both the Yorkton Public School Board and the Yorkton Regional High School testified that while the Caretaker's duties were such that any one with average ability could do them, the real issue was how well and in what manner.

The principal difference between the positions of Cleaner and Caretaker is with respect to the amount of contact an individual in either of those positions has with students; professional and support staff; and the public. The school day is from 9:00 a.m. to 3:30 p.m. and as a result of the hours of the respective positions, Caretakers would necessarily have far greater contact with students, professional and support staff and the general public than would Cleaners. Additionally, Caretakers working overtime share responsibility for the set up and general supervision of the use of the Anne Portnuff Theatre, which Theatre receives substantial use in the evenings. As a result of the contact between Caretakers and others, the Yorkton Regional High School felt that good interpersonal skills were an essential component of the Caretaker position.

Following the posting of the Caretaker position within the school and its advertisement in the local paper, 79 applications were received, including 2 from employees within the bargaining unit, one of whom

was Mr. Lees. Mr. Ratke made a short list of 5 applicants whom he, Mr. Sherwin, the Principal, and Mr. Schikowsky, the Supervisor, interviewed. As a matter of policy, and in purported accordance with Article 11.2 of the Collective Bargaining Agreement which obligated the Employer to attempt to fill vacancies from within the membership of the Union, Mr. Lees was automatically granted an interview.

Once again, however, Mr. Lees was unsuccessful and the position was granted to Mr. Keith Kucher, an applicant from outside the Bargaining Unit who was not a Union member. A good deal of evidence was led with respect to alleged shortcomings of Mr. Lees, which shortcomings, it was argued, impacted on his "ability" to perform the Caretaker position. On behalf of management, both Mr. Ratke and Mr. Sherwin testified that because Caretakers had significant contact with staff, students and the public, it was important that Caretakers were articulate, presented a good image and had good people skills -- in short, the Yorkton Regional High School wanted a Caretaker with good interpersonal skills. Further, management's evidence was that Caretakers had to be flexible; had to have initiative; had to be able to priorize their work; and had to be able to receive and follow instructions.

A number of incidents were pointed to as evidence of Mr. Lees shortcomings vis-a-vis the required attributes of a Caretaker. Early in his employment Mr. Lees applied wax to a terrazzo floor even though he had been told not to. The problem was not repeated. Mr. Lees had to be told it was inappropriate to wear a sleeveless muscle shirt. Again, once told, there was no further problem with his attire. On one occasion when Mr. Ratke was in the school, Mr. Lees approached him and complained that students should not be allowed to have soft drink cans in the classroom because of the mess they made, and further that students should not be allowed to spray artificial snow on the windows as Christmas decorations. Mr. Ratke felt that this demonstrated an unwillingness on the part of Mr. Lees to do his Cleaner's job and that it was inappropriate for him to have bypassed

his supervisor and his principal in order to take the matter to himself. On another occasion, Mr. Lees complained that the floor in the chemistry lab was being burned with chemicals. On yet another occasion, there was a complaint that Mr. Lees had removed student posters from the walls, although Mr. Lees testified that he had simply gathered up posters which had fallen down. Finally, Mr. Lees made unwelcome advances to a teacher within the school over a period of several years, leaving her notes, flowers and small gifts and improperly obtaining her unlisted phone number and phoning her at home on one occasion. Mr. Lees' conduct vis-a-vis the teacher was inappropriate and subsequent to his unsuccessful application for the caretaker position, he was disciplined by way of a five day suspension without pay.

Although it was argued that the above incidents demonstrated a lack of flexibility, initiative and ability to priorize, the real complaint was that Mr. Lees lacked good interpersonal skills. Mr. Sherwin testified that he had concluded that "Terry does a good job as a cleaner, but I don't think he has the ability to meet the public" and "my biggest concern was how Mr. Lees would meet and deal with the public and others." Mr. Sherwin concluded that Mr. Kucher would do a better job in this regard. Mr. Ratke testified that in his opinion "Mr. Kucher had above average people skills while Mr. Lees had below average people skills."

