

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHWEST UNITED EDUCATORS, Complainant,

vs.

HAYWARD SCHOOL DISTRICT, Respondent.

Case 75
No. 67030
MP-4356

Decision No. 32264-A

Appearances:

Mr. Michael Burke, Wisconsin Education Association Council, Northwest Regional Office, 2004 Highland Avenue, Suite "L", Eau Claire, Wisconsin, appearing on behalf of the Northwest United Educators.

Ms. Kathryn J. Prenn, Attorney, Weld, Riley, Prenn & Ricci, S.C., 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin, appearing on behalf of the Hayward School District.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Northwest United Educators filed a complaint with the Wisconsin Employment Relations Commission on June 8, 2007, alleging that the Hayward School District had committed prohibited practices within the meaning of Secs. 111.70 (3) 5, Stats., of the Municipal Employment Relations Act (MERA) by refusing to employ a bargaining unit member in the position of high school varsity basketball coach.

The Commission issued an order on November 8, authorizing Examiner Lauri A. Millot to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.70(4)(a) and 111.07, Stats. Hearing on the matter was held on December 20, 2007. The stenographic transcript of the proceedings was made and received. The Complainant and Respondent filed post-hearing briefs and reply briefs by March 12, 2008, whereupon the record was closed.

No. 32264-A

The Examiner, having considered the evidence and arguments of the Complainant's Counsel and Respondent's Counsel, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Complainant, Northwest United Educators (Complainant or Association), is a labor organization with its mailing address at 16 West John Street, Rice Lake, Wisconsin 54868. The Association serves as the exclusive collective bargaining representative for a bargaining unit of certified personnel of the Hayward School District.

2. The Respondent, Hayward School District, (Respondent or District), is a municipal employer, with offices located at 15930 West 5th Street, Hayward, Wisconsin, 54843. At all times material herein, Tom Kuklinski held the position of High School Principal and Barb Chiszar held the position of Athletic Director for the District. Chiszar has held the Athletic Director position for eight years and was previously a physical education teacher and coach in the District. During the first six years of Chiszar's employment in the Activities Director position, she was a bargaining unit member.

3. The District and the Association have been parties to a series of collective bargaining agreements. The 2001-2003 collective bargaining agreement contained, in pertinent part, the following provisions:

. . .

ARTICLE X - THE BOARD OF EDUCATION FUNCTIONS

The Board of Education retains all rights of possession, care, control, and management that has been granted by law and retains the right to exercise these rights during the term of the collective bargaining agreement, except as to the extent that such rights are restricted by the express terms in this agreement. These rights include, but are not limited to the following:

1. To direct all operations of the district;

. . .

3. To hire, promote, transfer, schedule, and assign employees in positions with the school system;

. . .

6. To select employees, establish quality standards, and evaluate employee performance;

...

7. To determine the methods, means, and personnel by which the school system's operations are to be conducted;

...

Appendix A

Hayward Community School District

2007-2008 SALARY SCHEDULE

...

BOYS BASKETBALL

Head Coach	3,271
JV Coach	2,139
C Team	1,828
Grade 8	1,516
Grade 7	1,516
Elem Coordinator	929

...

Explanatory Notes:

...

Positions set forth in Appendix B are bargaining unit work and shall first be offered to bargaining unit members who volunteer for such positions and who are qualified. In the event no qualified bargaining unit member volunteers, the Board reserves the right to assign the positions to bargaining unit employees, or, at its discretion, employ a non-bargaining unit member for the position. If a non-bargaining unit member is employed for the position, the position shall not again be available to bargaining unit members until such time as the employment relationship with the non-bargaining unit member is terminated by the Board and/or non-bargaining unit member. A teacher can only be assigned on involuntary extra-duty every five years. A teacher who already has an extra-duty assignment cannot be involuntarily assigned.

...

4. The Hayward community regards its athletics highly focusing on sportsmanship, promoting core values and success. District athletes have successfully earned collegiate

scholarships, including three student-athletes attending division one schools on scholarship in 2006.

