BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between SHULLSBURG EDUCATION ASSOCIATION and SHULLSBURG SCHOOL DISTRICT	Case 17 No. 52207 MA-8871 Rita Crotty Evaluation Grievance and Case 18 No. 53295 MA-9298 Rita Crotty Nonrenewal Grievance

Appearances:

Ms. Joyce Bos, Executive Director, South West Education Association, appearing on behalf of the Association.

Lathrop & Clark, Attorneys at Law, by Mr. David E. Rohrer, appearing on behalf of the District.

ARBITRATION AWARD

Pursuant to a request by Shullsburg Education Association, herein the Association, and the subsequent concurrence by Shullsburg School District, herein the District, the undersigned was appointed arbitrator by the Wisconsin Employment Relations Commission pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide the disputes as specified below. A hearing was conducted by the undersigned on December 12, 1995 and January 16, 1996 at Shullsburg, Wisconsin. The hearing was transcribed. The parties completed their briefing schedule on March 27, 1996.

After considering the entire record, I issue the following decision and Award.

ISSUES:

At the beginning of the arbitration hearing, the parties framed the issues as follows:

> Case No. 17
>
> Did the District violate the master agreement when it evaluated Rita Crotty in her head volleyball coaching position during the 1994 girls volleyball season and, if so, what is the appropriate remedy?

Case No. 18

Is the grievance arbitrable under the master agreement, which provides in Article VII, Section B that a grievance may be initiated by an individual teacher against the Administration or the Association against the Administration or the Association against the Board?

If so, did the District violate the master agreement when it nonrenewed the grievant, Rita Crotty, as the head volleyball coach following the 1994 volleyball season and, if so, what is the appropriate remedy?

FACTUAL BACKGROUND:

Rita Crotty, hereinafter the grievant, was the head girls volleyball coach for the District at all times material herein. Heather Olson was the assistant coach. As assistant coach, Olson was in charge of the junior varsity girls volleyball team. She held the same position during both the 1993 and 1994 seasons. During Olson's first season as the girls junior varsity volleyball coach, she encountered no difficulty working with the grievant. Olson's junior varsity team had the best record in the conference during the 1993 season.

The girls volleyball season ran from mid-August to mid-October. On or about August 25, 1994 the varsity entered a pre-season tournament held at Blackhawk High School. The varsity lost to Blackhawk and took second place in the tournament. After a Shullsburg fan voiced her displeasure to Blackhawk Athletic Director, Jerry Mortimer, over the lack of a final playoff game to determine the tournament champion, Mortimer approached the grievant and informed her that he did not appreciate being criticized for the way in which the tournament had been run. The grievant responded that she too was dissatisfied with the way the tournament had been run. Mortimer told the grievant that Shullsburg did not have to come back to the tournament. Later that evening Mortimer called Bob Boyle, the District's Athletic Director, asked him to speak with the grievant about the incident, and basically said that he did not want Shullsburg to come back because of the grievant's conduct. Boyle discussed the incident with the grievant the next day, and the grievant said that she did not want to go back to the Blackhawk tournament. As a result of this incident, the District has not returned to the Blackhawk girls volleyball tournament, even though they are neighboring school districts, only 20 miles apart.

Also in late August 1994, the grievant decided to move up a junior varsity player, Jessica Blackbourn, to the varsity for one game. The player was upset about it and told her mother that evening when she came home from practice that she did not want to move up to the varsity because she had just one practice with the varsity and did not know the plays. She also had enjoyed success with her classmates on the junior varsity team and was looking forward to playing

with her teammates. The player's mother, Deb Blackbourn, a District teacher, decided to talk to Athletic Director Boyle the next day to find out what the policy was on moving junior varsity players up to the varsity. She met with Boyle, and they decided to meet with the grievant to try to resolve her concerns. Blackbourn thought the matter had been resolved at the meeting because the grievant indicated that her daughter did not have to play on the varsity since she was so upset about it. For the rest of the volleyball season, however, Blackbourn said the grievant gave the cold shoulder to Jessica Blackbourn and the other junior varsity players.

