BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
HOLMEN EDUCATION ASSOCIATION	Case 30 No. 50916 MA-8429
and	
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF HOLMEN	

Appearances:

Mr. Thomas C. Bina, Executive Director, Coulee Region United Educators, 2020 Caroline Street, P.O. Box 684, LaCrosse, Wisconsin 54602-0684, appearing on behalf of the Holmen Education Association, referred to below as the Association.

Mr. Richard J. Ricci, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 715 South Barstow Street, Suite 111, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the Board of Education of the School District of Holmen, referred to below as the Board, or as the District.

ARBITRATION AWARD

The Association and the Board are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Association requested, and the Board agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Gary Bergman, who is referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on July 19, 1994, in Holmen, Wisconsin. The hearing was not transcribed, and the parties filed briefs and a waiver of a reply brief by September 16, 1994.

ISSUES

The parties stipulated the following issues for decision:

> Did the Board of Education behave in an arbitrary or capricious manner when it determined to replace the Grievant as the Girls' JV Softball Coach?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE ONE
NEGOTIATION AGREEMENT

. . .

D. Management Rights.

Management retains all rights of possession, care, control and management that it has by law, and retains the right to exercise these functions under the term of the collective bargaining agreement except to the precise extent such functions and rights are explicitly, clearly and unequivocally restricted by the express terms of this Agreement. These rights include, but are not limited by enumeration to, the following rights:

. . .

3. To hire . . . and assign employees in positions within the school system;
4. To suspend, discharge and take other disciplinary action against employees . . . Upon completion of the probationary period, no teacher will be non-renewed except for just cause.
5. To relieve employees from their duties because of lack of work or any other reason.

. . .

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

. . .

E. Layoff Procedures

When it becomes necessary to layoff a teacher . . . the Board shall determine the teacher(s) to be laid off in accordance with the following procedures:

. . .

2. A point system for the purpose of determining order of layoff <u>will</u> be established . . .

3. Point System Criteria and Allocation.

   a. Length of teaching . . .
   b. Academic training . . .
   c. Ability and performance as a teacher . . . as evaluated by appropriate supervisory personnel . . .

d. Certification . . .

4. The total accumulation of points under Section Three . . . will identify the teacher with the lowest number of points actively teaching . . . where the position is being eliminated. That teacher will be either reassigned or laid off . . . If the person with the lowest number of points actively teaching in the pool is a head coach of a major sport, either boys or girls, and there is no other District employee qualified and willing . . . to fill that position, that person will not be laid off.

. . .

ARTICLE TWO
NEGOTIATION PROCEDURE

. . .

F. Teacher Evaluation Procedures.

1. The Board and the Association agree that evaluation has as its purpose the improvement of the school program by assisting each teacher to improve his/her professional competencies. The Board shall evaluate teachers to assess job performance. All monitoring or evaluation of work performance of a teacher (including any monitoring or evaluation using audio and/or visual systems) will be conducted openly and with full knowledge of the teacher. Informal evaluations, referring to all observations noted and recorded in the normal course of day-to-day supervision may still take place and may be entered into the record. Teachers will be given a written-copy of any informal evaluation observation within one (1) week of its occurrence if it is considered significant.

2. The following procedure will be used in the formal evaluation of teachers:
   a. During the early part of the school year, the Administration will supply new teachers with copies of the School District's evaluative instruments.

   b. Teachers will be evaluated at least annually by their principal, supervisor, or other authorized evaluator. Under extenuating circumstances of an absence of the assigned evaluator and/or teacher,

the evaluation may be waived unless the last evaluation or general proficiency rating was rated as below average, then the teacher must be evaluated, if possible. Any teacher unable to be evaluated will receive the same general proficiency rating as their last general proficiency rating.

c. assistance shall be provided as soon as possible to teachers upon recognition of "professional difficulties." For the purposes of this Article, professional difficulties shall apply to deficiencies observed in classroom management, instructional skills, pupil evaluative skills, and/or professional preparation, following Board policies and procedures or administrative directives, and to deficiencies on matters contained within the school's evaluative instrument.

