

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

WEST DePERE EDUCATION ASSOCIATION

and

WEST DePERE SCHOOL DISTRICT

Athletic Coordinator duties
grievance dated 5-31-91

Case 31
No. 46092
MA-6864

Appearances:

Mr. Lawrence J. Gerue, Executive Director, United Northeast Educators, 1136 North Military Avenue, Green Bay, WI 54303, appearing on behalf of the West De Pere Education Association.

Mr. Dennis W. Rader, Godfrey & Kahn, S.C., 333 Main Street, Suite 600, PO Box 13067, Green Bay, WI 54307-3067, appearing on behalf of the District.

ARBITRATION AWARD

The parties requested the Wisconsin Employment Relations Commission to designate an arbitrator to hear and decide a dispute concerning the above-noted grievance under the grievance arbitration procedures contained in the parties' 1989-91 Agreement (herein Agreement). The Commission designated the undersigned as Arbitrator in the matter.

The parties presented evidence and arguments to the Arbitrator at the District's offices at West De Pere, Wisconsin on November 19, 1991. No transcript was made of the proceedings, but the parties agreed that the Arbitrator could maintain an audio tape recording of the hearing exclusively for the Arbitrator's use in award preparation. The parties filed written briefs which were received on December 9, 1991, as of which date the matter was fully submitted and ready for award issuance.

As was further agreed at the hearing, the Arbitrator has provided the parties a somewhat shortened form of award in an effort to provide a decision as quickly as possible.

ISSUES

At the hearing, the parties agreed that the Arbitrator was authorized to decide the following issues in this matter:

1. Did the District violate the contract by including certain supervisory duties in the job description for Athletic Coordinator which is a bargaining unit position?
2. If so, what is the remedy?

FACTUAL BACKGROUND

Beginning with the 1990-91 school year, the District has offered and bargaining-unit teacher David Dobkoski has accepted and performed the set of Athletic Coordinator duties described on the attached job description. The instant dispute has focused on items 13 and 14 in the listing of "PERFORMANCE RESPONSIBILITIES" in that description, which items read as follows:

13. Responsible for evaluating and recommending all new candidates for coaching positions.
14. Assist administration with the evaluation of coaches.

The Association filed and processed the attached grievance which was denied at the pre-arbitral steps, most recently by the attached letter from the District Administrator dated July 23, 1991.

The attached documents referred to above are hereby incorporated as a part of this Award as if set forth in full.

PORTIONS OF THE AGREEMENT

Article I - RECOGNITION

A. The Board recognizes the Association as the exclusive bargaining agent on wages, hours, and conditions of employment for all regular full and part time non supervisory certified professional teacher personnel, hereinafter referred to as "teacher(s)".

Article II - MANAGEMENT RIGHTS

A. The Board retains and reserves unto itself, without limitations, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and Constitution of the State of

Wisconsin and of the United States, including, but without limiting the generality of the foregoing, the right:

1. To the executive management and to the administrative control of the school system and its properties and facilities, and the duties and responsibilities of its teachers.

2. To hire all teachers and subject to the provisions of law, to determine their qualifications and conditions for their continued employment, or their dismissal or demotion, and to promote, and transfer all such teachers.

...

5. To determine class schedules, the hours of instruction, and the duties, responsibilities, and assignments of teachers with respect thereto, and with respect to administrative and non teaching activities and the terms of employment.

B. The exercise of the foregoing power, rights, authority, duties and responsibilities by the board, the adoption of policies, rules and regulations, and practices in furtherance thereof and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this agreement and Wisconsin Statutes Section 111.70 and the only to the extent such specific and express terms hereof are in conformance with the constitution and laws of the State of Wisconsin, and the Constitution and laws of the United States.

...

APPENDIX B
EXTRA DUTY CO-CURRICULAR SCHEDULE

A sign up form for these jobs will be posted in each school.

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COACHES

...

Athletic Coordinator 1.95

. . .

PORTIONS OF THE MUNICIPAL EMPLOYMENT RELATIONS ACT

[Section 111.70(1), Wisconsin Statutes:] . . .

(i) "Municipal employe" means any individual employed by a municipal employer other than an independent contractor, supervisor, or confidential, managerial or executive employe.

. . .

(o) "Supervisor" means: . . . As to other than municipal and county fire fighters, any individual who has authority in the interest of the municipal employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employes, or to adjust their grievance or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

. . .

POSITION OF THE ASSOCIATION

The Association asserts that performance responsibilities numbered 13 and 14 on the Athletic Coordinator job description are administrative and supervisory in nature, and not within the purview of a bargaining unit member. The Association further asserts that the District is prohibited by the Agreement and by the Municipal Employment Relations Act from assigning such duties to a bargaining unit employe. The Association relies on the express reference to only "non supervisory certified professional teacher personnel" in Agreement Art. I - Recognition; on the Sec. 111.70(1)(i), Wis. Stats., exclusion of supervisors from the definition of municipal employes; and on the portion of the the Sec. 111.70(1)(o)1, Wis. Stats., definition of supervisor which refers to the authority "to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employes." The Association also relies on Wisconsin Employment Relations Commission pronouncements that the purposes served by excluding supervisors from bargaining units of municipal employes are to avoid conflicts of interest within the employe between management responsibilities and loyalty to members and bargaining representatives of the bargaining unit, and to protect other employes' exercise of rights afforded them by the Municipal Employment Relations Act from interference by employes closely aligned with management.

