BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LITTLE CHUTE EDUCATION ASSOCIATION

and

LITTLE CHUTE AREA SCHOOL DISTRICT

Case 12
No. 52241
MA- 8886

Appearances:

Godfrey & Kahn, Attorneys at Law, 219 Washington Avenue, Post Office Box 1278, Oshkosh, Wisconsin 54902-1278 by Mr. Timothy M. Whiting, Attorney at Law, appearing on behalf of the Little Chute Area School District.

Winnebagoland Educational Staff Council, 550 Shady Lane, Neenah, Wisconsin 54956-1216, by Mr. Roger Palek, Executive Director, appearing on behalf of the Little Chute Education Association and the grievant, Dan McInnis.

## ARBITRATION AWARD

The Little Chute Education Association (hereinafter referred to as the Association) and Little Chute Area School District (hereinafter referred to as the District) jointly requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen of its staff as arbitrator of a dispute over the District's decision to reject the application of teacher Dan McInnis to coach the varsity girls basketball teams for the 1994-95 season, and instead hire a coach from outside of the bargaining unit. The undersigned was so designated. A hearing was held on May 2, 1995 at which time the parties were afforded full opportunity to present such testimony, exhibits, stipulations, other evidence and arguments as were relevant to the dispute. A stenographic record was made, but the parties waived a transcript and the submission of briefs. Instead they requested that the arbitrator take the matter on closing arguments and issue an expedited Award.

Now, having considered the evidence, the arguments of the parties, and the record as a whole, the undersigned makes the following Award.

### I. Issue

The parties were unable to agree on a framing of the issue. From the record evidence, it is apparent that the issues in this case are:

> 1. Does the Board have the right to reject applicants for co-curricular positions who are certified members of the bargaining unit, and instead seek outside applicants, under Article XVII?

2. Did the Board violate the collective bargaining agreement when it rejected the grievant's application to coach the varsity girls basketball team for the 1994-95 season?

3. If the Board violated the collective bargaining agreement, what is the appropriate remedy?

II. Relevant Contract Language

ARTICLE 17
CONTRACTS

. . .

B. Individual Contracts

1. All curricular duties shall be specified on individual contracts. Members shall be notified concerning any possible change in assignments in a timely manner. In the event changes in curricular duties occur, a written addendum will be attached to the individual contract.

2. An extra-curricular contract will be issued under separate cover with the job title specified on said contract. All extra-curricular vacancies will be posted, with applicants from all buildings considered. In the event the vacancy is unable to be filled from certified staff, applications from non-certified staff and community members will be considered. If the vacancy still exists, the Board and the Administration reserve the right to assign the extra-curricular contract to a member of the professional staff. Involuntary assignments will be reviewed by the District Administrator for reassignment on an annual basis.

. . .

In addition to the above quoted provisions of the collective bargaining agreement, the arbitrator has reviewed and considered the applicability of Article 3 - Management Rights and has been mindful of the restrictions in Article 8 - Grievance Procedure.

III. Background

This case flows from a vacancy in the varsity girls basketball coaching position for the 1994-95 school year. Because the vacancy was created by a late resignation, interviews were not

conducted until mid-October of 1994, about three weeks before the season began. The grievant, Dan McInnis, was a teacher who had coached the team for two years in the early 90's until he resigned to spend more time with his wife, who was ill with cancer. At the time of his resignation from the coaching assignment, McInnis informed then-High School Principal Bill Fitzpatrick of the reason for the resignation, but asked that it be kept confidential. McInnis had compiled a 38-6 won-loss record over his two seasons, playing a fast break offense suited to the athletes on his team. The only complaint about his performance as a coach came in relation to the amount of playing time and type of treatment received by one player. This complaint was passed on to McInnis by Fitzpatrick, and McInnis took steps to address the problems.

When the District approached the filling of the position for the 1994-95 school year, McInnis was the only member of the certified staff who applied for the job. Because the time frame was very short, the District arranged an interview with a community member who looked promising, just in case McInnis did not work out. That interview was set for several days after the grievant's interview.