3. Teachers shall be given a copy of any evaluation report prepared by their evaluator and shall discuss such a report with their evaluator before it is submitted to central administration or put into their personnel files.

4. Any serious complaints regarding a teacher that are made to the Administration by any parent, student, or other person, should be in writing and signed by the complainant. A copy will be given to the teacher as soon as possible. If the complainant refuses to sign a written complaint, the Administration will relay the unsigned complaint, if considered serious, to the teacher. The teacher shall have the right to answer any complaints, and the answer shall be reviewed by an appropriate member of the administra- tion and attached to the file copy of the complaint. No unsigned complaints may be placed in the teacher's personnel file.

5. Once a year the evaluator assigned to a teacher will give the teacher a general proficiency rating as required in the layoff procedure.

G. Non-Renewal

. . .

2. The contract of a non-probationary teacher may not be non-renewed except for just cause. A conference between the evaluator, teacher, and superintendent shall be held before any recommendation is made to the Board of Education regarding non-renewal of contract . . .

3. Whenever a question of non-renewal of contract . . . is raised, such question shall be raised no later than March 1st of the current school year . . .

ARTICLE SIX
SALARY SCHEDULE

. . .

I. Co-Curricular Assignments.

Co-curricular assignments shall be stated on the contract. The Board of Education reserves the right to appoint and remove individuals from co-curricular assignments. However, a staff member may not be removed for arbitrary or capricious reasons.

BACKGROUND

The following letter, dated November 24, 1993, 1/ from Pete Tabor, the Board's Activities Director, to the Grievant prompted the grievance:

> Thank you for attending the meeting with Mr. Trygve Mathison and myself on November 18, 1993 relating to the contract for J.V. softball for 93-94.
>
> At this meeting we informed you that the board had not approved your contract to coach J.V. softball for 93-94. It is my belief, based upon a review by the school attorney that the board has that option and has chosen not to approve this contract. Therefore, the district will seek a different J.V. softball coach starting with the 93-94 season.

As intimated in this letter, the events leading to the grievance started to evolve well before November.

In the late Spring, Tabor had his secretary prepare co-curricular contracts to be sent to the coaches of the Board's various athletic programs. She did so, and forwarded the contracts to each incumbent coach, including the Grievant. The Grievant signed the co-curricular contract for "JV/Freshman Softball" for the "1993-94 school term" on May 24, and forwarded the contract to the Board. At a Board meeting held on June 7, the Board approved all of the signed co-curricular contracts except the Grievant's. That contract was marked with a "HOLD," and the Board directed its Superintendent, Fred Frick, to

1/ References to dates are to 1993, unless otherwise noted.

investigate concerns voiced by a Board member.

Rod Riepl is the Board member who voiced concerns about the Grievant's performance as a coach. Riepl serves as a volunteer pitching coach, and has a child who participates in District athletics. Riepl stated, at the June 7 meeting, that he felt the Grievant did not enjoy good rapport with the students he coached; did not command those students' respect or maintain appropriate discipline; did not develope a serious attitude toward baseball among his student-athletes; failed to teach fundamental skills to those athletes; and was not increasing student participation in the sport. The Board, as noted above, did not approve the Grievant's contract, but directed Frick to investigate. Riepl alleged, at the June 7 meeting, that other parents and students had complained about the Grievant's performance as coach. He did not, however, further specify the substance or the sources of these complaints.

Frick responded to the Board's direction in a memo, dated June 17, to Tabor and to Duane Vike, a teacher and the Head Coach of Girls' Softball, which states:

> It has been brought to my attention that a number of people are dissatisfied with the performance of Coach Bergman. Could you please give me your perspective on this? Could you also tell me how you see the status of his coaching contract for 93-94?