The individual in the best position to judge Mr. Lees' ability, his supervisor, Mr. Schikowsky, did not testify. Apparently he had to take his wife to hospital in Regina on the day of the Hearing, although management did not seek an adjournment so as to allow him to testify.

Both Mr. Ratke and Mr. Sherwin acknowledged that they had never received any complaints about Mr. Lees from the public or from staff other than the one staff member mentioned above.

While Mr. Lees' inappropriate conduct regarding the one teacher was, and is, a serious matter, he was disciplined for it. Certainly management did not take the position that it rendered him unfit to perform the Cleaner position. If it did not make him unfit to be a Cleaner, I do not think it can be argued that it would make him unfit for the Caretaker position. The other incidents of shortcomings fall far short of demonstrating Mr. Lees' inability to perform the Caretaker position.

Indeed, although the alleged shortcomings were advanced as demonstrating a lack of ability, it was clear from the evidence that management, in reviewing the applicants, was not measuring Mr. Lees against the job but rather against the other applicants. Mr. Sherwin testified that they were "choosing the best person" and that they interviewed "to see who was the most suitable". Mr. Ratke said he had nothing against Mr. Lees, but that the others were better and that "we looked for the best person".

I am satisfied that management's determination that Mr. Kucher possessed better interpersonal skills than Mr. Lees was reasonable, and having observed both Mr. Kucher and Mr. Lees during the hearing, I reached the same conclusion. That, however, does not necessarily determine the grievance.

IV. Issues

The determination of the Grievance requires consideration of the following issues:

1. What is the appropriate scope of arbitral review?

2. Are interpersonal skills a relevant factor in determining "ability"?

3. Is the scheme provided for by the job posting provisions of this collective bargaining agreement one of "competition", "threshold

ability" or a hybrid of the two?

4. What effect is to be given to the words "The Employer shall attempt to fill vacant positions from within the membership of the Union."?

5. Remedy.

1. Scope of Review

Employers traditionally, and in this case the Yorkton Regional High School Board did, argue that the scope of review is a narrow one. Brown and Beatty in *Canadian Labour Arbitration* 3rd Ed, (Canada Law Book Ltd., 1990), par 6:3100 at p6-36 state:

> In the first place, it has been generally accepted that the standard of arbitral review of any managerial decision which includes an assessment of the abilities of various employees is less rigorous than in the case of disciplinary decisions effected by the employer. On this understanding, it has been said that unless there is evidence of discrimination, arbitrariness, bad faith (as for example, bias in a selection committee), or the employer exercised its judgment unreasonably, arbitrators should be loath to interfere with management's decision.

Although there is certainly a wealth of arbitral authorities supporting a narrow scope of review, I believe that a broader scope of review is warranted. That is especially so where, as here, there is no provision within the Collective Bargaining Agreement stating that the determination of an employee's abilities or qualifications is to be based on the opinion or judgment of the employer. Brown & Beatty, in their text, *Canadian Labour Arbitration* (supra), p 6-38 comment:

> However, following a decision of the Ontario Divisional Court, a number of arbitrators departed from this tradition and argued that this limited standard of review, on the second component of

> the employer's decision should not prevail where the parties have not, either in the seniority provisions or in the management's rights clause of the agreement, specifically provided that the determination of the employee's abilities and qualifications is to be based on 'the opinion or judgment' of the employer.