On September 1, 1994, both the junior varsity and the varsity went on the road to play at Bloomington. While most of the players rode the bus to Bloomington, the grievant drove about a half dozen varsity players to the game in a Suburban owned by the District. The School Board had a policy stating that if an athletic team is scheduled to stop and eat after an athletic contest, that schedule must be followed unless weather conditions prohibit it. The policy was initiated by a Board member who was upset about the volleyball coach (the grievant) deciding not to allow the team to stop for a meal after the team lost, even though she had previously informed the students that they would be stopping. The grievant was aware of this Board policy because it had been covered at the in-service prior to the start of the school year.

The varsity team lost the volleyball match at Bloomington. After the game, the grievant instructed a varsity player to tell Coach Olson that the bus would not be stopping for a meal on the way back to Shullsburg. Olson had previously asked the grievant several times after the varsity match whether or not the team would be stopping for a meal. According to Olson, the grievant refused to respond but simply walked away. When the grievant was subsequently questioned about this violation of Board policy, she indicated that the reason she decided not to stop was that she had a sick player.

The aforesaid sick player had an upset stomach and did not feel well. The player's parents were at the volleyball game in Bloomington. The grievant did not ask the sick player's parents to take her home. The player had ridden with the grievant in the Suburban and was thus not on the team bus. Nevertheless, the grievant determined that the bus would not be allowed to stop for a team meal because she considered herself responsible for the entire team and did not think it was a good idea to have the team bus stop at a fast food restaurant in Platteville while she went on to Shullsburg with the sick player in the Suburban. The girls volleyball team had not been involved in any serious incidents in the past when it had stopped for a post-game meal on the road. The failure of the team to stop for a post-game meal following the Bloomington trip was the subject of a discussion at a Board Policy Committee meeting after a parent inquired about the incident. Administrator John G. Timmerman also received phone calls on the subject.

On October 11, 1994, the junior varsity was scheduled to practice in the high school gym at 3:30 p.m. The junior varsity was again in contention for the best record in the conference. Coach Olson testified that without advising her, the grievant decided to have the varsity practice at 3:30 p.m. on Tuesday, October 11, thus bumping the junior varsity practice to a later time. The

grievant testified that she notified Olson of the change at least a day or two ahead of time. The schedule change was first publicly announced as part of the school-wide announcements on October 11. Olson testified that she first heard about the change from her fiance, a Shullsburg teacher, who called her at her work. Olson was very upset to hear about the schedule change because she was unable to be at the later practice time because she had a personal commitment, (wedding dress fitting) and she did not want to miss the practice because the junior varsity was on the verge of winning the conference. Immediately upon hearing about the change, Olson telephoned the grievant. The two exchanged heated words. The grievant hung up on Olson. When Olson tried to call her back, the grievant did not answer.

The grievant testified that the change in the practice schedule was necessary because she was one of four persons responsible for homecoming duties (decorating floats) on October 11, and none of the other persons was available that evening. During her telephone conversation with Coach Olson, the grievant offered to cover Olson's practice if needed, a proposal which Olson rejected because she felt that it was important for her to be at her junior varsity team practice. The result of the schedule conflict was that the junior varsity was forced to practice at the parochial school gym normally used by the junior high school team. The facilities there were inadequate for the junior varsity.

After the practice, Coach Olson went to talk to Tim Hazen, the acting high school principal at the time. She told Hazen that she had not been informed about this practice change, that she was upset with how the matter was handled, especially in light of a big match coming up, and she also expressed concern about the lack of communication between her and the grievant. She expressed her feeling that she was not being treated fairly.

At her evaluation conference on November 1, 1994, Coach Olson discussed her relationship with the grievant and informed the administration that she would not return as junior varsity coach as long as the grievant remained as the head coach. Olson was rated satisfactory or above in her evaluation.

The grievant's evaluation conference was also held on November 1, 1994. Administrator Timmerman, Acting Principal Hazen and Athletic Director Bob Boyle and the grievant were in attendance. The grievant was rated satisfactory or above in professionalism, technical skills and organization. However, the grievant was rated below average in leadership and below average in communication/public relations. The following description of the "Leadership" category appears on the evaluation form used to evaluate coaches: "1. Provides the direction necessary for a cohesive team effort. 2. Personifies the character traits the program is striving to develop in our youth, e.g. sportsmanship, self-discipline."