5. Michael J. Churchill was hired by the District in 2002 as a high school social studies teacher. Churchill was the C Team (freshman) Boys Basketball Coach for four years and moved to the Junior Varsity Boys Basketball Coach position for the 2006-2007 school year. Prior to his hire to the District, Churchill was the 8th grade girls basketball coach in the Pulaski School District and interned and worked for two years with the University of Wisconsin-Green Bay Mens Basketball program with responsibilities for scheduling, recruiting, and camps. Churchill also attended coaches meetings at UWGB.

6. On December 14, 2006, Churchill engaged in a verbal altercation with a student athlete as a result of the student talking about and belittling Churchill to teammates in the locker room. The athlete and his parents filed a complaint. During the investigation, Churchill submitted a letter of resignation from his coaching position which the District did not accept. Churchill was issued a disciplinary letter on December 20, 2006 for use of foul language directed at a student athlete. Churchill did not grieve the discipline.

7. Near the end of the 2006-2007 basketball season, and likely in March, 2007, Ken Vesel, Varsity Boy's Basketball Coach informed the District and the coaching staff that he intended to resign from the Head Coach position at the conclusion of the basketball season. As a result, the District included in teaching vacancies notification that the Varsity Boys Basketball Coach position was available.

8. Churchill submitted his application for the Varsity Boys Basketball position on April 15, 2007.

9. After Churchill's discipline and during the time period between when he submitted his application for the Varsity Coach position and the interviews for the Varsity Coach position, Churchill and Chiszar spoke about Churchill's desire to succeed Vesel in the position. Chiszar explained to Churchill that certain conditions and expectations that would be imposed upon him by Chiszar in the event he was awarded the Varsity Boy's Basketball Coach position. Chiszar informed Churchill that if he was awarded the coaching position, he would be put on an improvement plan to address his use of appropriate language and communication skills. Churchill told Chiszar that he would not accept the head coach position if he was starting out with an improvement plan.

10. On May 2, 2007 the District sent an email to all staff regarding co-curricular positions that were vacant for the 2007-2008 school-year. Included in the posting was the position of Varsity Boy's Basketball Coach – Winter 2007. The posting read as follows:

2007-2008 CO-CURRICULAR POSITIONS OPEN

The Hayward Community School District is taking applications for the following positions:

- Varsity Boy's Soccer Coach – Fall 2007
- Varsity Boy's Basketball Coach – Winter 2007
- Varsity Boy's Hockey Assistant – Winter 2007
- Coach/Advisor
- Cheerleading Coach
- Color Guard Coach

Applicants should send a letter of application with qualifications, experience and references to Barb Chiszar, Hayward High School, P.O. Box 860, Hayward, WI 54843 (715)634-2619, Ext. 1505.

Application deadline: Applications will be accepted until filled.

11. The District ran the same notice as contained in finding of fact 10 in the Classified section of the Sawyer County Record, the local newspaper, on May 9, 2007.

12. The District has a Coaching Handbook that addresses various coaching responsibilities. Included in the Handbook are job descriptions. The Head Athletic Coach job description reads as follows:

TITLE: Head Athletic Coach

QUALIFICATIONS:

1. Valid WI teacher certification preferred
2. Employment as a teacher in Hayward Community School District or hold ASEP certification
3. Has the ability to organize and supervise a total sports program
4. Previous successful coaching experience in assigned sport preferred
5. The Head Coach must have substantial knowledge of the technical aspects of the sport and at the same time must continue to examine new theories and procedures pertinent to the field

REPORTS TO: The Athletic Director, who provides overall objectives and final evaluation in conjunction with the Co-Curricular Director

SUPERVISES: In several instances, the Head Coach must advise, coordinate and support a staff of High School Assistant Coaches and Middle School Coaches in conjunction with the Athletic Director and respective Principal

JOB GOAL: To instruct athletes in the fundamental skills, strategy, and physical training necessary for them to realize a degree of individual and team success. At the same time, the student shall receive instruction that will lead to the formulation of moral values, pride of accomplishment, acceptable social behavior, self-discipline, and self-confidence.

GENERAL:

1. The success of athletic programs has a strong influence on the community's image of the entire system. The public exposure is a considerable responsibility and community/parent pressure for winning performance is taxing, but must not override the objectives of good sportsmanship and good mental health.
2. The position includes other unusual aspects such as extended time, risk injury factor and due process predicaments.
3. It is the express intent of this job description to give sufficient guidance to function. In cases not specifically covered, it shall be assumed that a coach shall exercise common sense and good judgment.

