

IN THE MATTER OF AN ARBITRATION

BETWEEN:

**Canadian Union of Public Employees, Local 3470
(hereinafter referred to as the "Union")**

- and -

**The St. Vital School Division No. 6
(hereinafter referred to as the "Division")**

Diane E. Jones, Q.C., Chairperson
Gerry D. Parkinson, Nominee of the Division
Colin Robinson, Nominee of the Union

Rob Simpson; Counsel on behalf of the Division
Bill Sumerlus; Counsel on behalf of the Union

ARBITRATION AWARD

This matter came before this Board of Arbitration pursuant to the terms of the Collective Agreement (Exhibit 1) between the Union and the Division. Counsel confirmed that this Board was properly constituted and had the jurisdiction to determine the grievance between the parties.

The grievance filed as Exhibit 3 states as follows:

I/We the undersigned claim that the Employer has posted a position for a night custodian at College Jeanne Sauve and they have stated that hiring preference will be given to bilingual applicant – French/English. As this qualification has not been required for this position in the past, this is a violation of Article 8 and other related articles of the collective agreement.

Therefore I/we request that the Employer post the position without the bilingual French/English requirement.

The Division has denied the grievance.

Three witnesses (Mr. Guy Moquin, Mr. Lloyd McLaughlin, and Mr. Mark Kernaghan) were called by the Union. One witness (Mr. Terry Borys) was called by the Division.

The issue between the parties according to the Union is that requirement of bilingualism for a night custodian is not reasonably related to the duties of a night custodian and is therefore an unreasonable interference by the Division with seniority rights. The Division's position is that College Jeanne Sauve is a French immersion school and that the requirement is reasonable and related to the work of the school. Counsel for the Division noted that this is a policy grievance before the Board and that no one has applied for the job and didn't get it.

It is not the Board's intention to review the evidence in detail but to highlight its more salient portions.

Guy Moquin was night custodian at Jeanne Sauve for approximately 6 years prior to his current position at Glenwood School. He has been with the Division full time since 1985, the majority of his time as night custodian in a number of schools. Mr. Moquin outlined his duties at Jeanne Sauve during his shift from 3 p.m. to 11 p.m. These included discussing with the Head Custodian any specific points about the day and who was to be in the school that particular evening, getting the car ready with necessary supplies and begin cleaning. Mr. Moquin said that his contact with students after the dismissal bell was minimal. He thought there were three dismissal times – 3:15, 3:30, and 3:45. He acknowledged there were activities, which took place in the evening but said he focused primarily on cleaning his area. He thought that about 5% of the school population stayed or returned after the last bell. Mr. Moquin said that he has a hard time conversing in French and does not read or write the language.

On cross-examination Mr. Moquin acknowledged that he knew Jeanne Sauve was an immersion school in which French was the language used for instruction, administration and operation. He said he had been told on his hiring that it would be beneficial for him to keep using his French and "get it back". Mr. Moquin said that he was expected to converse with students, staff and co-workers in French and that he had a "hard time" doing that. He testified that he was spoken to in French by the principal and received direction from him in French.

Mr. Moquin also said, when questioned by Mr. Simpson, that it was possible dismissal time was 4 p.m. and that there was no question that his start time and students leaving overlapped for a period of time. Mr. Moquin agreed that the student population had increased in his tenure at Jeanne Sauve and that the level of after school activities had increased.

Lloyd McLaughlin has been with the Division for 26 years, the first 14 years of which he has been Head Custodian at St. George School. He is currently Chairperson of the Union's Grievance Committee. He told the Board that when he received the job posting (Exhibit 2) he saw that hiring preference would be given to bilingual applicants. Mr. McLaughlin said that this had not been included before and after giving consideration to the number of people with seniority in this unit, he felt it was not a legitimate requirement and he issued the policy grievance.

Mr. McLaughlin testified that Head Custodians are required to be bilingual in immersion schools. This came to be, said Mr. McLaughlin, after the Union filed a grievance and discussions ensued between the Union and the Division. The Union determined that the bilingual requirement wasn't that unreasonable and that particular grievance was withdrawn.

Mr. McLaughlin also stated that it was his opinion that the major difference between working as a custodian during the day and during the night was that during the day contact with students couldn't be avoided while during the night shift there is much less contact.

On cross-examination Mr. McLaughlin confirmed that he had never been a custodian at Jeanne Sauve or in any high school. He said that he did not believe the level of after school activity was higher in a high school than an elementary school. He indicated that on occasion he had been to Jeanne Sauve in the evening because his wife worked there.