On June 21, the Board again met and discussed the Grievant's co-curricular contract. The Board took no formal action on his contract, leaving it on "hold."

Tabor understood the purpose of the June 17 memo to be that he should research the Grievant's coaching performance to determine if the allegations aired at the June 7 meeting had substance. Tabor called a meeting between himself, the Grievant and Vike for June 25.

At the June 25 meeting, Tabor, Vike and the Grievant discussed the concerns aired by Riepl. Tabor summarized the meeting in a memo to the Grievant, dated June 30, which states:

> Thank you for taking time on June 25, 1993, to meet with Duane Vike and myself about some concerns relating to softball. As I indicated I had received a memo from Dr. Frick indicating he had received some concerns about your coaching from residents of the district. In that memo, Dr. Frick did not give me any names or specific concerns. I also indicated I would ask Dr. Frick for specifics, (i.e. name(s) and nature of concern).
>
> In our discussion, Duane Vike stated some parents had said things to him about you, like he is a nice man - not a good coach. Mr. Vike also indicated that you took too much guff from students and felt they lacked respect for you.
>
> I indicated that I did not recall any parent contacting me with concerns. However, prior to our meeting when I spoke to Duane Vike, he indicated he had some complaints that he related to you at this meeting.
>
> Both Mr. Vike and I stated we felt that maybe former players for you were telling present students that they did not like and/or think much of you as a coach. Therefore, if this is happening, you have great difficulty in overcoming these comments.
>
> Also, I indicated that you had signed a contract for 93-94 but to date the board had not approved it.
>
> Further, I stated I would ask Dr. Frick for the name(s) and nature of the complaints and relay them to you if and when I received them. As of this date, I have forwarded a request for this information from Dr. Frick. After we know the specifics, we can meet again to decide what plan of action needs to be developed to resolve these complaints.

> If you feel this memo is not an accurate reflection of our meeting, please let me know by July 7, 1993, or I will assume it is an accurate recap of the meeting of June 25, 1993. Meeting time was 1:05 PM-1:35 PM.

Tabor did not, at any time relevant here, further specify the parent/student complaints discussed at this meeting.

In a letter to Frick dated July 1, Vike stated the following:

> (The Grievant) has been the JV softball coach during the five years I have been the Varsity coach. During this time I have received numerous complaints from players and parents. Many of the players have stated to me that they do very little in practice or that the players determine what they do in practice. The players seem to be frustrated a great deal of the time. I told him at the beginning of the year to make sure the girls can bunt. According to some of the players, this was practiced very little and as a result, the JV players are poor bunters.
>
> Parents with whom I have spoken express disappointment also. Comments like "He's a nice guy, but no coach", and "it was a wasted year for my daughter", have been spoken to me about (the Grievant).
>
> His level of enthusiasm seems to be very low. If his enthusiasm is low, how is he going to motivate players to improve? His reputation with the players is such that I don't think he has a chance to be or become an effective coach.
>
> The future of (the Grievant) as a coach should be determined by what is best for the students who play JV softball each year. It is my opinion that it would be best if (the Grievant) discontinue his position as JV softball coach.

Tabor did not request this letter.

District administration did not formally advise the Grievant on the status of his contract until the November 18 meeting noted in Tabor's letter of November 24. The Grievant, however, did see advertisements, in the local newspaper and in the High School Bulletin, for the co-curricular position he had held in the 1992-93 school year. He testified he saw these ads no later than the first week of the 1993-94 school year.

Vike testified that he received between five and ten parent based complaints regarding the Grievant's coaching performance in each of his five years as Head Coach. He noted that student complaints were voiced with greater frequency. The only complaint he discussed with the Grievant, however, concerned one voiced by several members of the JV team who claimed the Grievant had sworn at one of them. Vike's direct observations of the Grievant's performance were limited. The varsity and junior varsity practice together briefly at the start of each season. As weather permits, each team moves outside and practices at separate fields. Vike acknowledged that he dominated joint practices. He noted that the concern with the bunting skills noted in his July 1 letter dates from a summer program game held at about the time he wrote the letter. During the game he noticed girls who had been coached by the Grievant lacked the basic skills to bunt. His concern was particularly focused on that skill because he had advised the Grievant to concentrate on bunting skills at the start of the Spring, school year, season.