As reasons for her below average rating in the leadership category, her evaluation form lists the fact that "misunderstandings" had occurred that could have been "prevented" and further that "community reaction had not been positive." Acting Principal Tim Hazen had received four

phone calls from persons who expressed negative reactions to certain things that the grievant had done, and Athletic Director Bob Boyle had received a written statement from Deb Blackbourn expressing her concerns about the manner in which the grievant had conducted herself as coach during the 1994 volleyball season. All of these individuals, including Deb Blackbourn who refused to sign her letter, specifically requested anonymity, fearing retaliation by the grievant.

The following description of the "Communication/Public Relations" category appears on the evaluation form used to evaluate coaches: "1. Communicates meaningful information to parents, e.g. practice schedules . . . 2. Communicates effectively with team members, e.g. rules, expectations . . . with administration . . . with the media. . . ." The grievant's below average rating in this category is reflected in the comments which state: "These areas need improvement: 1. schedules should be flexible, but need advanced notice when changes are made. 2. communication with assistant coach was questionable which led to program continuity problems. 3. bus policy needs to be handled consistently."

The grievant filed a timely grievance on November 22, 1994, contesting the evaluation and processed it through the grievance procedure. The School Board heard the grievance and a written denial of the grievance was given to the grievant within fifteen (15) days in accordance with the negotiated agreement.

On February 15, 1995, Stephen M. Schwartz, the school board clerk, sent a preliminary notice of nonrenewal of coaching contract to the grievant. The notice stated in part as follows:

> During their regular monthly meeting of the Shullsburg School Board on February 8, 1995, contracts for the 1995-96 school year were discussed. The board examined the renewal of your coaching contract at this time. After examination of your past performance, a majority of the School Board voted to give you preliminary notice of their intent not to renew your contract as head volleyball coach for the 1996 volleyball season.

On March 1, 1995, Administrator Timmerman stated as follows in response to the grievant's February 20, 1995 letter requesting a private conference and the reasons for consideration of nonrenewal:

> In your request for a private conference, you requested additional information as to the reasons for consideration of nonrenewing your coaching contract. Reasons include your failure to provide the leadership and professionalism needed at the varsity level, violation of school board policy, violation of the Master Agreement, continued problems in scheduling, problems in moving players up to varsity, and failure to work with your assistant coach in a team oriented professional manner.

A private conference was held with the grievant on March 7, 1995.

On March 13, 1995, Administrator Timmerman informed the grievant in writing that the Shullsburg School Board at its March 7, 1995 meeting voted to nonrenew her head volleyball coaching contract. The letter stated in part: "This communication is written notice of the board's refusal to renew your head volleyball coaching contract for the 1995-96 school year."

On April 25, 1995, Rita Crotty filed a formal grievance with regard to the Board's nonrenewal of her volleyball coaching contract. Specifically, the April 25, 1995 grievance states "The Board and/or its agents have violated . . . Said violations . . . occurred when the Board and/or its agents non-renewed Rita Crotty's volleyball coaching contract in an arbitrary and capricious manner and without just cause." The April 25, 1995 document which is entitled "Formal Grievance" identifies the grievant under Section 1 as "Rita Crotty." It also includes her signature as the grievant. The remedy requested is that "The Board rescind its March 7, 1995 vote to nonrenew Rita Crotty's volleyball coaching contract and maintain her as head volleyball coach for the 1995-96 volleyball season." The grievance also requests as a remedy that "The Board officially apologize for any inconvenience caused to the grievant."

On April 25, 1995, Administrator Timmerman received the above grievance from the Association President Sandy NeCollins and, by his own letter, dated May 2, 1996 "forwarded" it to the Board level.

In early June, 1995, the grievant submitted to the School Board four letters in her support which attempted to counter the comment in her evaluation that "community reaction has not been positive," as well as to reverse the non-renewal decision. The grievant's husband, Tim Crotty, had sent out a letter dated May 16, 1995, with the grievant's knowledge soliciting letters of support. His May 16, 1995 letter contains a list of 83 or so individuals or families to whom he directed his letter.