Mr. McLaughlin confirmed that Norbert Phillippe, the Superintendent of Education for the Division, had advised him that while the Division wanted bilingual night custodians in immersion schools it would not displace anyone, but that it would be done through attrition. Mr. McLaughlin agreed that Mr. Phillippe told him that the Division wanted a bilingual night custodian because of the level of after school activities.

Mark Kernaghan is currently employed as a national representative with CUPE. He also maintains his position as a cleaner with St. James School Division. Mr. Kernaghan told the Board that he had reviewed the requirements of City school divisions respecting bilingual night cleaners. Bilingualism was not required in Assiniboine South School Division, Fort Garry School Division, River East School Division, St. James School Division and Transcona School Division according to Mr. Kernaghan.

On cross-examination Mr. Kernaghan acknowledged that he was not aware that, with the exception of Transcona School Division, none of the school divisions he surveyed has a French Immersion high school.

Terry Borys has been principal of Jeanne Sauve since 1989. He told the Board that it is the only French immersion high school in the Division and it has approximately 630 students, 40 teachers, 4 paraprofessionals, 3 secretaries and 3.5 custodians.

Mr. Borys described the difference between a French immersion school, a dual track school and a French immersion centre. The definitions are derived from the Canadian Association of Immersion Teachers (CAIT) and Curriculum Policy for French Immersion. A French immersion school has 75% of its teachings in French, as mandated by the Province, the remainder in English. French is the language of communication, instruction and administration. A dual track school is a type of French immersion program within the walls of an English program facility. A French immersion centre has two distinct programs and staff, two distinct administrations – one of English, one bilingual. The two programs sometimes share resources such as gyms. Mr. Borys said besides Jeanne Sauve, there are two other French immersion high schools in Winnipeg – Pierre Trudeau in Transcona and College Beliveau in St. Boniface. From his knowledge about these schools, Mr. Borys said that at Beliveau the expectation is that all staff, day or evening, is bilingual and that at Trudeau the day staff is bilingual and that Trudeau's night custodian was hired to be the day custodian in St. Vital.

Mr. Borys stated that he expected French to be used in the classrooms by students and teachers and that communication, among and between professional staff and school support staff, was also to be in French. Communication with parents in English where necessary. Mr. Borys said that in class, in the cafeteria, with the caretaker, the office secretary, the vice-principal and the teachers, the language of communication is French. He also said that it is his expectation that extra curricular activities are to be in French but that he makes exceptions for parent volunteers who are not bilingual. Mr. Borys testified that the reason for this was based on research which shows that the more French immersion students have the opportunity to speak and use the language, the more they will. Therefore, it is very important to use French with a variety of people. When everyone around the students uses French it allows them to experience a variety of opportunities to use the language, which Mr. Borys said allows the staff to create as close to a perfect language centre for learning as possible in a predominantly English environment. He referred the Board to the school's Mission Statement in support of this (Exhibit 7 and Exhibit 8). Mr. Borys said there were exceptions to this general principle where competency in the language was an issue. For example the current evening custodial aide cannot speak French, and, certain itinerant Divisional staff such as the psychologist from Child Guidance Clinic and the social workers. The psychologist is bilingual but speaks to parents in English, or to the student in English. The social worker is primarily assisting parents and therefore speaks in English.

Mr. Borys testified specifically about Mr. Moquin and said that he communicated often with him in French and did not recall speaking to him in English, although said he may have. He said that although Mr. Moquin had some difficulty in communicating in French, he spoke to him in French and reminded and encouraged other staff to do so as well.

Turning to the activities at Jeanne Sauve, Mr. Borys stated that the school hours are from 8:45 a.m. to 4:15 p.m. and that while some classes dismiss at 3:30 p.m. some go until 4:15 p.m. He stated that the

school definitely does not "empty out" at 3:30 p.m. and that many activities take place. He cited as examples, the tutoring of students by teachers, drivers' education which involves "just about everybody" and which is conducted in French in class and in care, many athletic team games and practices, music activities such as choir, drama, various clubs such as Radio club, social responsibility club, and school dances. The use of French is expected by those students who participate especially when addressing a teacher, adult, secretary, or caretaker and the staff is expected to use French in these evening activities, according to Mr. Borys. He also said that while a large percentage of students do leave the building after school, on most evenings there are some activities being held. Mr. Borys stated that this is consistent with the culture and philosophy of the school, which is that it is a place to learn in and outside of the classroom.

Mr. Borys testified that with respect to custodial staff it was his expectation that custodial staff to speak to students in French. He said the custodians are important to the school and have a role to play. Mr. Borys noted that day custodians are important to the school and have a role to play. Mr. Borys noted that day custodians are bilingual and do have more regular contact with students than the night custodian does. However, he stated that because of the activity in the school after the regular day, he wanted a bilingual night custodian and that this was consistent with the environment of a French immersion school such as Jeanne Suave.