The Grievant had, as of the 1993-94 school year, nine seasons of experience as the Girls' JV Softball Coach. He has also served as the Board's Freshman Girls' Basketball and Volleyball Coach. He declined to continue as Volleyball Coach because of increased non-school demands on his time, and was not offered a contract as basketball coach because Vike reorganized the Girls' Basketball program, and the Grievant was not offered a contract. Before coming to the Holmen School District, the Grievant served as the Head Coach of the Varsity Girls' Softball Team in the Colfax School District. In the five years he held that position, his teams went to sectionals once and tied for the conference title once. He testified that he was unaware of any complaints about his coaching prior to June 25. He acknowledged that Vike told him to concentrate on bunting skills in the Spring of 1993, and stated that he did so.

Further facts will be set forth in the DISCUSSION section below.

THE ASSOCIATION'S POSITION

After an extensive review of the evidence, the Association argues that Article II, Section F, contains a number of provisions bearing on the grievance. Section 4 of that article requires that "serious" complaints about a teacher will be forwarded to the teacher "if considered serious." That no testifying witness provided the Grievant with any such complaint prior to June 7 establishes, the Association argues, the lack of any serious complaint justifying the "firing" of the Grievant.

Acknowledging that complaints surfaced after June 7, the Association argues that those complaints cannot be considered significant. Vike's concerns were not, the Association argues, sufficiently specific to be considerable and were, in any event, not based on first hand observations. Arguing that "(i)n a discipline case the burden of proof falls upon the employer," the Association concludes that the "vague reasons put forward by the District fail to meet even the minimal criteria required under a capricious or arbitrary standard."

June 7, to the Association, marks the date of the Grievant's discharge as the JV Softball Coach since "(t)here is no evidence the Board ever dealt with (the Grievant's) contract after the June 7 meeting." That Tabor recommended he be awarded a contract at that meeting is particularly significant to the Association, since Tabor is the Grievant's first line evaluator. Events following June 7 reveal, to the Association, nothing more than "an effort to make the process look less arbitrary and less capricious." The Association contends that since Tabor, as the "only person who actually observed (the Grievant's) coaching performance" recommended the Board issue him the JV coaching position belies the Board's after the fact attempt to deny the Grievant was fired on June 7.

Articles Two and Six must, the Association avers, be read together. When read together, those provisions require that the Board promptly refer significant complaints to a teacher thus permitting the teacher to address performance problems. Upon completion of the season, the "Activities Director will review the job performance of each coach and make a recommendation to the Board as to the coach's continued employment." The Board then acts on the recommendation. That action is, the Association notes, reviewable under an "arbitrary and capricious" standard. Acknowledging that this standard of review provides "very little in the way of job protection for coaches," the Association argues that "(w)hat little there is must be honored."

Beyond this, the Association argues that Articles Two and Six, read together, specifically modify Article One. The language of Article Two is sufficiently broad to bring co-curricular assignments within its scope, and the Association concludes that the evidence will not support any conclusion other than the Board acted on a whim when it fired the Grievant at its June 7 meeting. The Association concludes that the Grievant "should be reinstated as Junior Varsity Girls' Softball Coach for the 1994-95 season and that he be reimbursed lost wages for the 1993-94 season when he was improperly replaced."

THE BOARD'S POSITION

After a review of the evidence, the Board notes that it uses "two separate contracts for its teachers, an individual teacher contract . . . and another covering extra-curricular duties." Doing so, according to the Board, separates the basic teaching contract and its attendant rights under Wisconsin statutes, case law and the collective bargaining agreement, from the co-curricular contract. More specifically, the Board contends that it has reserved under Article One, Section D, 3, and Article Six, Section I, "the right to make and remove all assignments, including co-curricular activities." This background, according to the Board, underscores that "the co-curricular contract can be terminated without just cause or utilization of . . . the nonrenewal statute."