The Association expresses particular concern that a bargaining unit coach could object to an evaluation in which Dobkoski participated, potentially involving the Association in the conflicting roles of processing the coach's grievance against Dobkoski, defending Dobkoski's job performance, and perhaps even charging Dobkoski for Association Code of Ethics violations that could result in his censure, suspension or expulsion from Association membership. The Association sees the District's above-noted July 23 letter as acknowledging potential problems but offering only unspecified forms of assistance. The Association asserts that the District's refusal provide assistance by simply relieving Dobkoski of the duties in items 13 and 14 leaves the Association alone to resolve the potential conflicts among its members, with the District free to merely observe and await the Association's resolution of the situation. The Association notes that the duties in dispute here were previously performed by the High School Vice Principal, who was and is outside the bargaining unit. The Association asserts that the District could therefore easily reassign the disputed duties in such a way that they are not performed by any member of the bargaining unit.

By way of remedy, the Association requests that the Arbitrator order the District to relieve Dobkoski of the duties in items 13 and 14.

POSITION OF THE DISTRICT

The District acknowledges that it has assigned certain duties of a supervisory nature to bargaining unit member Dobkoski. It asserts, however, that neither the Agreement recognition clause nor the statutory exclusion and definition of supervisor prohibits the District from making such assignments, but rather that they both merely draw lines among individuals based on whether the mix of authority they possess renders them supervisory or non-supervisory. If the former, then they are excluded from the bargaining unit as a supervisor; if the latter, then they are not excluded as a supervisor. The District further argues that Art. II - Management Rights, and particularly section A.5. thereof, specifically and expressly reserves to the District the right to "determine the duties, responsibilities, and assignments of teachers . . . with respect to administrative and non teaching activities," and to assign duties such as those at issue herein to a bargaining unit member such as Dobkoski as it has done in this case.

In the view of the District, the Union's only recourse in this matter would be to file a unit clarification petition with the WERC for a determination whether the extent to which Dobkoski has been assigned supervisory duties has rendered his position that of a supervisor as defined by MERA. The District expects that the result in such a proceeding would be that Dobkoski's supervisory duties are not sufficient to warrant excluding him from the bargaining unit. In any event, however, the District asserts that the grievance is clearly without merit and requests that the Arbitrator dismiss it.

DISCUSSION

The Arbitrator finds the grievance to be without merit.

Article II, and especially sections A.1. and A.5. of that Article, specifically and expressly reserves to the District the rights it has exercised in this matter. Article I defines whom the Association represents. It does not limit, let alone extinguish, the District's right to assign administrative and non-teaching duties--including those of a supervisory nature--to members of the bargaining unit. The fact that prior to 1990-91 the District chose to assign the disputed duties to the High School Vice Principal who is outside the bargaining unit does not prohibit the District from exercising its right to assign those duties differently, as it has in and since the 1990-91 school year. There is no basis on which to find that the District's "use of judgment and discretion" in connection with its exercise of its work assignment rights in this case violated any "specific and express term of this agreement" within the meaning of Art. II.B.

Similarly, the MERA provisions and WERC policies cited by the Association determine who is labor and who is management, i.e., who is a municipal employe and who is not, for purposes of proper inclusion in a bargaining unit of municipal employes. Those statutory provisions, coupled with others, protect municipal employes and their labor organizations from unwelcome inclusion of supervisors in municipal employe bargaining units and from the conflict of loyalties that could arise were a true supervisor (as defined in MERA) to be included in such a bargaining unit. However, they do not prohibit assignments of duties of a supervisory nature to members of bargaining units of municipal employes. As the District asserts, the propriety of continued unit inclusion of any given position depends on whether the incumbent possesses supervisory authority in sufficient combination and degree to render the position supervisory within the meaning of MERA. It is frequently the case that individuals are assigned duties and responsibilities of a supervisory nature that are not sufficient to render the position supervisory under MERA. The statute does not require that municipal employers avoid assigning duties of a supervisory nature just because they are not sufficient to render the position supervisory, and neither does the Agreement.

It is true that one bargaining unit employe could grieve an evaluation in which another bargaining unit employe participated. However, in such a situation, the District would remain responsible for the actions taken by those exercising delegated supervisory responsibility, whether they are in the bargaining unit or not. The Association would remain in a position to hold the District accountable through the grievance procedure for any violation of the Agreement that may have taken place. While the Association membership may be uneasy pursuing Agreement grievances or Association Code of Ethics charges critical of an Association member's job performance, the same sort of problem can arise in other contexts such as alleged sexual harassment of one bargaining unit member by another. While such situations can no doubt be problematic for the Association, they are not a basis on which to limit the work assignment rights that are reserved to the District in the Agreement.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole it is the DECISION AND AWARD of the undersigned Arbitrator on the ISSUES noted above that:

1. The District did not violate the contract by including certain supervisory duties in the job description for Athletic Coordinator.

2. The subject grievance is denied, and no consideration of remedy is necessary or appropriate.

Dated at Shorewood, Wisconsin this 26th day of December, 1991.

Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator