IN THE MATTER OF AN ARBITRATION

BETWEEN

WATERLOO COUNTY BOARD OF EDUCATION
- the Employer

and

CUSTODIAL AND MAINTENANCE ASSOCIATION
- the Union

AND IN THE MATTER of a grievance of Tom Gerry regarding the job posting for a Head Custodian at North Wilmot Public School

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Simon E. C. Mortimer	- Counsel
Helen Thorman-McLean	- Superintendent of Human Resources

On behalf of the Union:

Frank D. Carere	- Counsel
Dave Weiler	- President
George Martin	- Chief Steward
Tom Gerry	- Grievor

Intervenor

Bruce Fritz

Hearings held in Kitchener, Ontario on May 8, June 11, June 14, June 24, and August 29, 1996

INTERIM AWARD

I. INTRODUCTION

The sole issue in this award is as follows:

> Since the grievor no longer seeks the position, is his job posting grievance moot?

On August 28, 1995 the Employer posted Head Custodian positions at three elementary schools. Tom Gerry, the grievor, applied for the position at North Wilmot Public School but was unsuccessful. The position was awarded to Bruce Fritz, an employee with less seniority than the grievor.

The grievance reads in part as follows:

> Tom would like to have the Head Custodian position at North Wilmot be given to him.

On the fifth day of the hearing the parties advised that the grievor had obtained another Head Custodian position and no longer sought the North Wilmot job. The Employer submitted that the developments rendered the matter moot. The parties argued this issue. I ruled orally that the matter was not moot and that the hearing would continue. The parties asked me to provide written reasons and I am thus issuing this interim award setting out the reasons for my ruling.

After I issued my oral ruling the Employer asked that the hearing be adjourned for the remainder of the day on August 29 and also sought the adjournment of the hearing which had been scheduled for September 6, 1996. The Employer did not wish to proceed until it had these written reasons. The Employer expressed a concern that, should it decide to pursue the question of whether the matter was moot, its interests might be prejudiced by having proceeded. The Union objected to that request. I ruled on August 29 that the hearing would

proceed as scheduled but that I would note the Employer's request for an adjournment.

The issue of whether the matter had become moot arose in the middle of the hearing. As considerable evidence remained to be heard, I cannot provide a full review of the facts. Instead I briefly outline the nature of the grievance, recount the agreed facts which prompted the submission that the matter had become moot, and then deal with the submissions and my conclusions.

II. THE PROVISIONS OF THE AGREEMENT

The following is the relevant provision of the collective agreement:

ARTICLE X - SENIORITY

The rules herein respecting seniority and competence are designed to give Employees security based on length of service with the Employer.

10.01 In all cases of promotion and posted positions, the following two factors shall be considered:

(a) seniority of the applicants, and

(b) skills, competence, efficiency, reliability, training, experience, and past work record with the Employer.

When factor (b) is relatively equal between two or more applicants, seniority shall govern.

III. THE EVIDENCE

Custodians from various schools are grouped together for administrative purposes. In this instance, custodians at two high schools (Waterloo Oxford and Forest Heights) and the satellite schools for the two high schools are grouped under the leadership of a Supervisor of Custodial Services, Bruce Arnold, and an Assistant Supervisor of Custodial Services, Gary

Fleming. North Wilmot is one of the satellite schools grouped with the two high schools under Mr. Arnold and Mr. Fleming, and thus the Head Custodian at North Wilmot reports to them.

North Wilmot is a small school with about 90 students. It has only one custodian who is referred to as the Head Custodian. Schools are rated from A through D and a Head Custodian in a D school (such as North Wilmot) receives the lowest pay rate among Head Custodians; Head Custodians at A schools receive the highest pay.

In early 1995 the Head Custodian at North Wilmot was Greg Crocker. Mr. Crocker took a leave of absence in the spring of 1995 and Bruce Fritz, who was then the lead hand on the night shift at Waterloo Oxford High School was assigned as Acting Head Custodian at North Wilmot. By late August, 1995 Mr. Crocker transferred out of his position at North Wilmot and Mr. Fritz was again assigned to serve as Acting Head Custodian.