By letter dated June 12, 1995, Robert Edge, District School Board President, informed the grievant, in relevant part, as follows:

> After examination of this latest grievance of the grievant alleging that the school board non-renewed the coaching contract in violation of the Master Agreement, it appears that there is a definite problem with continuing the grievance process. According to the Master Agreement, an individual is not given the option to initiate a grievance against the school board. This latest grievance was initiated by an individual against the school board for the school board action of non-renewing a coaching contract. The latest

grievance lists an individual as the grievant.

Edge added: "After examination by legal counsel, the Shullsburg School Board does not recognize the latest grievance filed by an individual against the School Board as a valid grievance."

The grievance was ultimately presented to the Board on June 14, 1995 but no further written response of denial was received by the grievant.

PERTINENT CONTRACTUAL PROVISIONS:

SECTION A ARTICLE II - BOARD RIGHTS

A. The Board retains without limitations all authority, rights and powers vested in it by all laws, rules and regulations of the State of Wisconsin. The exercise of these authorities, rights and power shall not be subject to the grievance procedure.

. . .

SECTION C ARTICLE II - EVALUATION PROCEDURES

A. The School 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 School Board, through its administrators and supervisors, shall evaluate teachers to assess job performance. Formal monitoring or observation of work performance of a teacher will be conducted openly and with the 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 in the record. A copy shall be given to the teacher. A rebuttal may be written by the teacher and placed in the file.

B. The following procedure will be used in the formal evaluation of teachers.

1. During the early part of the year, the administration will supply new teachers with copies of the school district's evaluative instruments.

2. Observations may occur anytime during the school term. Teachers new to the District shall be observed for the purpose of evaluation at least twice during the school term; experienced teachers shall be observed at least once each school term prior to February 15. The purpose of the February 15th date is to aid the Board in the renewal and non-renewal process.

Additional evaluations may occur after February 15th.

3. An observation shall be defined not as a single classroom visit but as the result of three (3) visits representing different classes of instruction of different days.

4. A conference between evaluator and teacher shall be scheduled within two (2) weeks of completed observations, and at such time, teacher will receive a copy of the evaluation report.

5. The teacher shall acknowledge that he/she has read all evaluations and other materials to be placed in his/her personal file by affixing his/her signature to the file copy. Such signature does not necessarily indicate agreement with content of such material. A copy of observation shall be given to the teacher. The teacher shall have the right to attach a rebuttal.

C. Teachers will have the right to review the contents of their official personnel file and receive a copy of any documents contained therein. A teacher will be entitled to have one Association representative accompany him/her during such review.

The School Board may protect the confidentiality of personal reference, academic credentials and other similar documents received prior to the teacher's initial employment.

D. If a teacher indicates that any materials in the personnel file are obsolete or inappropriate, the District Administrator will review said documents and if he agrees, they will be destroyed. All obsolete material such as personal references or documents relating to prior employment will be removed from the file and destroyed, if agreed upon by the Administration.

E. A complaint regarding a teacher made to the administration by a parent, student or other person shall be in writing and

signed by the complainant. A copy of the complaint will be given to the respective teacher. The teacher shall have the right to answer the complaint in writing, and have it placed in his/her file by the Administration.

. . .

SECTION A ARTICLE IV - TEACHER RIGHTS

. . .

C. If a teacher in the application of progressive discipline is to be warned or reprimanded on matters which could adversely affect the wages, hours or conditions of employment, he/she will be entitled to have a representative of the Association present.

D. All rules and regulations governing the teacher's wages, hours and conditions of employment shall be interpreted and applied uniformly throughout the District.

. . .

SECTION A ARTICLE VI - GENERAL PROVISIONS

. . .

C. Acceptance of a contract with the District carries with it an agreement to conform to all rules and regulations governing the school as stated in this Agreement, The Teachers Handbook, Statutory requirements, and School Board Policies.