The Board contends that the sole contractual issue is whether "granting the co-curricular assignment held by (the Grievant) to another coach was done in an arbitrary or capricious manner." The burden of proving any violation, according to the Board, is the Association's. A review of the evidence in light of arbitral precedent establishes, the Board argues, that it properly exercised

its discretion. More specifically, the Board argues that it withheld the assignment from the Grievant pending "further investigation" of concerns related at a June 7 meeting. The Board sought the input of the "supervising coach," which was "very much a confirmation of the concerns that were raised at the Board meeting in June of 1993." As a result, the Board "offered the position to another person" who "was eventually formally assigned the position by the School Board, thus contemporaneously removing the assignment from (the Grievant)." This background, the Board contends, establishes that "the removal of his coaching assignment was based on his performance, which is a valid business reason, one relating to the best interest of the students and the program itself."

The Board concludes that it acted "based on fact and the reliable opinion of supervising Coach Vike," and thus well within its appropriate discretion. It follows, according to the Board, that "there was no breach of the agreement, and the grievance should be denied."

DISCUSSION

The stipulated issue is governed by Article Six, Section I. The application of that provision to the facts can be stated rather summarily. This should not obscure that the application of the provision is, on these facts, troublesome.

The first sentence of Article Six, Section I, requires a co-curricular assignment to be "stated on the contract." The Board offers teaching and co-curricular assignments on separate contracts. "(T)he contract" is, then, the co-curricular contract. The collective bargaining agreement tracks this separation by establishing, at Article One, Section D 4, a just cause standard for the non-renewal of a non-probationary teacher's contract. This standard does not apply to the "removal" of a teacher from a co-curricular position, which is governed by the second and third sentences of Article Six, Section I.

The final two sentences of Article Six, Section I, require that a teacher's removal from a co-curricular assignment must not be "for arbitrary or capricious reasons." As the Association points out, arbitrary and capricious connotes "not based on principle . . . based on . . . notion or whim."

If, as the Association has asserted, the Board removed the Grievant from the JV coaching position on June 7, the conclusion that the removal was arbitrary and capricious would be persuasive. The record will not, however, support this assertion. The Board's action toward the Grievant raises significant questions, but its compliance with the standard set by Article Six, Section I, has been proven.

At the June 7 meeting, Board member Riepl articulated a number of concerns regarding the Grievant's performance. The Association contends this effectively removed the Grievant from his position, because the Board took no further action. This view ignores that the Board referred the matter to Frick for further action. Frick deferred the matter to Tabor and to Vike. Ultimately,

Tabor, Frick and Vike met on June 25 to discuss Riepl's concerns. Vike seconded those concerns and in his July 1 letter formally confirmed that he preferred that a new JV coach be recruited. The Association portrays the June 25 meeting as, essentially, window dressing to mask the fact that the Grievant had already lost his job. The evidence indicates that Tabor viewed his duty to be to confirm or deny the basis of Riepl's concerns. He could have done this by tracking down the complaining parents and students. His June 30 memo indicates this was an option he thought he would pursue. The strength of Vike's June 25 and July 1 confirmation of many of Riepl's concerns supplanted this effort. The record shows Tabor relied heavily on Vike's affirmance of Riepl's concerns as the answer to the Board's directive.