The selection committee for the North Wilmot position consisted of Mr. Arnold, Mr. Fleming and Fred Wiens, the Principal of North Wilmot School. The committee interviewed seven candidates and chose Mr. Fritz as the preferred candidate. Mr. Fritz was awarded the position, and this grievance followed.

I also received as evidence an extract from the Employer's Procedure Manual which purports to offer additional guidance on the process for selecting, among others, Head Custodians.

On August 29, the parties agreed to the following facts. The insertions in brackets are mine.

1. Tom Gerry [the grievor] was awarded and currently occupies the position of Head Custodian at North Lake Public School. [North Lake is a new school and the Principal is John Spinak, who was Principal at the school where the grievor had

worked since 1991.]

2. North Lake is a Class A school with one matron [a custodial position] and two night custodians [in addition to the Head Custodian].
3. The grievor will receive a higher rate of pay at North Lake as compared to the pay of the Head Custodian at North Wilmot School.
4. Mr. Spinak was a member of the selection panel for the North Lake position. [Mr. Spinak has testified on behalf of the grievor for the Union in this grievance.]
5. In light of the fact that he was awarded the position at North Lake School, the grievor would not post for, nor accept, the position of Head Custodian at North Wilmot.
6. The Employer policy on job competitions [in the Procedure Manual] has been reviewed.

IV. POSITION OF THE UNION

At the beginning of the hearing the Union outlined its case and raised several concerns about the process by which the Employer selected Mr. Fritz. The concerns were as follows: 1. On February 22, 1995 the Employer approached the Union to ask that the Union consent to a transfer, or switch, in which Mr. Fritz would move from lead hand at Waterloo Oxford to Head Custodian at North Wilmot and Mr. Crocker would move from Head Custodian at North Wilmot to lead hand at Waterloo Oxford. The Union did not consent.

2. In April Mr. Fritz was made Acting Head Custodian. Prior to this instance, a lead hand had never been made Acting Head Custodian.
3. On June 27, 1995, at the end of the school year staff lunch at Waterloo Oxford High School, the Principal of that school announced that Mr. Fritz would be leaving Waterloo Oxford to become the Head Custodian at North Wilmot.
4. The selection panel consisted of Mr. Arnold, Mr. Fleming and Mr. Wiens, each of

whom had written a letter of reference for Mr. Fritz.

5. The selection panel did not contact any of the grievor's references.

The Union said that:

1. The grievor was the most qualified candidate.
2. The grievor was the most senior candidate and seniority had not been used as a criterion in the selection process.
3. The selection process was completely biased and designed to select Mr. Fritz, who had already been informally selected in February, 1995.
4. The selection process was flawed as
   - there was no investigation of the qualifications of the candidates,
   - references were not contacted,
   - the panel included people who provided reference letters for at least one candidate,
   - the panel included people for whom some candidates had worked and other candidates had not,
   - the panel considered matters it should not have considered, and
   - the panel considered matters which had not been included in the job posting.

V. POSITION OF THE EMPLOYER

In its opening statement the Employer submitted that my jurisdiction was limited to a consideration of whether the Employer's finding on the qualifications was reasonable, and whether it was made in a good faith and in a non-discriminatory manner.

In particular the Employer said that:

- all individuals were asked the same questions,
- the Employer had no obligation to seek out qualifications,

- the Employer need only run a fair competition,
- the selection panel was a normal and appropriate panel,
- the Employer selected the most qualified person, and did consider seniority,
- the process was fair, the questions related to the position, and there was no bias, or conspiracy,
- the grievor was, in any event, the third ranked candidate, and
- finally, even if I were to find a fatal flaw, the only available remedy would be to order the competition re-run.

In submitting that the matter had become moot, the Employer noted that the grievance was an individual employee grievance, in which the grievor asked for a particular position. The grievor suffered no economic loss as he made as much money as he would have made as a Head Custodian at a D school. In any event he did not ask to be made whole. Instead he asked simply for the job. Now he no longer wants it. Thus there is no longer any live issue, and the continuation of the hearing and the receipt of more evidence would have no value to the parties. A resolution of the job competition issues would be of no value to the parties.