. . .

13. Chiszar and Kuklinski developed a listing entitled "Qualifications for Boy's Varsity Basketball Candidate". The document is dated May 2007, although the actual date it was created is unknown. The list reads as follows:

1. Current/recent successful experience in Varsity level competition
2. Experience in working with and mentoring a coaching staff
3. Experience in building a strong basketball program and the players with evidence of success from the youth and community level through high school
4. Ability and experience facilitating youth basketball clinics for coaches and players
5. Able to communicate in a positive and appropriate manner with administration, staff, students, parents, and community

6. Reflects, represents and respects the District and Athletic Department's philosophy of the role of co-curricular activities and core values in education as an integral part of the total education experience
7. Is a positive role model

14. The District received six applications for the vacant Varsity Boys Basketball Coach position. One candidate was not offered an interview due to not having any prior varsity experience. The District offered interviews to the five remaining candidates, including bargaining unit member Churchill and non-bargaining unit member, Richard "Whitey" Gilbertson.

Gilbertson is a retired coach and athletic director from Clinton, Wisconsin. While at Clinton, Gilbertson led the Girls' Basketball team to three state tournament appearances, 17 conference championships, and three suburban conference championships. Gilbertson was awarded Coach of the Year on three occasions during his coaching tenure.

15. Interviews for the Head Boy's Basketball position occurred in May 2007. Churchill was interviewed on May 16 and Gilbertson on May 23. The interview questions were prepared by Kuklinski and had been in use for at least the prior seven years. Chiszar read the interview questions to the candidates. Kuklinski asked follow-up or clarifying questions if he desired.

Following are the questions asked of the candidates:

1. Briefly describe for us your experiences that have qualified you for this position.
2. Describe for us your coaching philosophy.
3. How do you plan to communicate with parents concerning your athletic program?
4. How would you describe both your practice and game demeanor?
5. What do you consider to be your greatest strengths as a coach?
6. What areas might you need to improve upon as a coach?
7. How do you motivate your players for both practices and games?
8. What are some goals that you might set for your team?
9. What is your role as _____ within the _____ athletic program?
10. Describe for us a typical daily practice plan.
11. Immediately after a game an angry parent confronts you. How would you handle this situation?
12. How important is winning in your athletic program?
13. How do you go about determining which players play in each contest?
14. Do you have any questions for us?

16. Chiszar and Kuklinski created the May 2007 Qualification List because they believed that basketball specific qualifications were necessary. The List required that

candidates have experience working with and mentoring coaches, experience working with youth and community programs, and experience facilitating youth and coaching clinics. These requirements were not addressed in the seven year old interview questions nor did the District ask the applicants any questions to determine the candidates' experience in any of these areas.

17. Chiszar and Kuklinski made notations after each interview and independently ranked the all of the candidates. Chiszar ranked Gilbertson first, a non-bargaining unit member second and Churchill third. Kuklinski ranked Gilbertson first, the same non-bargaining unit member second and Churchill third.

Chiszar completed reference checks on Gilbertson. Chiszar and Kuklinski recommended to District Administrator Cox that the Varsity Boy's Basketball Coach position be offered to Gilbertson.

18. The District offered the Head Boy's Basketball Coach position to Richard "Whitey" Gilbertson on the last school day of the 2006-2007 school year.

19. The District did not hire Churchill because he was not qualified for the Head Boys Basketball Coach position. Specifically, Churchill did not meet qualifications one and five on the May 2007 Qualification List in that he did not have any varsity level coaching experience and did not have the ability to communicate in a positive and appropriate manner with students and staff as demonstrated by his reprimand in December 2006.

20. Had Gilbertson and the second-ranked candidate not accepted the Varsity Boys Basketball Coach position, the District would have either re-opened the position to accept more candidates or re-evaluated the qualifications and offered the position to Churchill.

21. During Chiszar's two year tenure as Athletic Director, she hired two head coaches, Girls Softball and Boys Soccer. Chiszar sought candidates with varsity level coaching experience for head coach positions and viewed her desire for varsity level experience as a required qualification.

Ken Vesel was hired to the Varsity Girls Softball Coach position for the 2007 season. Vesel had 10 years varsity experience as the Varsity Boys Basketball Coach, but did not have any varsity experience in girls softball.