The decision referred to was *Canadian Food and Allied Workers Union Local 175 v. Great Atlantic & Pacific Company of Canada Ltd. et al* (1976) 76 C.L.L.C. 14056 (Ont. Div. Ct.); leave to appeal to Ont. C.A. refused, 13 L.A.C. (2d) 211N. There, at pp 14534 and 14535, the Divisional Court stated:

> The Board, as a creature of a collective agreement, must then see to it that the provisions of the collective agreement have been complied with; its role cannot be more or less than this. The honesty and lack of malafides in making the decision are factors to be taken into account. So, too, is the question of whether or not the employer has acted unreasonably. Indeed, in determining the 'reasonableness' of the employer's decision, the Board may go a long way to determine the issue submitted to it. However, once the collective agreement makes provisions as to the method of selection of employees for promotions, then the Board must see to it that those provisions have been complied with and in so doing, it cannot restrict itself to determining whether the employer acted honestly and reasonably. If the Board is not to make such a decision, then the parties and the collective agreement should ensure that management's right in this regard is unfettered.

Notwithstanding my preference for a broader scope of review, I accept the warning of Brown and Beatty in their text, *Canadian Labour Arbitration* (supra) at p 6-39 that:

> Even where the arbitrator asserts jurisdiction to review the employer's decision on the merits as to the relative abilities of several employees, there remains a strong presumption of arbitral deference to the employer's judgment. As one arbitrator has said:
>
> > 'An arbitrator must, of course, realize that an employee's supervisors are in the best position to judge his qualifications and an arbitrator should for that reason hesitate to substitute his own judgment for that of the company.'

2. "Ability"

Article 11.2 of the Collective Bargaining Agreement lists as one of the criteria for the selection of a candidate for a vacant position:

> Ability to perform the required duties in the new assignment.

As indicated previously, I have concluded that Mr. Lees had the "ability" to perform the duties of the Caretaker Position in the sense that he could, for example, mop and dust floors; move and arrange furniture; effect minor repairs to equipment; and cut grass as well as the other duties outlined in the job description. He was denied the position, however, primarily on the basis that the other applicants had better interpersonal skills, which skills it was argued, were a necessary component of the position given the contact that a Caretaker has with students, staff and the public. This raises the question of whether or not interpersonal skills are a necessary component of the "ability to perform the required duties in the new assignment."

On behalf of the Grievor, it was argued that the job description made no reference to a requirement of interpersonal skills. The Employer, on the other hand, argued that interpersonal skills were a necessary component of the position and, as such, did not have to be stated within the job description itself.

Brown and Beatty, in their text *Canadian Labour Arbitration* (supra) at par. 6:3330, p. 6-61 state:

> Arbitrators have generally recognized that ability goes beyond mere mechanical aptitude and may include considerations as varied as an employee's dependability, reliability and responsibility, leadership qualities, religious persuasion, accident and absenteeism record, stability, ability to withstand mental stress, or to get along with colleagues, interest in the work, motivation and customer appeal, communication skills, and his initiative, energy and good temperament. All of these

> characteristics will become relevant factors of assessment where they an be demonstrated to actually reflect upon the employee's ability to perform the job in question.

Similarly, Palmer and Palmer in their text, *Collective Agreement Arbitration in Canada* 3rd ed. at pp 506 and 507 acknowledge that mental attitude and character suitability can be considered as part of a job standard if the job, by its inherent nature, requires such character traits.

In the present case, I accept the Employer's argument that interpersonal skills are a component of the position, however that requirement must be examined in light of the position itself. Obviously, some positions will require a greater level of interpersonal skills than will others and with all due respect to the position of Caretaker, the level of interpersonal skills required would be at the lower end of the scale in comparison, for example, with other positions within the school such as teachers or administrators. Further, it is difficult to objectively assess one's interpersonal skills. Brown and Beatty in their text, *Canadian Labour Arbitration* (supra) caution at p. 6-61 that in assessing whether or not an employee has the requisite leadership abilities that:

> "However, because these particular qualities are of a vague and nebulous character, arbitrators have asserted that care must be taken in judging them. As a consequence, some arbitrators have stated that they would require clear evidence, preferably of a tangible nature, rather than abstract tests, to confirm a conclusion that the grievor did not possess such qualities."

Similarly, interpersonal skills are of a vague and nebulous character and are difficult to assess. In this case, while I am satisfied that Mr. Kucher possesses better interpersonal skills than does Mr. Lees, I am still satisfied that Mr. Lees does possess sufficient interpersonal skills so as to have the necessary "ability" to perform the required duties of a Caretaker.