On cross-examination Mr. Borys agreed that the night custodian's primary responsibility is to clean the school and that he had the least direct contact with students of any of the staff, although he reiterated that it was his view that the custodian had a role to play with other support staff to create the French milieu.

In argument, Mr. Summerlus advanced the Union's position that bilingualism is a reasonable requirement for the day custodian, but it is an unreasonable requirement for the night custodian. He said that Article 4 of the Collective Agreement gives management a wide latitude, but one of the few restrictions was seniority as referred to in Article 7 and 8. By including the preference for bilingual night custodian at Jeanne Sauve, the Division has affected and abridged the seniority rights of employees in the bargaining unit, said Mr. Sumerlus. Further, he noted that management must not be arbitrary or discriminatory or act in bad faith and that this is not alleged here. However, that does not mean that the Division has an absolute free hand. Mr. Sumerlus asserted that the Division must set qualifications that are reasonably relative to the position and he referred the Board to *Brown & Beatty* at 6:3 300 which says that "...regardless of the type of security clause which the parties have included in their agreement, it is also firmly settled that an employee's claim that he was improperly denied a particular job would prevail if it could be established that the standards and criteria relied upon by the employer in making its judgment were not contemplated by the collective agreement or statute and did not bear any reasonable relationship to the work to be done...".

Mr. Sumerlus emphasized that the ability to speak French is not a real requirement of this position, although it may be a desired attribute. The night custodians' job is to clean the school, he said. Mr. Sumerlus referred the Board to Re Canadian Pacific Ltd. and Canadian Telecommunication Union 28 L.A.C. (2d) 431 @ 434, which says, "...management is not allowed to make its decision on the basis of criteria or information that bear no reasonable relation to the job in question." Based on the evidence of Messrs. Moquin, McLaughlin and Kernaghan, Mr. Sumerlus argued that the contact with students is "slim to none" and that the stated preference for bilingualism is a restriction on seniority rights of the Union's members.

Mr. Sumerlus further argued that the evidence does not disclose that fluency in French is a necessary and integral requirement to the satisfactory performance of the job of night custodian (Re Municipality of Metropolitan Toronto and Canadian Union of Public Employees, Local 79 26 L.A.C. (3d) 333). Conversation by the night custodian should be described as incidental at best and to impose the

requirement of bilingualism is not justified by the nature of the contact between the night custodian and others, Mr. Sumerlus said.

Mr. Sumerlus did not dispute that the Division acted in an honest and sincere manner in this matter. However, he urged the Board to find, as did the Board in The Board of School Trustees of School District No. 7 and Canadian Union of Public Employees, Local 748 (Nelson) July 10, 1987, that "...it is not sufficient for the School Board to simply say that the French requirement is necessary to increase efficiency or create a proper environment for students in the French immersion program. In short, we require more evidence of the relationship between the French requirement and the job task..." In the Nelson case the board found the student contact to be "fairly limited" and it was not enough to persuade that board that the requirement was appropriate said Mr. Sumerlus.

Mr. Simpson began his argument by stating that it was important to note the context in which this policy grievance came about in contract to the cases filed by the Union where someone is being displaced. In this case before this Board the bilingual qualifications was included in the job posting only when an opening occurred and no one was displaced. There is no requirement for a similar qualification for this position elsewhere in the Division and there is no issue with respect to arbitrariness or discrimination said Mr. Simpson.

The Union also concedes that it takes no issue with respect to the bilingual requirement for the day custodian and yet, argued Mr. Simpson, the job is essentially the same. The night custodian arrives at 3:00 p.m. but the programs offered by the school do not end at 3:30 p.m. or 4:15 p.m. After school activities take place four nights a week and contact takes place. College Jeanne Sauve attempts to establish a French environment after school with students and staff and these staff are some of the same people who are on duty when school is in operation during its regular hours. Mr. Simpson drew to the Board's attention the Job Description for custodians (Exhibit 5) in support of this position.

Mr. Simpson referred the Board to Article 1.01 of the Collective Agreement which says that "...at all times and under all circumstances, first consideration will be given to the education needs of the Community..." and to Articles 4.01, 8.01, 8.02 which give very broad recognition of the Division's right to determine qualifications.

Mr. Simpson also directed the Board's attention to The Public Schools Act s. 41(1)(a), s. 79(5) and particularly Regulation 9(2), there under, and which he said is applicable to College Jeanne Sauve. It states:

9(2) In a school in which French is used as the language of instruction for 75% or more of the school day in the elementary grades and 60% or more of the school day in the secondary grades, the administration and operation of the school shall be carried out in the French language (underlining added)

The evidence of Mr. Borys established that his school is providing a French environment within an English community during school and after the end of classes and Exhibit 6, "Curriculum Policy for French Immersion Programs" outlines what is to be accomplished by a French immersion school, said Mr. Simpson. This, in conjunction with Regulation 9(2), illustrates that there should be no issue of the Division's authority to establish qualifications.