D. It is understood that bargaining unit work will be done by bargaining unit employees. This does not exclude C.E.S.A. personnel, volunteer workers, the supervised use of student teachers, teacher interns, and practicum students in guidance programs. After May 30th the administrative staff may fill any overload teaching position or one created by attrition, a study hall position or a coaching position, as long as the position is not created through layoff.

. . .

SECTION A ARTICLE VII - GRIEVANCE PROCEDURE

A Grievance is defined as a difference of opinion relative to the interpretation or application of this Agreement.

1. The Association may request all pertinent information needed by the Association to represent bargaining unit members.

. . .

B. The Grievance may be initiated by an individual teacher against the Administration; or the Association against the Administration; or the Association against the Board.

C. All time limits shall be days as defined except that when a grievance is submitted or remains unresolved after the close of the school term, the grievant may waive the time limits until the beginning of the next school term.

D. The primary purpose of the procedure is to secure, at the lowest level possible, equitable solutions to a claim of the person or persons filing the claim. It should be determined at this stage at what level the grievance is pertinent. This will prevent loss of time and airing the grievance between inappropriate parties.

. . .

Step V. Arbitration - If the grievance is not resolved at the School Board level, the Association may submit the grievance to arbitration by written notification to the Clerk of the School Board within ten (10) days after receiving the Board answer.

If a grievance is submitted to arbitration, the Association shall request the Wisconsin Employment Relation's Commission to appoint a commissioner or staff member.

The sole function of the arbitrator shall be to determine whether or not the rights of a teacher have been violated by the school district contrary to an express provision of this agreement. The arbitrator

shall have no authority to add to, subtract from or modify this agreement in any way.

A decision of an arbitrator, within the scope of his/her authority, shall be final and binding upon the district, the grievant and the Association.

. . .

SECTION A ARTICLE VIII - TEACHER PLACEMENT

. . .

C. The Board shall have the right to assign all co-extra-curricular positions. Each such assignment shall be mutually agreed upon by the Board and teacher when annual co-extra-curricular contracts are issued. Denial to renew a previously held extra-curricular contract shall be pursuant to Section A, Article IX - Non-renewal, Suspension, Discharge.

. . .

SECTION A ARTICLE IX - NON-RENEWAL, SUSPENSION, DISCHARGE

A. Procedures for non-renewal shall be in accordance with Wisconsin Statute 118.22. Reasons for non-renewal of a teacher contract shall not be arbitrary or capricious.

B. No teacher who has completed at least two full time contract years with the District shall be suspended or discharged without just cause. Teachers who have not completed two full time contract years with the district may be non-renewed or suspended without just cause.

. . .

PARTIES' POSITIONS:

In sum, the Association argues that the District did not properly evaluate the grievant, that Case Number 18 is arbitrable because the grievant had the right to process a grievance through the Board level grievance step, and that the District was arbitrary and capricious and lacked just cause in its non-renewal of the grievant. With respect to the evaluation procedure, the Association challenges the manner in which the District evaluated the grievant, the propriety of the persons doing the evaluations and the way citizen complaints were handled in the matter. The Association also argues that the District has the burden of proof in this matter, and, therefore, must prove by a preponderance of the evidence that the grievant should not have been renewed.

With respect to just cause, the Association argues for the application of Arbitrator Daugherty's seven tests as enunciated in Enterprise Wire Co., 46 LA 359 (1966). In this regard,

the Association opines that just cause requires that an employe be notified of what he/she is doing incorrectly and that the individual be given an opportunity to correct the behavior at issue. The Association adds that the just cause standard requires the process leading up to discipline be fair including an investigation to determine if the disputed behavior actually transpired.

The Association takes issue with the relevance of the six (6) incidents relied upon by the District to non-renew the grievant's extra-curricular contract.

Based on all of the above, the Association concludes that the District improperly evaluated and improperly non-renewed the grievant. The Association asks the Arbitrator to sustain the grievances and for a remedy to direct the District to remove the 1994 extra-curricular evaluation from the grievant's personnel file, to pay her extra-curricular salary, with interest, which she lost as a result of the District's actions and to order the District to reinstate her as head volleyball coach for the 1996 volleyball season.