3. Scheme: Competition, Threshold Ability or Hybrid?

In Re: *Corporation of District of Maple Ridge and Canadian Union of Public Employees Local 622* 1980 23 L.A.C. (2d) p. 86 at p. 88, the Arbitration Board succinctly summarized the two principal schemes in job posting cases as follows:

> "As long ago as 1960, Bora Laskin, C.J.C., identified two distinct themes in seniority articles. Under one type the basic question was whether the applicants possessed the ability and competence to do the job. In such a case, a senior person who is equal to the job is entitled to it, although there may be a junior applicant who can do it better. The other theme involved a contest between competing applicants, the senior applicant being entitled only where their competence or ability is equal or relatively equal. Subsequent authorities have identified a third, or hybrid clause in which seniority is a factor to be weighed along with skill and ability."

In the present case, counsel for the Grievor argued that we were dealing with a hybrid case rather than a competition scheme. With respect, I cannot agree. An example of a hybrid clause can be found in *Re: Alberta Government Telephones and International Brotherhood of Electrical Workers, Local 348* 1992 23 L.A.C. (4th) 202 at p. 207. There, the relevant provision within the collective bargaining agreement provided:

> "In filling job vacancies, including promotions, transfers and new positions, the job shall be awarded based on seniority, ability and qualifications."

Similarly, in *Re: Alberta Government Telephone Commission and International Brotherhood of Electrical Workers Local 348* 1991 16 L.A.C. (4th) p. 61 at p. 62 the clause provided that:

> "In filling job postings, the job shall be awarded based on seniority, qualifications and ability."

In the present case, Article 11.2, at least as regards applicants from within the Bargaining Unit, clearly sets out a competition, and

as a result the senior applicant will be awarded the position only if his qualifications and ability are equal to that of the other candidates. As a result, an individual with less seniority, but who has greater qualifications and/or ability will be awarded the position.

Here the Yorkton Regional High School Board clearly treated the posting as a competitive process. As indicated, management measured Mr. Lees against the other applicants.

If Mr. Kucher had been a Union member within the Bargaining Unit at the time he applied I would dismiss the Grievance as I accpet managment's decision that Mr. Kucher was the best applicant. However, because Mr. Kucher was not at the time of his application a Union member within the Bargaining Unit, we must go further.

4. Preference to Union Members

The most troublesome aspect of the grievance is the effect to be given to the opening words of Article 11.2 which provide that:

> The Employer shall attempt to fill vacant positions from within the membership of the Union.

and to the provision in Article 10.1 that:

> Seniority shall be used in determining preference or priority for ... promotion...

Regard must also be had to the opening words of Article 11.1:

> All vacant and new positions shall be posted internally and may be advertised externally.

On the one hand it could be argued that permitting external advertisements supports the employer's position. On the other hand,

it could be argued that because vacant positions must be posted internally, that that provision supports the concept of giving a preference to union members.

One of the most, if not the most important principle for which unions and their members fight to have included within collective bargaining agreements is seniority rights. Further, seniority rights can affect promotions. As indicated by Brown and Beatty in their text *Canadian Labour Arbitration* 3rd ed. (supra) at pp 6-22 and 6-23:

> Frequently, the exercise of seniority rights, particularly in the context of promotions, is provided for in the collective agreement by way of a job posting procedure. Viewed from the employer's perspective, job posting procedures are a restriction on its ability to re-organize work within the bargaining unit where such re-organization results in a vacancy or otherwise causes the job posting procedure to apply. From the employee's point of view, job posting provisions establish the mechanisms or procedures by which she will exercise her seniority rights, ...

In the present case, the successful applicant, Mr. Kucher, was not a member of the Union.