In sum, the evidence does not indicate the Board had effectively removed the Grievant from his co-curricular position on June 7. Its hold of his co-curricular contract put the contract in jeopardy, but the ultimate basis of the Board's denial of the contract is rooted in Vike's forceful confirmation of Riepl's concerns. The Association's contention that the Board had, as of its June 21 meeting, nothing but the "whim" of Riepl to ground the denial of the Grievant's co-curricular assignment is persuasive. However, that "whim" was confirmed by the Head Coach of the Girls' Softball Team. That the Board viewed this corroboration as a sufficient basis to conclude a change was needed in the leadership of the JV program cannot be dismissed as based solely on Riepl's unsubstantiated allegations. Vike, as a unit member, cannot be dismissed as an agent of Board power. Rather, he offered disinterested, from the perspective of Board policy formulation, confirmation of the concerns voiced by Riepl on June 7. It must be acknowledged that Vike's observations of the Grievant's coaching performance was limited. He did, however, have undisputed access to team members and their parents. His confirmation of Riepl's concerns offers less than definitive proof of the factual basis of those concerns. However, it is apparent that his familiarity with parents and players offered the Board a reasonable basis to conclude that Riepl's concerns had a basis in fact.

That Riepl's concerns have a basis in fact precludes branding the Board's actions as arbitrary and capricious. The Grievant's removal from the co-curricular position thus did not violate Article Six, Section I.

As noted above, however, this summary overview of the application of Article Six, Section I, should not obscure that the Board's conduct raises troublesome issues. Most significant among these is the relationship of that provision with Article Two, Section F.

The Association forcefully notes that language within Subsections 1 and 4 of Article Two, Section F, are broad enough to cover the evaluation of a co-curricular position. Section 1 refers to "job performance" and is, then, broader than "teaching performance." Section 4 refers generally to "serious complaints regarding a teacher" and is similarly not limited to "teaching performance." Tabor's June 30 memo and his testimony indicate he felt bound to comply with Section 4.

The two sections raise related interpretive issues. The interpretive issue regarding Subsection 1 is whether the formal evaluation process that subsection prefaces applies to co-curricular assignments. While the provision presumably applies if the Board chooses to make co-curricular performance part of the formal evaluation process, the section does not, by its terms, apply to the removal of a teacher from a co-curricular assignment.

The primary reason for this is that Article Six, Section I, specifically and narrowly governs the removal of a teacher from a co-curricular assignment. It does not incorporate the formal evaluation process detailed in the subsections of Article Two, Section F. Nor do other agreement provisions pull

Article Two, Section F, and Article Six, Section I, together except where co-curricular performance can implicate the non-renewal of a teaching contract.

The formal evaluation process of Article Two, Section F, is tied by its terms to the non-renewal process. That process is, under the agreement, disciplinary and linked to the termination of a teaching contract. Article One, Section D 4, addresses the authority to discipline. The first sentence of the subsection reserves the power to discipline to the Board, while the last sentence limits the exercise of that authority, regarding the non-renewal of a non-probationary teacher, to "just cause." Article Two, Section G, specifically addresses "Non-Renewal," restates the just cause requirement, and is applicable to the teaching contract. Article Six, Section I, is distinguishable from these provisions. It refers to the termination of a co-curricular contract as a "removal," and sets a standard less restrictive on Board discretion than just cause. The agreement, therefore, distinguishes between the termination of a teaching contract and a co-curricular contract. The former is bound by just cause and is disciplinary in nature. The latter is not bound by just cause, and is not, by its terms, disciplinary in nature.

The formal evaluation procedures of Article Two, Section F, underscore this distinction. Subsection 2 c, for example, defines "professional difficulties" in terms of "classroom management, instructional skills . . ." and other items crucial to the teaching, but not necessarily the co-curricular, contract. Beyond this, Subsection 5 refers to a "general proficiency rating" relevant to "the layoff procedure." The layoff procedure addresses coaching assignments only after the proficiency rating has been applied to "(a)bility and performance as a teacher." What evidence there is on the parties' practice regarding co-curricular contracts shows that the formal evaluation process has not been applied to co-curricular performance. In sum, Article Two, Section F, establishes a formal evaluation process which the agreement and the parties' implementation of that agreement have not, on these facts, extended to co-curricular contracts.