The individual hired to the Soccer Coach position did not have any varsity level experience. The District offered the Soccer Coach the position because there were not any candidates with varsity level experience.

22. Varsity level coaching experience is not a required minimum qualification for Varsity Head Coach positions. Varsity level coaching experience is a desired qualification for District Head Coach positions.

23. During the 2005-2006 basketball season and as a result of an incident, Churchill did not allow parents or members of the public observe basketball practices. A parent complained to Chiszar and Cox. Chiszar spoke to Churchill and explained that he could not close practices, but that the District could establish expectations for observers.

A second situation arose the following year when Churchill confronted a parent at half-time of a basketball game after he observed the parent communicate an inappropriate hand gesture to then Varsity Boys Basketball Coach Vesel. Chiszar and then High School Principal Bill Mastell intervened and spoke to the parent regarding acceptable and unacceptable behavior. Chiszar informed Churchill it was not his responsibility to confront parents and fans regarding inappropriate behavior and that he should have informed Chiszar of his observation so that she could address the issue.

Churchill was not disciplined for either of these incidents.

24. The District directs head coaches to evaluate assistant coaches. The Athletic Director evaluates the head coach. Churchill was evaluated by Ken Vesel three times between 2004 and 2008. Vesel rated Churchill at the highest level in all evaluations.

CONCLUSIONS OF LAW

1. Complainant is a labor organization within the meaning of Sec. 111.70(1)(h), Wis. Stats.

2. Respondent is a municipal employer within the meaning of Sec. 111.70(1)(j), Wis. Stats.

3. Respondent's decision to concurrently post the Varsity Boys Basketball Coach position internally and externally is not prohibited by the labor agreement and therefore was not a violation of Sec. 111.70(3)(a)5, Wis. Stats.

4. Respondent violated Sec. 111.70(3)(a)5, Wis. Stats. when it concurrently interviewed, evaluated and ranked internal and external applicants for the Varsity Boys Basketball Coach position in contravention to the language of Appendix "B" of the collective bargaining agreement.

5. Respondent violated Sec. 111.70(3)(a)5, Wis. Stats. when it awarded the Varsity Boys Basketball Coach position to non-bargaining unit member Richard Gilbertson rather than qualified bargaining unit member, Mike Churchill.

ORDER

Respondent School District of Hayward, its officers and agents, shall immediately:

- a. Cease and desist from violating the terms of the collective bargaining agreement.
- b. Award the Varsity Boys Basketball Coach position to Mike Churchill.
- c. Compensate Mike Churchill the difference between the Head Coach salary and the Junior Varsity Coach salary, plus interest at the rate of twelve percent (12%) *per annum*.
- d. Take the following affirmative action which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act:
 - (1) Notify all of its employees in the School District of Hayward by posting in conspicuous places where employees are employed in that Department, copies of the notice attached hereto and marked "Appendix A". That notice shall be signed by District Administrator and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the School District of Port Edwards that those notices are not altered, defaced, or covered by other material
 - (2) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply with this Order.

Dated at Rhinelander, Wisconsin, this 23rd day of July, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lauri A. Millot /s/

Lauri A. Millot, Examiner

APPENDIX "A"

**NOTICE TO ALL EMPLOYEES REPRESENTED
BY NORTHWEST UNITED EDUCATORS**

Pursuant to an order of the Wisconsin Employment Relations Commission, and in order to effectuate the purposes of the Municipal Employment Relations Act, we hereby notify our employees that:

1. WE WILL NOT violate the terms of the collective bargaining agreement.
2. WE WILL award the Varsity Head Boys Basketball Coach position to Mike Churchill.

SCHOOL DISTRICT OF HAYWARD

District Administrator Date

THIS NOTICE WILL BE POSTED IN THE LOCATIONS CUSTOMARILY USED FOR POSTING NOTICES TO EMPLOYEES REPRESENTED BY NORTHWEST UNITED EDUCATORS FOR A PERIOD OF SIXTY (60) DAYS FROM THE DATE HEREOF. THIS NOTICE IS NOT TO BE ALTERED, DEFACED, COVERED OR OBSCURED IN ANY WAY.