Grievances which have not been settled can be resolved through arbitration. As the grievor's complaint was to get a particular job and as he no longer sought it, the issue in this grievance had been resolved.

The Employer characterised the issues raised by the Union as follows:

1. The process was flawed - and referred to a conspiracy, bias, improper transfer, etc.
2. The Employer did not select the most senior relatively equal candidate.
3. The Employer did not consider seniority as is required by Article 10.01.

The Employer submitted that the third issue need never be answered to give an award in favour of the Grievor. It was thus not a live issue in terms of resolving this grievance. It

could be dealt with through a Union grievance and the Employer was willing to have a separate hearing on that issue. As for the other two issues, the Employer submitted that a decision would be of no assistance to the parties. Any decision would be fact specific and, as labour arbitrators are not governed by the concept of *stare decisis* (under which judges are bound to follow the earlier decisions of other judges), the decision would be of no value.

The Employer relied on the following authorities: *Re American Can of Canada Ltd. and Sheet Metal Workers International Assoc., Local 487* (1975), 10 L.A.C. (2d) 73 (O'Shea); *Re Welland County Roman Catholic Separate School Board and Ontario English Catholic Teachers Association* (1992), 30 L.A.C. (4th) 353 (Brunner); *Re International Nickel Co. of Canada Ltd. and United Steelworkers, Local 6166* (1972), 3 L.A.C. (2d) 438 (Gallagher); *Canadian Union of Public Employees, Local 1329 and Corporation of the Town of Oakville* (November 18, 1992), unreported (Hunter); *The Board of Trustees of the Edmonton Roman Catholic Separate School District No. 7 and The Alberta Teachers' Association* (November 24, 1989) unreported (Jones); and *Re City of Lethbridge and Canadian Union of Public Employees, Local 70(Hughes)* (1990), 13 L.A.C. (4th) 315 (McFetridge).

VI. THE UNION'S REPLY

The Union submitted that the resolution of the issues in this grievance was still of importance and thus the matter was not moot.

As for the suggestion that these issues would not arise again, the Union pointed out that the grievor, who had not been able to obtain the Head Custodian position at a small D school, had now obtained the Head Custodian position in an A school, and the Principal for whom he had worked was on the selection panel. Job posting issues will continue to arise as long as there is no ruling on the propriety of the Employer practice.

As for the issue of this being an individual grievance, the collective agreement made it clear that only the parties, that is the Union and Employer, could pursue matters in arbitration. There has been no withdrawal or settlement of the grievance. There has been only the unilateral act of the Employer in awarding another Head Custodian position to the grievor.

The Union repeated the issues it had raised at the beginning of the hearing, and noted that of the many concerns which the Union had raised, the only issue which the Employer had argued the Union could not pursue in this grievance was the issue of the spring assignment of Mr. Fritz as Acting Head Custodian. The Employer had, however, said throughout that if the Union was successful in this grievance the remedy should not be an award of the position to the grievor but rather an order that the competition be redone. The Union now agreed with that Employer position and acknowledged that if the Union proved its alleged breaches the appropriate remedy was to send the matter back for the competition to be redone. The Union submitted that this selection process was similar to others and that there were a number of issues that would continue to arise. The Union also sought declarations about the propriety of those practices in this grievance.