The District's interview team was comprised of now-District Administrator Fitzpatrick, Athletic Director Gary Hurley, and High School Principal David Botz. Botz had just arrived in Little Chute at the beginning of the school year. Hurley had been the Athletic Director for several years. All three men had coached basketball at some point in their careers. The interviews were conducted using a series of 21 prepared questions prepared by Fitzpatrick. Among the questions were:

> 4. What involvement will you have with the lower level programs?
>
> . . .
>
> 11. What, if any, contact should there be with parents?
>
> . . .
>
> 17. What is your offensive philosophy?

In answer to the question about lower level programs, McInnis stated that the lower level programs appeared to be in good shape. He indicated that he had previously run a summer camp when coaching in West DePere but had not done so in Little Chute. He expressed reluctance to run a summer program, but said he would do so if necessary. 1/ In response to the question of

---

1/ This is a point of some confusion in the record. This statement of facts reflects the testimony of Fitzpatrick and Hurley.

parent contact, the grievant indicated that he would have a beer with the parents after a game and talk with them then. As to offensive philosophy, McInnis told the
panel that he believed in a fast break offense. On further questioning, he said that he did not

design set plays to attack particular defenses, simply had his players pass and pick away. Although it was not part of the printed questions, the committee also asked about his abrupt resignation from the program two years earlier. He told them that his wife had been ill and that she was now recovered.

The committee concluded that the grievant was not qualified for the opening and interviewed the outside applicant. He was asked the same standard set of questions that had been posed to the grievant. The committee recommended to the Board that the outside applicant be selected and he was hired as coach. The instant grievance was thereafter filed, alleging that the District had violated the contract by selecting an outside applicant when it had a member of the bargaining unit applying for the job. The grievance also alleged a violation of WIAA rules. This latter allegation was dropped at the hearing.

## IV. Decision

### A. The Right to Reject Internal Applicants

This case is controlled by the language of Article XVII, B(2): "All extra-curricular vacancies will be posted, with applicants from all buildings considered. In the event the vacancy is unable to be filled from certified staff, applications from non-certified staff and community members will be considered. . . ." The quoted language cannot reasonably be interpreted to bar the selection of an outside applicant merely because a member of the bargaining unit seeks a position. The critical phrase is "the vacancy is unable to be filled", and this may be interpreted as being an inability to fill the position because of a lack of applicants, or because of a lack of qualified applicants. Had the parties intended that even an unqualified applicant from the staff would be guaranteed a co-curricular assignment before outsiders would be considered, they would have begun the second sentence by simply stating "If there are no internal applicants" or words to that effect. The existing language could be read as such a guarantee, but only if one assumes that the parties contemplated the possibility of staffing positions with unqualified personnel and decided to incorporate that concept into their agreement. Giving the language that meaning, which runs counter to the whole educational purpose of a co-curricular program, requires much clearer language of intent than is present on this record. The far more reasonable interpretation, and that which the bargaining history supports, is that the District retained the right to go outside if it determined that there were no qualified internal applicants.

### B. The Determination That The Grievant Was Not Qualified

The District has a very difficult problem. Its stated policy is to employ only qualified personnel in co-curricular positions, and it seeks to have McInnis found unqualified. However, in

the very recent past the grievant had served for two years in this very same position, and the record does not show any defect in or dissatisfaction with his performance. 2/ Two of the

2/ A complaint about one girl's playing time and treatment cannot be considered an unusual event in coaching, and Fitzpatrick admitted that the grievant responded to the complaint once he was made aware of it.

three members of the interview team were employed in the District during his coaching tenure and were aware of his performance of this job. Even though it has previously given him two successive contracts for the identical job, and was unable to identify any problem with his previous tenure as coach, the District now seeks to persuade the arbitrator that he is not capable of performing the job. As a general rule, the most persuasive evidence that someone possesses the qualifications to perform a job is a history of having successfully performed it in the past. 3/ Thus the District is fighting against a presumption that the grievant is qualified, a presumption that it has itself created.

The bases for the District's conclusion that the grievant is not qualified to coach basketball are his lack of interest in the lower level programs, his comment that he would communicate with parents by having a beer with them after the games, and his commitment to an offense based exclusively on the fast break. 4/ These responses came out in the interview process. The grievant said that the lower level programs were in good shape already, and that he would run a

---

3/ See Elkouri, HOW ARBITRATION WORKS, 4th Ed. (BNA 1985) at pages 623-625, and cases cited therein.