HAYWARD SCHOOL DISTRICT

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

POSITIONS OF THE PARTIES

The Complainant

The District was contractually obligated to consider bargaining unit candidates before advertising or interviewing non-bargaining unit applicants. The clear and unambiguous language of the contract supports the Complainant's position. The first sentence of Appendix "B" provides that the position "shall first" be offered to bargaining unit members. The second sentence states that "in the event" the position is not filled, then the Board may assign or hire a non-bargaining unit member. The word "first" means just that. The contract creates a pecking order: first teacher applicants are considered; then teachers may be assigned or non-bargaining unit members may be employed.

Had the District followed the contract language, it may have viewed Churchill's qualifications differently. Churchill has been involved in every aspect of the day-to-day operation of the Hayward boys' basketball program for six years. Churchill was the highest ranked bargaining unit member. Churchill was qualified for the coaching position and the District's decision to not offer him the position was arbitrary.

The District primarily denied Churchill the position because he lacked head coaching experience. This is a flawed argument. First, the District has not required head coach experience for head coach positions hired in the past. Ken Vesel, the previous coach and even Gilbertson, when he was hired to Clinton High School, did not have any varsity level coaching experience. Moreover, varsity coaching experience has not been a consistent qualification for head coach positions and is not listed in the Coaching Handbook.

Second, the document the District asserts are the "qualifications" for the position is suspicious. The District's qualification list was dated May 2007. This was the same month in which the interviews took place. Nowhere in the interview notes prepared by Chiszar or Kuklinski noted Churchill's lack of varsity level coaching experience.

Churchill was reprimanded in December of 2006. He accepted responsibility for his actions and apologized to the student and his teammates. There has been no further conduct of that sort in the year that followed the reprimand. It is unfair to deny Churchill the coaching position based on one incident. As to the two other instances where Chiszar spoke to Churchill, they are not relevant because they were not reprimands. Churchill has been coaching in the District for six years and the positives he has contributed far outweigh the negatives.

Complainant urges that the decision of Arbitrator Jay E. Grenig in MADISON METROPOLITAN SCHOOL DISTRICT, WERC A/P M 05-052 (November, 2004) with regard to the remedy.

Complainant in Reply

Complainant points out that Chiszar testified that she did not review the language of Appendix "B" or speak to other administrative personnel regarding the District's concurrent interviewing of applicants. The District did not consider Churchill separate from the external applicants. The District interviewed all candidates and considered all applicants. Had the District followed the contract, it would have interviewed Churchill first.

Vesel's evaluations of Churchill should not be discounted. Vesel prepared the evaluations and it is improper to conclude that because of his NUE affiliation, he is not capable of giving a fair assessment of Churchill.

Although the District concedes it does not have the right to hire the most qualified candidate, that is exactly what it did in this instance. Because the District considered Churchill with external candidates, it never assessed Churchill's qualifications.

The District went out of its way to deny Churchill the Varsity Boys Basketball Coach position in violation of Sec. 111.70(3)(a)5 and should be ordered to award the varsity coaching position to Churchill for the 2008-09 school year.

The Respondent

The District's expressly reserved management rights in the collective bargaining agreement and its inherently reserved management rights provide it the authority to establish qualifications for the Varsity Boys Basketball Coach position. The qualifications established by the District were reasonable. The qualifications, and specifically the expectation that the successful candidate have prior varsity level coaching experience and the expectation that the candidate communicate in a positive and appropriate manner, were based on the District's placement of high value on the quality of its athletic programs. This was not the first time that the District looked for past varsity level experience; it did so when it hired Mike Vesel to the Head Softball Coach position. With respect to the positive communication qualification, it would defy reason to not include such a qualification in this position.

Mike Churchill was not qualified for the coaching position. Churchill did not have successful varsity level coaching experience. Churchill had been disciplined for his failure to communicate in a positive and appropriate manner. In addition to the written reprimand, Athletic Director Chiszar identified two additional incidents where Churchill had engaged in inappropriate communications. The first was an incident at half court where Churchill confronted a parent. The second involved a parent and Churchill's decision to close practices to that parent. Chiszar sternly warned Churchill following both incidents.

The District is not limited by the language of Appendix B from interviewing internal and external candidates simultaneously. Churchill was granted an interview, even though he did not have any varsity level experience, as a courtesy and because the District did not know “who would be applying and what the results of the interview might be.” Br. 17. Had Churchill not been a teacher, he would not have even been offered an interview.