The District, on the other hand, maintains that it did not violate the agreement when it evaluated the grievant in her head volleyball coaching position during the 1994 girls volleyball season.

The District also maintains that the Arbitrator lacks jurisdiction to reach the merits of the nonrenewal grievance because the grievant and her union failed to comply with the procedural requirements contained in the grievance/arbitration provisions of the parties' agreement. In support thereof, the District first argues that adherence to the grievance procedure promotes peaceful and constructive employment relations, and benefits the parties, and the public alike. The District next argues that the plain meaning of Section A, Article VII as well as bargaining history, precludes an individual from initiating a grievance against the Board. The District concludes that the nonrenewal grievance should be dismissed because the Arbitrator lacks jurisdiction to decide the grievance which was filed by an individual against the Board, contrary to the grievance and arbitration procedures set forth in the agreement which require the Association to initiate a grievance against the Board.

Assuming arguendo that the nonrenewal grievance is arbitrable, the District argues the standard to be applied is set forth in Article IX, Section A, which requires that a nonrenewal "shall not be arbitrary or capricious." In the alternative, even if a just cause standard is applied, the District feels it had just cause to nonrenew the grievant's coaching contract. In this regard, the District first argues the Arbitrator should not utilize the tests put forward by Arbitrator Daugherty in his Enterprise Wire Company decision. Rather, the District posits a different test for the Arbitrator to use in the present case; namely, a two part analysis consisting of two basic questions: one, whether the Employer demonstrated the misconduct of the employe, and two, if so, was the discipline imposed contractually appropriate. In the instant case, the District opines that it had cause pursuant to the aforesaid test to nonrenew the grievant's volleyball coaching contract and that it acted fairly and in good faith.

Based on the above, the District requests that the evaluation grievance be denied because no violation of the agreement occurred. The District believes that the nonrenewal grievance should be dismissed because the Arbitrator lacks jurisdiction to decide the grievance and because the District did not act in an arbitrary and capricious manner when the Board voted to nonrenew her coaching contract. To the contrary, the District claims it had just cause to nonrenew her even though the agreement does not require a showing of just cause to nonrenew her coaching contract.

DISCUSSION:

1994 Evaluation

The first issue before the Arbitrator is whether the District violated the master agreement when it evaluated Rita Crotty in her head volleyball coaching position during the 1994 girls volleyball season. The Association argues that the District violated the agreement by its actions in evaluating the grievant while the District takes the opposite position. For the reasons discussed below, the Arbitrator agrees with the District's position.

The Association first argues that the District violated the agreement when it chose to ignore the evaluation procedure set forth in Section C Article II - Evaluation Procedures. In particular, the Association challenges "the process in which the instrument was utilized, the person from the District who can be the evaluator, and the way complaints are handled in the District."

The Association questions the appropriateness of the three (3) signatories to the evaluation: Bob Boyle - Athletic Director/Teacher, Tim Hazen - Acting Principal/Teacher and John Timmerman - District Administrator. The District, on the other hand, argues that it was inappropriate to raise this particular argument for the first time at hearing. Assuming arguendo that this is true, the Arbitrator points out nevertheless that the grievant addressed this issue in her statement of the grievance dated November 22, 1994, when she stated:

> The evaluators are specifically identified, as per the contract, to be "administrators and supervisors." The Grievant was never notified that an "open with full knowledge" of the evaluation process was occurring and being conducted by the administrators and supervisors. We would concur that the observation never occurred, . . . (emphasis added)

The grievant also addressed this issue when, in her identification of the "Agreement Provisions Violated," she stated "Section C Article II - Evaluation Procedures." Said contract provision states, in Subsection A, that

> The School Board, through its administrators and supervisors, shall

evaluate teachers to assess job performance. (Emphasis added)

Therefore, based on the foregoing, the Arbitrator rejects the District's argument that the Association raised an issue regarding the evaluators for the first time at hearing.