The Union relied on the following authorities: *Re Windsor Roman Catholic Separate School Board and Service Employees' International Union, Local 210* (1994), 45 L.A.C. (4th) 149 (Jolliffe); *Re International Nickel Co. of Canada Ltd. and United Steelworkers, Local 6500* (1975), 9 L.A.C. (2d) 83 (Simmons); *Re Canada Post Corp. and Canadian Union of Postal Workers (Mundle)* (1989), 8 L.A.C. (4th) 201 (Thistle); *Re Durham Region Roman Catholic School Board and Canadian Union of Public Employees, Local 218* (1991), 19 L.A.C. (4th) 72 (Brandt); *Re Treasury Board (Transport Canada) and MacGregor* (1992), 30 L.A.C. (4th) 330 (Chodos); *Re Guelph General Hospital and Ontario Nurses' Association* (1992), 25 L.A.C. (4th) 260 (Burkett); *Re Colonial Furniture (Ottawa) Ltd. and Retail, Wholesale & Department Store Union, Local 414* (1995), 47 L.A.C. (4th) 165 (Lavery); *Re Burns*

Meats Ltd. and United Food & Commercial Workers, Local 111 (1989), 10 L.A.C. (4th) 405 (Baizley); and *Re Pacific Western Airlines Ltd. and Canadian Air Line Flight Attendants Association* (1987), 28 L.A.C. (3d) 291 (Hope).

VII. CONCLUSIONS

Judges and arbitrators, as a matter of policy, only make decisions on issues which can have a practical impact. When a decision will not have a real impact on the parties to the dispute the decision maker will decline to continue with the case and the matter is said to be "moot".

The question of whether a matter is moot can arise in a wide variety of proceedings in which decisions are being made about the rights of the parties. As the question of whether a matter is moot is a general one, the concept has been described in many different ways by judges and arbitrators.

The concept was recently addressed in a case in the Supreme Court of Canada, where the principle was expressed by Mr. Justice Sopinka as follows:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. (*Borowski v. Canada (Attorney General)* (1989), 57 D.L.R. (4th) 231 (S.C.C.) as quoted in *Re Welland County, supra*, at page 357)

The arbitration cases to which I will refer shortly express the idea in somewhat different language. In general terms, however, when the resolution of the issues in a grievance is not

of any importance to the parties an arbitrator should not hear or resolve the grievance, but rather declare the matter moot. The resolution of a grievance which was of importance originally, may become of no importance as the hearing progresses. In that situation an arbitrator may decide that the grievance is moot. As an example, if the issues originally raised have, during the hearing of a grievance, been resolved in another forum such as by a Labour Board, then the matter may be moot. Alternatively, if the resolution of an issue will have no impact on the parties' relationship, if for example all the complaints raised by the grievance have been accepted by the employer, the matter may be moot. While the principle has been described in a variety of ways, the essential question is whether the resolution of the grievance will have a real effect on the relationship between the employer and the union.

This concept has been applied by arbitrators for many years. The cases cited by the parties elaborate on the concept and indicate how other arbitrators have assessed the question of whether their decisions will have the effect of resolving some controversy which affects the rights of the parties, whether the decisions will have a real impact. I will not review all of the cases, but a reference to some is illustrative of the approach followed by other arbitrators.

In *American Can, supra,* the grievor originally sought a payment of money for expenses in taking a medical examination required by the employer. Prior to the hearing the employer paid the money and indicated that in circumstances such as those involved in the grievance it was the employer policy to pay. The union sought general declarations as to the liability of the employer and the intent of the parties. The arbitration board declined to issue this general declaratory relief, in part because that was not the relief which had originally been requested, but also because the board felt it was being asked to redraft the language of the agreement to better express the intent of the parties. While the board did not use the word moot, it is clear that the board believed all the differences raised in the grievance had been resolved and thus the board should not proceed further with the matter.

If the arbitration board in *American Can* had continued with the grievance, its decision would have had no impact as the employer had paid the grievor, and the employer had agreed that it should pay other employees if similar situations arose in the future. That case differs markedly from the situation in this grievance. This Employer has not said that under the provisions of the collective agreement the grievor should have been appointed as Head Custodian at North Wilmot School. This Employer has neither acknowledged that it made any mistakes, nor that in the future it would do as the Union submits it should have done in this situation.

In *Welland County, supra,* the arbitration board declined to deal with a matter as the contested provision, a provision which had been applicable for only one year, no longer existed in the collective agreement. The union sought only declaratory relief and the board was of the opinion the declaration would have "no collateral consequences or practical effect."