The interview process was not rigged to favor Gilbertson. Had the District wanted Churchill out of coaching, Chiszar would have accepted his resignation when he offered it in December, 2006.

District in Reply

The District points out that the parties agree that the language of Appendix “B” is clear and unambiguous. The language states that a qualified bargaining unit member is entitled to the position. Unfortunately, the Complainant seems to ignore the fact that the bargaining unit volunteer must be qualified and Churchill was not qualified.

The labor is agreement is silent regarding advertising and interviewing procedures. If the Complainant wants to add language prohibiting the concurrent external advertising of Appendix “B” vacancies and the concurrent interviewing of internal and external candidates, then it has to obtain that language at the bargaining table.

When Churchill did not meet the qualifications, he was not offered the position and the District moved forward in its consideration of external applicants. Appendix “B” language provides that once there are no qualified bargaining unit members, the District may a non-bargaining unit member (emphasis in original). If Churchill had met all of the qualifications, and assuming no other qualified bargaining unit member was interested, he would have been offered the position. Churchill was considered first, but was ruled out because he did not meet all of the qualifications. The District’s selection process was fair, unbiased and neither arbitrary or capricious.

The Complainant has the burden to demonstrate that the qualifications were unreasonable or the selection process was biased, arbitrary, or capricious. It has failed to meet this burden. As a result, it is unnecessary for Churchill’s qualifications to be assessed.

In response to the assertion that the District’s qualification list is suspicious because it was created after Churchill applied for the position, the fact is that he applied before the position was even posted. Staff were notified of the vacancy on May 2 and the advertisement ran in the local newspaper on May 9. Churchill’s submission of his letter of application prior to the position being posted does not trump or negate the District’s authority to establish qualifications.

Churchill’s December 2006 reprimand cannot be downplayed. The hiring decision was made less than six months from the reprimand. Churchill was not denied the coaching position

because of the single reprimand; he was denied the position because “he did not meet two of the requisite qualifications for the position”. (Reply Br. P. 3)

The MADISON case cited by Complainant is distinguishable. In MADISON, the parties stipulated that the internal applicants were qualified for the position. Churchill was not qualified for the position and therefore the outcome in MADISON is not relevant.

The District respectfully requests that the Complaint be dismissed in its entirety.

DISCUSSION

The parties’ labor agreement does not provide for final and binding arbitration of grievances. As such, labor disputes are resolved through a prohibited practice complaint.

Sec. 111.70(3)(a)5, Wis. Stats., provides that it is a prohibited practice for a municipal employer:

To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement...

If the District’s conduct was contrary to the Agreement, then the Association has established a violation of this section.

The Complainant makes two challenges to the District’s decision to hire Gilbertson. First, the Complainant maintains that Appendix “B” does not allow for the simultaneous consideration of internal and external candidates for co-curricular vacancies. And second, Complainant asserts the District violated the labor agreement when it offered the Varsity Boys Basketball Coach position to a non-bargaining unit member when a qualified bargaining unit member had volunteered for the position.

Did the District Violate Appendix “B” when it concurrently advertised and interviewed bargaining unit members and non-bargaining unit members?

The language of the Appendix “B” provides that positions shall be “first offered” to bargaining unit members who “are qualified”. This language deals with who is awarded the position, not the posting component, and will be addressed separately below.

Moving to the next sentence, it states that the District may assign a bargaining unit member the position or employ a non-bargaining unit position if a qualified bargaining unit member did not volunteer. This language establishes that the parties contemplated the possibility that a bargaining unit member may not volunteer or that a volunteer bargaining unit

member would not meet the qualifications, but does not address the issue of posting. As such, the plain language of the labor agreement does not address how a position is posted. The District relies on this silence, in concert with its inherent management rights, and concludes that since the parties did not specifically forbid the District from concurrently posting and interviewing internal and external candidates, then it has the right to do so. I agree in part and disagree in part.

The traditional inherent management rights view is that management has “reserved its right to manage unless it has limited its right by some specific provision of the labor agreement”. Elkouri & Elkouri, *How Arbitration Works*, 6th Ed. (BNA 2006), p. 640. This theory is limited by a standard of reasonableness which requires a detailed review as to whether the action was arbitrary, capricious or exercised in bad faith.