On behalf of the Employer it was argued that effect was given to the opening words of Article 11.2 in that they automatically granted an interview to Mr. Lees and to the only other applicant from within the Bargaining Unit who applied for the position. Further, they pointed to past instances of where a Cleaner had successfully bid on a Caretaker Position.

Does the Collective Bargaining Agreement create a preference for Union Members, and if so, of what effect is the preference? Are applicants from within the Union to be looked at firstly, and without regard to applicants from outside the Union provided that one or more of the applicants from within the Union possess the threshold ability? Alternatively, given that Article 11.1 allows the Employer to advertise vacancies both within and outside the Union, are

applicants from both within and outside the Union to be treated on the same footing? To put it in another way, are all applicants from both within and without the Bargaining Unit subject to the same test, a competitive scheme, or do you look to applicants from outside the Bargaining Unit only if there are no applicants from within the Bargaining Unit with the threshold ability?

In *Yorkton Union Hospital and Chernipeski v. Saskatchewan Union of Nurses et al* [1993] 7 W.W.R. 129 (Sask. C.A.) the collective bargaining agreement in question provided:

> 21.03 In all cases of promotion, transfer and filling of vacancies, the following factors shall prevail:
>
> (a) the ability, experience, performance and qualifications of the Nurses;
>
> (b) the seniority of the Nurse.
>
> Where ability, experience, performance and qualifications are relatively equal, seniority shall be the deciding factor. **Preference shall be given to applications from within the Bargaining Unit.** The Nurse who is the successful applicant shall be provided with Unit orientation and training for certifiable skills. (emphasis added)

In that particular case, Mrs. Chernipeski had been excluded from the bargaining unit by the Labour Relations Board on religious grounds. Subsequently, the nurse applied for a full time vacant position in the Hospital's nursing home. The Hospital found that all of the applicants were relatively equal in terms of their ability, experience, performance and qualifications and awarded the position to Mrs. Chernipeski as the "senior" applicant. The Union grieved. Before the Arbitration Board, both the Union and the Hospital took the position that Mrs. Chernipeski was not a member of the Union nor a member of the Bargaining Unit as a result of having been excluded on religious grounds. The Arbitration Board allowed the grievance, ruling that the Hospital had failed to give the required preference to applicants from within the Bargaining Unit. The relevant portion

of the Arbitration Award on this issue is outlined at pp 138 and 139 of the decision of the Court of Appeal. After referring to the definition of preference, and in dealing with the provision that preference was to be given to applications from within the Bargaining Unit the Board of Arbitration stated:

> Clearly, then, the phrase and issue standing on its own, must mean a member of the bargaining unit is to be chosen above or before a non-member ....
>
> In my opinion, the construction of the phrase giving priority to members within the bargaining unit as opposed to members outside, is in keeping with the general tenor of the agreement as a whole...
>
> ... it is my opinion that where a decision must be made between two applicants, one being within the bargaining unit and the other without, provided that the bargaining unit member has the necessary ability, experience, performance and qualifications, she must be awarded the position even though the non-bargaining unit member may have superior ability, experience, performance and qualifications;...

The Arbitration Award was set aside in the Court of Queen's Bench. On appeal Mr. Justice Sherstobitoff, with Vancise, J. A. concurring, held that the effect of the exclusion on religious grounds was a question of law and ought to have been considered by the Board of Arbitration. They concluded that the Board, instead of deciding the threshold question, had simply bypassed it by stating that both parties agreed that through the exclusion order the nurse ceased to be a member of the Union and the Bargaining Unit. That, they concluded, led to the Arbitration Board losing jurisdiction by failing to consider a relevant factor. Further, they pointed out that had the Arbitration Award been left standing, the result would be adverse effect discrimination against the nurse contrary to *The Saskatchewan Human Rights Code*. Chief Justice Bayda, concurring in the result, addressed the Arbitration Board's interpretation of Article 21.03. At pp. 146 and 147 Chief Justice Bayda stated:

> The first perspective, which raises the first question, focuses on the Arbitration Board's interpretation of Article 23.01 (sic) of the Collective Agreement and particularly the preference phrase to mean that where an employer has two applications from candidates seeking a position, one from a candidate who has at least the threshold qualifications based on merit and who is 'from within the Bargaining Unit' and one from a candidate who, too, has the threshold qualifications based on merit but who is not 'from within the Bargaining Unit', it is the former who must be chosen for the position, not the latter."