Welland County is an instance in which the same problem could not occur again. A decision that the employer in *Welland County* had previously made a mistake or had violated the agreement would have had no real impact on the on-going relationship between the parties. The situation before me differs substantially. In this grievance the dispute centres on Article 10.01 which remains as part of the parties' collective agreement. It is also clear that questions of job postings and the application of Article 10.01 will continue to arise. While the exact fact situation will not reoccur, a decision on the points raised here may have an ongoing impact on other job postings and the application of Article 10.01, and thus may have an effect on the parties' rights. To use the *Welland* language, a decision here may well have "collateral consequences" and a "practical effect."

Another case in which an arbitration board felt the matter was moot was the *Edmonton*

Roman Catholic School Board case *supra.* That case involved an assessment of whether an employer action in refusing a leave request was reasonable. At the hearing the grievor sought no personal remedy. The union sought only general declaratory relief on the application of the leave provision - that it would never be proper for the employer to consider certain factors in making decisions on this type of leave. (In so doing it appears that the union was attempting to broaden the grievance.) The arbitration board felt a decision as to whether the employer action had been unreasonable would be of no practical value in the future, as each leave request must turn on its own facts, and declined to provide the general declaratory relief sought by the union.

In this grievance the Union has not suggested that I should make any ruling that it is never, or always, proper for the Employer to conduct job postings in a particular manner. Instead it seeks a ruling that in this case the particular actions of the Employer were in violation of the collective agreement, and that the posting should be redone.

Other arbitration cases have fact situations which are more similar to this case. In *International Nickel and U.S.W., Local 6500, supra*, the grievor had originally grieved a job posting, but at the hearing he no longer sought the position. The Board decided the matter was not moot and expressed their reasons as follows:

> There are two basic reasons for our decision. One, at the time of filing the grievance the grievor was directly affected by the decision of the employer and had a valid (as opposed to a hypothetical) complaint because of same. While he does not now seek the position for which he claimed in his grievance, we are unable to conclude that he no longer has any interest in having the complaint determined through arbitration. There has been no settlement of his complaint *per se* and because of the evidence presented in this connection it would be dangerous for this board to conclude that his complaint had disappeared in all respects. Secondly, it is this board's view that in the absence of a settlement, all valid . . . grievances should be resolved through arbitration. . . .
> It appears to this board that unless it is absolutely clear that the difference that had existed has totally disappeared a board of arbitration should decide the issue on its merits. (at page 88)

While the arbitration board chaired by Professor Simmons in *International Nickel and*

U.S.W., Local 6500, believed it was dangerous to conclude that the complaint had disappeared in all respects, in this grievance the complaint has clearly not disappeared. The Union has raised several issues which have not disappeared.

Another helpful case is *Durham School Board, supra,* where an employee had sought a leave of absence in order to get married and the request had been refused. Prior to the period for which the leave of absence had been sought, the employee went on an extended sick leave. She remained on sick leave during the period of the requested leave. The arbitration hearing occurred after the period for which the leave had been sought. The employer argued the matter was moot and noted that the employee suffered no loss. The board reviewed the *International Nickel and U.S.W., Local 6500* and *American Can* cases, *supra* and concluded as follows:

> The grievor wants to put in issue the question as to whether her interest in enjoying a honeymoon should be accorded greater priority that the interests of the employer respecting staffing, etc. That question has not been resolved simply because of the fact that the grievor did not on this occasion marry and take her honeymoon. Admittedly, circumstances have made it a less pressing or immediate concern, but it remains a concern nevertheless. (at page 74-75)

The questions raised in the grievance before me have not been resolved although, now that the grievor has obtained another position, the questions are likewise of less pressing or immediate concern.

With that background, I now turn to the situation before me. The grievance as outlined by the Union raised numerous alleged flaws in the Employer's selection process. The remedy which the Union originally sought for those alleged flaws was an order that the grievor be appointed as Head Custodian at North Wilmot School. Because he has obtained a "better" position, the parties now agree that the grievor would not take the North Wilmot position even if it was offered to him. The Union also now agrees with the Employer's original submission that if I were to find violations of the collective agreement the most I could order

is that the competition be redone.