In this instance, the District posted the position internally on May 2 and with a local newspaper on May 9.¹ The District posted the position first to the bargaining unit and next to the public. The Complainant has not offered any evidence or argument as to why it was unreasonable to post the position internally and externally at the same time. Given the District’s broad management right, the fact that the bargaining unit was placed on notice of the vacancy and the lack of any evidence that the District’s motivation was arbitrary or capricious, I conclude that the District acted within its rights when it posted the Varsity Boys Basketball Coach position concurrently to internal and external applicants.

Moving next to the interview and evaluation of candidates, it is necessary to further explore the language of the agreement. Appendix “B” specifically states that the District must “first” offer the position to a qualified bargaining unit member before any external candidate. This is not discretionary language. The parties’ use of the word “first” is significant, as is the expectation that the candidate must be qualified. At this juncture, analysis will focus on the process and not the candidates’ qualifications which will be further evaluated below.

The District decided it would interview five candidates. Those interviews were scheduled during an eight day window in May. No evidence was presented regarding any methodology for scheduling candidates for interviews, i.e. interviewing internal candidates before external candidates. Churchill was interviewed on May 16 and Gilbertson was interviewed on May 23. After all interviews were complete, Chiszar and Kuklinski independently evaluated and ranked all candidates. At no time did the District assess the internal candidates’ qualifications separate from the external candidates. Rather, the District interviewed and ranked all candidates without differentiation as to their internal or external status. This process violated the priority which Appendix “B” provides bargaining unit members – that they are given the “first” opportunity at extra-curricular positions.

¹ The record does not include any historical evidence which would explain whether the District has concurrently posted vacant positions internally and externally, nor does it reveal the District’s rationale for posting internally and externally at about the same time.

Having concluded that the District violated Appendix “B” when it interviewed and evaluated external candidates along with internal candidates, it is necessary to resolve whether Churchill was qualified for the varsity coach position.

Was Churchill qualified for the Head Basketball Coach position?

The District maintains that Churchill failed to meet qualifications one and five on the May 2007 Qualification List and therefore it’s non-selection of Churchill for the Varsity Boy’s Basketball position was justified. Complainant challenges the creation and content of the May 2007 Qualification List, specifically the validity of the District’s new varsity level coaching experience qualification, and concludes that Respondent’s failure to offer him the position violated Appendix “B” of the collective bargaining agreement

The District posted for the Varsity Boys Basketball position on May 2 and May 9. The new Qualifications List is dated May 2007. There is no question that the District has the right to establish job requirements for positions, but the creation of a new listing of job requirements to be used to differentiate candidates after the position has been posted and applications were received is highly suspect.

The May 2007 Qualification List was drafted because Chiszar and Kuklinski agreed that the Boys Basketball Coach position required more specialized qualifications than those found in the job description in the Coaches Handbook. These qualifications contain specific references to basketball whereas the qualifications contained in the job description in the Coaches Handbook are general to all sports. Yet, when Chiszar and Kuklinski conducted the interviews for the position, they used a seven year old listing of interview questions that were general to all sports. This begs the question, if there was a such a strong belief by these two administrators that the Boys Basketball Coach position needed to be evaluated based on specific basketball criteria as opposed to the general qualifications it utilized to evaluate other coaching vacancies, why didn’t they re-write the interview questions to ascertain information from the candidates specific to the new job qualifications.

Three qualifications on the May 2007 Qualifications List were not addressed during the interview. These include qualification two which addresses mentoring of the coaching staff; qualification three which addresses youth and community basketball programs; and qualification four which addresses the implementation and direction of youth basketball clinics in the community. By using the general interview questions, the District denied itself the ability to solicit information so as to ascertain whether the candidates’ knowledge, skills, abilities and experience in the areas desired by these qualifications. The use of the antiquated interview questions, given the new Qualifications List, points to further injustice due to the District’s failure to assess candidate competence in certain areas.