4/ The District changed its position several times on whether his abrupt resignation was also a factor in the decision to reject him, or merely a concern going into the interviews. Given the overall conclusion on qualifications, the question of whether this factor was weighed against him need not be resolved.

summer camp if necessary, although he did not want to. No one shared with McInnis that enthusiastic involvement in the lower level and summer programs was a requirement of the coaching job, and in the absence of a job description it is difficult to find his honest response to the question a disqualification. Perhaps had this aspect of the job been made known to him in some way he would either have declined to post for the job or at least considered how deeply involved he wished to become in the other programs. 5/

The District's criticism of McInnis for saying he would communicate with parents of team members over a beer after a game springs from their fear that he would be a bad role model, and might have bad judgment. The members of the interview team appear to have a very literal turn of mind, since in the common parlance having a beer with someone connotes a conversation in a relaxed social setting. Even if he had meant that he would actually have a beer with the parents, there are degrees to this activity and it does not necessarily entail violating any social norms. The grievant apparently made it through his previous two year stint as a coach, communicating with the parents without causing a scandal. In short, the committee's concern about this remark strikes the arbitrator as considerably overstated.

The grievant's focus on a fast break offense, and his statement that he didn't use set plays against different defenses, apparently caused great concern in the committee, because they felt that it did not reflect the level of sophistication that should be taught at the varsity level, and could not succeed if the necessary talent level was absent from the team. If a given offensive philosophy is required of the job, that fact should be stated on a job description, or in some way made clear to

---

5/ An evaluation tool used to determine qualifications must, in order to be valid, specifically relate to the requirements of the job, be fair and reasonable, administered in good faith and properly evaluated. See Elkouri at pages 619-623. The questionnaire format used in the interviews is fair insofar as it was generally related to the basketball coaching, but the disqualifying weight given the grievant's answers in areas of discretion and philosophy draws into question the relatedness of the interview process to the actual known requirements of the job and the validity of the committee's evaluation of the interview.

applicants. If the job requires teaching a range of offensive philosophies and techniques to players, that should likewise be stated. The grievant had previously generated close to an 85% winning percentage over two seasons running a fast break offense at this same school. It is natural that he would cite this as his offensive philosophy. His statement, on its face, does not indicate an inability to turn to other strategies and to teach other techniques.

The District has the right to require its coaches to involve themselves in developmental programs beyond their own teams, or to teach a particular curriculum of skills, techniques and strategies to players. The District is well within its rights in demanding that an applicant conform to its expectations in these areas, and if the applicant indicates that he will refuse to comply or is unable to comply with these demands, he will be unqualified for the position. However, unless these requirements are made known to the employees applying for the position, are generally known in the work force, or are so much a part of the position that any applicant should reasonably understand them to be required, they represent areas of preference and personal philosophy. The fact that an applicant disagrees with the members of the interview committee in areas of preference and personal philosophy does not mean that he is unqualified.

The question before the arbitrator is whether the District could reasonably have found that the grievant was unqualified to coach the varsity girls' basketball team. An employer is entitled to a great deal of deference in determining qualifications, but the grievant's satisfactory performance of the coaching job for two seasons in the recent past creates a strong presumption that he is qualified to perform the job. Inasmuch as there was no job description specifying involvement in the lower level programs or teaching a range of offensive techniques and strategies as qualifications for the coaching job, nor any other indication before the interviews that these were required aspects of the job, the grievant's honest response to questions in those areas cannot reasonably be interpreted as evidence that he is unqualified to coach. As for his statement that he would talk with parents over a beer after the games, this may have been a flippant response, but standing alone it cannot serve to disqualify him.

On the basis of the foregoing, and the record as a whole, the undersigned makes the following

## EXPEDITED AWARD

The District has the right to reject unqualified applicants from within the bargaining unit in order to seek qualified applicants from the outside. However, the determination that the grievant was not qualified to serve as the girls basketball coach is not supported by the record. Accordingly, the District violated the contract by rejecting the grievant's application. The District is directed to make the grievant whole.

Dated at Madison, Wisconsin this 17th day of May, 1995.

By Daniel J. Nielsen /s/
Daniel J. Nielsen, Arbitrator