Chief Justice Bayda went on to answer the question at pp. 148 and 149 when he stated:

> The Arbitration Board recognized, implicitly if not expressly, that where an employer such as the Hospital in the present case needs to fill a vacancy, he or she may be faced with one of two general situations: either a situation where he or she must choose between applications entirely 'from within the Bargaining Unit' or a situation where he or she must choose from between, on the one hand an application (or applications) 'from within the Bargaining Unit' and on the other an application (or applications) not 'from the Bargaining Unit." The Arbitration Board treated these two situations as distinct and separate rather than co-incident, that is to say, it treated them as two situations that do not fill the same space. Either one or the other exists, but both do not exist at the same time. The Arbitration Board in effect found that in the first situation -- as between applications entirely 'from within the Bargaining Unit' -- there is no need to invoke the preference phrase and it is the two criteria, 'better qualifications' and 'seniority' of the applicant (as outlined in the first part of the article) that govern who should be selected for the position. In the second situation, however -- as between an application 'from within the Bargaining Unit' and one not 'from within the Bargaining Unit' -- the Arbitration Board found that the preference phrase must be invoked and the governing criteria then is that contained in the preference phrase: priority or a 'preference' must be given to the application 'from within the Bargaining Unit'. In the Arbitration Board's analysis, given the distinctness of the two situations, those criteria which governed the selection in the first situation simply do not apply to the second. In my respectful view, this interpretation is nothing more than one which derives from the plain and ordinary meaning of the words contained in Article 21.03. It is necessary to do no more than point out that if one were to invoke the preference phrase in the second situation only to give effect to the criteria which govern the first situation,

> that would be tantamount to not invoking the preference phrase at all. To so interpret the preference phrase would be to render it meaningless and to fly in the face of the obvious intention of Article 21.03 to keep the first and second situations distinct and separate...the interpretation made by the Arbitration Board (the Code aside) is clearly one that 'the words of the agreement can -- reasonably bear', to use the *Shalansky* terms and is not patently unreasonable. The award should not be set aside on this ground, and the Judge below, in my respectful view is wrong to hold otherwise.

Chief Justice Bayda's comments raise the question as to whether or not the wording in *The Yorkton Union Hospital* case (supra): "preference shall be given to applications from within the Bargaining Unit" is any stronger than the wording in the present case which provides: "The Employer shall attempt to fill vacant positions from within the membership of the Union."

Although it could be argued that the reference to "candidates" within Article 11.2 does not distinguish between candidates from within and without the Bargaining Unit, the same argument could be made in *The Yorkton Union Hospital* decision (supra).

In my view, effect must be given to the wording that the Employer shall attempt to fill vacant positions from within the membership of the Union. Simply granting applicants from within the Union an interview does not do so. I have concluded that if there is an applicant from within the Union, who possesses the threshold ability then that applicant ought to be awarded the position, even though there is a better qualified candidate who is not within the membership of the Union. To do otherwise would be to ignore the provision that the Employer is to attempt to fill vacant positions from within the membership of the Union. In my view, that wording is no less effective than the wording in the *Yorkton Union Hospital* case (supra). In either case, to require Union members to compete on the same basis as non-union members would render the Employer's obligation to attempt to fill vacancies from within the Union meaningless.

5. Remedy

That determination, however, raises a further question by virtue of the fact that there were two applicants from within the membership of the Union, Mr. Lees and one other individual, Mr. James Fritzke. Although there was testimony that management had ranked Mr. Lees fifth among the five applicants and one could infer that the other applicant from within the Union, Mr. Fritzke, was ranked higher in ability, it is clear management focused its attention not so much on a comparison of the two applicants from within the Bargaining Unit as to a determination of who the best of the five applicants was.