Churchill’s was disqualified from consideration, albeit ranked third, due to his inability to meet two of the seven qualifications on the May 2007 Qualification List. Yet, there was no means by which to appraise any of the candidates’ experience as it related to qualifications

two, three, and four on the May 2007 Qualification List. The problem with the District's position is that while its rationale for creating specialized qualifications is reasonable, the timing of when the qualifications were created and its failure to follow through and evaluate the candidates based on the specialized qualifications support the Complainant's position that the May 2007 Qualifications were created as a mechanism to disqualify Churchill in favor of a highly qualified external candidate.

Looking next to the reason Churchill was not offered the Varsity Boys Basketball Coach position, the District asserts he was not qualified for the position. It must first be pointed out that Churchill coached boys basketball for the District for five years prior to his application to the Varsity level position. For four of those years he worked with the freshman class and during the fifth year he coached the junior varsity team varsity. The fact that he was currently performing as a coach presumes a finding that he is qualified for the Varsity level coaching position, but is rebuttable. See Elkouri at p 623-25 and LITTLE CHUTE AREA SCHOOL DISTRICT, MA-8886 (Nielsen, 5/95).

The record establishes that until the District created the May 2007 Qualifications List for the Head Boys Basketball Coach position, varsity level coaching experience was not a job requirement known to the candidates. The District maintains that it has sought candidates with varsity level experience for other head coach positions in the past, citing Coach Vesel for the Softball position. The weakness contained in the District's assertion is that at no time prior to this position has the qualification been reduced to writing so as to inform the candidates nor has it been enforced when hiring coaches.

The District denied Churchill the Varsity Boys Basketball Coach position because he did not have any varsity level coaching experience. At the same time that the Boys Basketball Coach position was posted, the District posted for the Varsity Boys Soccer Coach position. The candidate hired to that position did not have any varsity level coaching experience. The District distinguishes the Soccer Coach situation on the basis that no candidate that applied for the Soccer Coach position had any varsity level experience. I find the two situations to be indistinguishable. If it is not a requirement for a non-bargaining unit member coach applicant to hold varsity level coaching experience, why is it a requirement for a bargaining unit member coach applicant?

Churchill's inability to communicate in a positive manner with students and parents was the second reason the District did not hire him to the coaching position. Churchill was a six year coach who had received a written disciplinary sanction for inappropriate behavior/communication. The two informal conversations with Chiszar were not disciplinary and will not be considered. The remaining event occurred in December, 2006 which was just five months prior to the interviews for the head coach position. Churchill's behavior was, without question unacceptable, to which he acknowledged. The question is, given the invalidation of the varsity level coaching experience qualification, whether it justified not hiring him for the position?

A head coach is subject to a fair amount of criticism and Churchill's inappropriate behavior with the student provides some indicia of how he may respond in similar circumstances. But, the District had already expressed its position that the discipline imposed did not disqualify Churchill. After Churchill was disciplined and before the interviews for the Head Boys Basketball Coach position, Churchill and Chiszar had a conversation regarding Churchill's desire to become the Head Coach. During that conversation, Chiszar expressed to Churchill that should he be successful in his effort to obtain the position, it would be subject to an improvement plan. While this confirms that the District had concerns about placing Churchill in the head coach position, it also establishes that those concerns would be satisfied if he accepted an improvement plan.

The District points out in its brief that Churchill communicated his unwillingness to accept the head coach position if it was contingent upon being placed on an improvement plan. The District has every right to offer a candidate hire subject to certain restrictions and the candidate can choose to accept the position with those restrictions. In this instance, the District needed to provide Churchill that opportunity to decide whether he was willing to accept the position with conditions.

In summary, the District utilized a new list of qualifications to disqualify Churchill. The qualifications were not known to the candidates and were created after the position was posted and applications received. Churchill was subjected to differential treatment when he was disqualified from consideration due to the new qualifications since all of the new qualifications were not enforced in the Varsity Boys Basketball Coach hire nor was the varsity coaching experience qualification enforced in the Boys Soccer Coach hire. The District's reliance on the May 2007 Qualification List as justification to deny Churchill the Varsity Boys Basketball Coach position was arbitrary and capricious.

For the foregoing reasons, the District violated Sec. 111.70(3)(a)5, Stats., when it interviewed, evaluated and hired a non-bargaining unit member when a qualified bargaining unit member had volunteered for the Varsity Boys Basketball Coach position.

Dated at Rhinelander, Wisconsin, this 23rd day of July, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lauri A. Millot /s/

Lauri A. Millot, Examiner

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