While the remedy being sought has changed, all the underlying issues or alleged flaws in the selection process remain the same. The change in the remedy being sought does not resolve the question of whether the Employer should have offered the position to the grievor in 1995. Whether the Employer used seniority in the selection process has not been resolved by the change in remedy. Similarly, the change in remedy has had no impact on whether:

- the grievor was the most qualified candidate
- the process was biased and designed to select Mr. Fritz
- there was a requirement to investigate the qualifications of candidates
- it was improper that a selection panel was comprised of three persons all of whom had written letters of reference for one candidate, or
- the panel failed to consider matters it should have considered or considered matters not dealt with in the posting.

None of these issues was resolved by the grievor's acceptance of his current position, or by the parties' agreement that the grievor would not take the North Wilmot position.

Looking at the issue of job postings in general, while the parties agreed that the Employer policy on job competitions in the Procedures Manual had been "reviewed," there was no indication that the selection process had been changed in any way.

Could a resolution of the issues raised in this grievance affect the rights of the parties, affect the ongoing relationship? It appears, both from the Employer's opening position and from the evidence, that the selection process followed in this instance was similar to that which the Employer normally follows. For example, if I were to decide that it was, or was not, proper in this case to staff a selection panel with three persons all of whom had written letters of reference for one candidate, that ruling may be relevant to another selection

process. Similarly, if I were to decide that the Employer either did or did not have to seek out information about the candidates in this competition, that conclusion may affect another selection process. Likewise, if I were to decide that the use made of seniority was, or was not, proper in this selection process, my decision may be of relevance in another selection process. I conclude that the resolution of these issues raised by the Union could have a real impact on the parties' rights and their on-going relationship.

It follows that I do not view the underlying issues, the alleged breaches of the collective agreement, to be hypothetical or abstract questions. I believe they are of practical importance. I believe that decisions on those issues may well have the effect of resolving controversies between the parties.

Addressing simply the issue of remedy, the Employer has argued that declaratory relief would have no practical effect. I acknowledge that a situation identical to this one is unlikely to happen again and that declarations of the kind sought may have only limited value. For the reasons given above, however, I do not accept that declarations can or will have no practical effect.

In any event the Union also sought to have the competition redone. Such a remedy would clearly have a practical effect. (I acknowledge that, in addition to the grievor no longer wanting the position, the second ranked candidate has testified that he no longer has an interest in the position, and thus there may be an argument that ordering the competition redone is not an appropriate remedy in this particular situation. That issue is something which will, however, have to await the argument at the end of the case. The fact remains that the Union seeks to have the selection process redone as a remedy.)

The policy reasons in favour of arbitrating grievances have led other arbitrators to conclude

that where an employee grieves on the basis of a violation of the collective agreement, the employer cannot make the matter moot and deprive the employee of an adjudication of that breach by conceding the relief sought without conceding that the grievance has merit (see, for example, *Durham County, supra).* Similarly, it has been held that where an Employer concedes that the grievance has merit, such a concession does not render the matter moot where the issue of remedy remains outstanding (see *Colonial Furniture, supra).*

In my view the same approach should apply in this case where, due to the grievor obtaining a better position, the original remedy is no longer sought. The fact that the grievor no longer seeks the position should not deprive the grievor, and the Union, of an adjudication of the issues which were raised by the grievance. All of the issues raised by the Union in this case, all of the alleged violations of the collective agreement, remain outstanding.

Whether one looks at the definition quoted above from Mr. Justice Sopinka, or the approach of other arbitrators, the situation in this case does not fit within the description of a matter that is moot. A live controversy continues to exist between these parties and arbitration should be available for the resolution of their differences.

For the reasons given above, I ruled orally that the matter was not moot and that the hearing of the grievance would proceed as scheduled.

Dated in London, Ontario, this _____ day of September, 1996.

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Howard Snow, Arbitrator