Brown and Beatty in their text, *Canadian Labour Arbitration*, 3rd ed (supra) discuss the remedial authority of arbitrators in promotion cases in Paragraph 6:4100. At p 6-70 they state:

> In these circumstances, in the more recent awards, arbitrators have generally adopted the view that rather than themselves determining which of the various applicants should be appointed to the job, they should remit the decision back to the employer for a fresh determination to be based on such standards and terms as are prescribed by the agreement or award. Indeed, in any case where there are more than two applicants for a job, even though only one of the unsuccessful employees grieves, the Ontario Court of Appeal has asserted that unless the collective agreement specifically empowers the arbitrator to do otherwise, where it is found that the employer's decision was unreasonable or discriminatory, the matter must be remitted back to the employer for a new determination.

The Ontario Court of Appeal decision referred to in the above quote was *Re: Falconbridge Nickel Mines Ltd. and United Steelworkers of America*, 1973 30 D.L.R. (3d) 412. An examination of the cases referred to within Brown and Beatty on this point, and of Brown and Beatty itself, suggest that the reasoning in *Falconbridge* (supra) would not be applicable where either there was nothing left for the employer to determine on a reconsideration -- that is that the evidence had established conclusively that the grievor was entitled

to the position, or in a case in which there has been a finding of dishonesty or bad faith on the part of the employer which would make a fair reconsideration difficult, if not impossible.

In this case, as I have stated, the evidence indicates that management focused its attention on which of the five was the best applicant rather than on a comparison of Mr. Lees and Mr. Fritzke. Clearly, we did not hear sufficient evidence to assess the qualifactions and abilities of the two of them, and further we do not know which of the two had more seniority at the time of their application. As a result, we would only be speculating if we attempted to choose between Mr. Lees and Mr. Fritzke.

Further, I do not see this as a case in which management acted dishonestly or in bad faith. Rather, it is a case of management operating on what I have found was a mistaken view of the operation and application of Article 11.2 in that assessing candidates both from within and outside the Bargaining Unit on the same footing management failed in its obligation to attempt to fill the vacancy from within the membership of the Union.

Accordingly, I direct the Yorkton Regional High School Board to notify Mr. Fritzke of this award and to enquire as to whether or not he is still interested in the Caretaker position. If he is, I direct the Yorkton Regional High School Board to reconsider the applications of both Mr. Lees and of Mr. Fritzke. As I have indicated, Article 11.2 as regards applicants from within the bargaining unit provides for a competitive scheme and accordingly as between Mr. Lees and Mr. Fritzke the senior of them will be entitled to the position only if their competence and ability is equal. In that connection, I accept the argument advanced on behalf of Mr. Lees that equal means relatively equal. The successful applicant will then be awarded the position retroactive to the date that Mr. Kucher was appointed to the position and shall be entitled to be compensated financially in light of the fact that the Caretaker position carries with it a higher rate

of pay than the Cleaner position. As indicated at the outset, the matter of compensation will be left, in the first instance to the parties, with the Board reserving jurisdiction should they be unable to agree.

If Mr. Fritzke is no longer interested in the position, then, given that Mr. Lees was the only other applicant from within the Bargaining Unit and given that I have concluded that he has the threshold ability to perform the Caretaker position, I allow the grievance and award him the position, again retroactive to the date that it was awarded to Mr. Kucher. Again, Mr. Lees will be entitled to compensation and the issue is left, in the first instance, to the parties with the Board reserving jurisdiction should they be unable to agree.

Further, the Board will reserve jurisdiction to resolve any issues regarding implementation of the Award.

DATED at the City of Regina, in the Province of Saskatchewan this 20th day of December, 1993.

W. Robert Pelton, Chairperson

Ted Koskie, Grievor's Nominee

Bonnie Ozirny, Respondent's Nominee