Thus the provisions of Article Two, Section F, do not modify the standard stated at Article Six, Section I. It does not, however, follow from this that the provisions of Article Two, Section F, have no bearing on Article Six, Section I. As noted above regarding the breadth of Subsection 1, the formal evaluation procedures would apply if the Board chose to formally evaluate co-curricular performance or to make such performance a feature of the evaluation of performance to maintain an individual teaching contract. More significantly here, Subsection 4 is, by its terms, broad enough to apply to "(a)ny serious complaints regarding a teacher."

Subsection 4 governs any complaint which can find its way into "the teacher's personnel file." That such complaints must be "considered serious" obviates the need for the administration and instructors to discuss petty gripes. The "serious" threshold highlights, however, that any complaint "considered serious" by "the Administration" will be brought into the open and discussed with the affected teacher. The breadth of the language referring to "(a)ny serious complaints" addresses the fact that complaints from "any parent, student, or other person" can be based on sources not necessarily limited to classroom performance. Such complaints, if not documented, could impact Board evaluation of a teacher. The procedures of Section 4 assure that such complaints do not creep into the evaluation process unknown to, and unaddressed by, the affected teacher.

In this case, the administration's failure to document Riepl's or Vike's concerns regarding parent or student based complaints arguably violate Article Two, Section F 4. No violation has, however, been found here or remedied below. This reflects that the evidence shows the Board has not viewed the Grievant's removal as a disciplinary act, but as a policy choice. There is no evidence the Board sought to include any of the concerns articulated by Vike or Riepl into the Grievant's personnel file, or to make any of those concerns a factor in the formal evaluation process affecting the Grievant's teaching contract. The complaints at issue here are not, in the terms of Subsection 4, "considered serious" by "the Administration." Based on this conclusion, no violation has been found.

Before closing, it is appropriate to tailor the conclusions stated above more closely to the parties' arguments. The Association's arguments have been forcefully and well stated, and warrant a specific response. The Association's contention that the formal evaluation process modifies the application of the standard of Article Six, Section I, has been touched upon above. The removal of the Grievant as JV Girls' Softball Coach is, from a practical perspective, at least quasi-disciplinary, if not disciplinary. The issues posed here are, however, legal in nature. The agreement's terms set the governing law. In this case, the power to "discipline" is made subject to a just cause standard. The power to "remove" from a co-curricular contract is not. The agreement's terms, then, make the removal something other than discipline. This is not indefensible. Co-curricular activities, especially coaching, are subject to the potentially fickle impact of fan (parent/student/community) support. That a removal from a co-curricular position should not be viewed as an adverse assessment of a teacher's teaching competence is not indefensible, and this mirrors the distinctions created in the agreement at Articles One, Two and Six.

More difficult to address is the Association's concern that "(t)here is no fairness in the way the District removed (the Grievant) from his assignment." The conclusions reached above establish that the authority given an arbitrator to review the Board's action is to determine if the removal was "for arbitrary or capricious reasons." The Board's conclusion that the Head Coach of the program echoed the concerns of a Board member, and that the Head Coach's views reflected the best path for the program, cannot be dismissed as arbitrary or capricious. The Board's failure to discuss the status of the co-curricular assignment with the Grievant between late June and late November can hardly be labelled fair. The Grievant served in his position for nine years prior to his removal. He attended coaching-related conferences which he was not required to attend. Between late June and November the only message he received on the review of his contract was through postings for his position. Such postings presumably only tested the applicant pool, but can hardly be characterized as a fair means of communication.

These concerns, however, reflect only my individual review of the evidence before me. The agreement does not contemplate my individual views on

fairness, but an arbitrator's application of the "arbitrary and capricious" standard. That application is made above. The fairness concerns raised by the Association cannot, then, be effectively answered other than to be noted as valid, if not contractually binding.

AWARD

The Board of Education did not behave in an arbitrary or capricious manner when it determined to replace the Grievant as the Girls' JV Softball Coach.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 21st day of November, 1994.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

RBM/mb
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