Mr. Simpson further argued that having regard to what the Division is attempting to accomplish the conclusion should be drawn that its request for a bilingual night custodian is both proper and reasonable.

Mr. Simpson referred the Board to Re Network North and Ontario Public Service Employees Union, Local 666 50 L.A.C. (4th) 155 @ 161 where it was decided that an employer has the right to assess the needs of its clientele and decide if a bilingual qualifications is a reasonable qualifications for a particular job, so long as there is no evidence of bad faith or arbitrary or discriminatory conduct.

Mr. Simpson provided the Board with the case of Re Mohawk Hospital Services Inc. and Canadian Union of Public Employees, Local 1605 which deals with the situation where a particular certificate was required for a position where it has not been before. The board in the Mohawk case found that in order to require this certificate the employer had to meet three tests. First, the requirement must be for bona fide purpose. Second, the requirement must be congruent with the normal requirements of the position. Third, the right to establish the requirement must be capable of accommodation within the plain meaning of the management rights clause. Mr. Simpson said applying these tests to the bilingual requirement here, it is clear that all of the criteria have been met. Further, he argued that there is nothing in the evidence before this Board to say that the Division cannot revise, and/or update job requirements. Mr. Simpson reminded the Board, however, that the Division has had a French speaking person in place as head custodian since Jeanne Sauve opened.

It was asserted by Mr. Simpson, that, where an employer feels for the sake of efficiency, language facility is a job requirement, it is not an unreasonable requirement. The onus is on the Union to establish a violation of the Collective Agreement in this regard. Re Canada Post Corp and P.S.A.C. 58 L.A.C. (4th) 377 was cited in support of this proposition.

Mr. Simpson provided the Board with Re Stormont, Dundas & Glengarry Board of Education and C.U.P.E. Local 782 23 L.A.C. (3d) 379 as being on "all fours" with the matter before this Board. The arbitration board found that a requirement to speak French in a school where French is the working language at the school in that it is the language of instruction, administration and communication, is reasonable even for a boilerman who had "no necessary contact" with students. Further, the board in the Stormont case considered the cultural and pedagogical policies which the employer was pursuing in establishing a French school as relevant public policy grounds. Mr. Simpson said that Mr. Borys' evidence on these points is similar to that in the Stormont case.

In conclusion, Mr. Simpson said that if the strict wording of the grievance is considered, it appears that the Union is grieving that there has been a change in requirements for the night custodian position. The cases clearly illustrate that there is no restriction on the changes which the Division can make, so long as it acts in a manner which is not arbitrary, discriminatory or in bad faith.

Mr. Simpson noted that the grievance, as it has been presented at this arbitration, has been argued on the basis of reasonableness. He argued that if the Board considered this then the context in which the grievance has arisen must also be reviewed. That is, firstly no one has been displaced. Secondly the purpose for which the requirement is sought by the Division is to create a French immersion school as contemplated in The Public Schools Act & Regulations. The night custodian does have contact with students as the school's activities continue past 3:00 p.m. into the evening. The bilingual requirement is reasonable and has been implemented in a reasonable fashion. He urged the Board to find the Union had not discharged the onus placed upon it and to dismiss the grievance.

In reply Mr. Sumerlus stated that it is clear that the real issue between the parties is whether the requirement is reasonable. He also asked the Board to review the cases supplied by the Division as turning on their own facts.

The Board has carefully reviewed the evidence and argument presented by the parties. We note that no one will be displaced by the requirement which the Division seeks to impose. Further, we accept the

evidence of the Division as it pertains to the creation of a French immersion school such as College Jeanne Sauve.

In the particular circumstances of this case, and given the unique position which Jeanne Sauve occupies in the Division, it does not seem unreasonable for the Division to require that the night custodian be bilingual. We agree that the contact he has with students is limited, but the Union has already agreed that it is a reasonable requirement for day custodians. Just because the number of students the night custodian comes in contact with is less than the day custodian does not, in our opinion, render the requirement unreasonable. Further, when Regulation 9(2) of The Public Schools Act is considered, the Division's position is strengthened considerably. We find, therefore, that there has not been any breach of the Collective Agreement and the grievance is dismissed.

Dated at the City of Winnipeg in the Province of Manitoba, this __12th__ day of June, 1999.

Diane E. Jones, Q.C.
Chairperson

Gerry D. Parkinson
Nominee of the Division

Colin Robinson
Nominee of the Union