The Arbitrator, however, also rejects the Association's objection to the three evaluators. The Arbitrator agrees with the Union's assertion that having bargaining unit members assess the grievant's job performance raises certain issues regarding the appropriateness of same. However, there is nothing specific in the agreement which prohibits the Athletic Director or the Acting Principal, even though they are bargaining unit members, from evaluating the grievant, also a bargaining unit member. In fact, the Athletic Director has evaluated the grievant in the past on her coaching performance without objection from the Association or the grievant. Nor is there any material restriction in the agreement on the Administrator regarding his approach to assessing the grievant's coaching performance. The Administrator is not contractually required, as argued by the Association, to "officially observe" the grievant in order to sign her evaluation. Based on the foregoing, the Arbitrator rejects the objection by the Association to the evaluators.

The Association next argues that the District followed an improper procedure when evaluating the grievant. In particular, the Association contends that "evaluation of a bargaining unit member must be made with the 'full knowledge of the teacher' not based on hearsay or parental complaint;" that "passing 'in and out of practices'" does not qualify as a visit of instruction of different days as required by the agreement; and that "an informal observation, as stated in the contract, must be "conducted openly and with the full knowledge of the teacher." The problem with this argument, however, is that the agreement requires none of the above. Section C Article II, Subsection A, only requires that "Formal monitoring or observation of work performance of a teacher will be conducted openly and with full knowledge of the teacher." (Emphasis added) Said contract provision provides no such restrictions on informal evaluations. It doesn't restrict the District from considering hearsay or parental complaints and it doesn't say that the District is prohibited from evaluating a coach's performance based on the coach's conduct at practices as well as during and after a game. In fact, contrary to the Association's assertion, since the grievant is a coach it is more appropriate to evaluate her performance during practices and games than in the classroom. Finally, informal observations of the grievant as noted above are not covered by the contractual restrictions on formal observations cited by the Association in its brief in support of its position. For these reasons, the Arbitrator rejects this argument of the Association as well.

The Association further argues that the agreement does not give the evaluators "the option to reference a complaint in an evaluation whether it is signed or not." Therefore, according to the Association, it was improper for the District to claim in the grievant's 1994 coaching evaluation that "Community reaction has not been positive."

Section C Article II, at Subsection E, only provides with respect to "a complaint regarding

a teacher made to the administration by a parent, student or other person" that it be "in writing and signed by the complainant." Said contract provision also provides that a copy of the complaint be given the affected teacher, and that the teacher have an opportunity to

respond to the complaint. However, it doesn't restrict the District from considering informal complaints as in the present case as part of the evaluation process. In addition, as pointed out by the District "it was the incidents underlying the complaints that led to the critical evaluation of the grievant's performance;" not the fact of the complaints themselves. Therefore, the Arbitrator likewise rejects this argument of the Association.

Finally, the Association makes several other arguments regarding faults it perceives in the evaluation process as well in the evaluation itself. However, the Association makes these arguments in the context of arguing that with respect to the "basic issue before the Arbitrator" the District was arbitrary and capricious and lacked just cause to nonrenew the grievant. Therefore, the Arbitrator will address these other arguments in the context of deciding the nonrenewal issue. Based on same, and all of the foregoing, the Arbitrator finds that the answer to the first issue as framed by the parties is NO, the District did not violate the master agreement when it evaluated Rita Crotty in her head volleyball coaching position during the 1994 girls volleyball season. The Arbitrator next turns his attention to the nonrenewal issue.

Nonrenewal

The District initially raises an arbitrability objection to the grievance claiming that the Arbitrator lacks jurisdiction to reach the merits of the nonrenewal grievance because the grievant and the Association failed to comply with the procedural requirements of the agreement's grievance and arbitration clauses. In particular, the District argues that said contract provision provides as follows: "The grievance may be initiated by an individual teacher against the Administration; or the Association against the Administration; or the Association against the Board." (Emphasis supplied) The District claims in this case the grievance was initiated by an individual teacher against the Board; and, therefore, should be dismissed. (Emphasis supplied) For the reasons discussed below, the Arbitrator agrees.

The Association first argues that the grievance should not be denied on arbitrability grounds because "the Local Association President initiated the grievance." However, the record does not support a finding regarding same. The aforesaid person merely presented the grievance on behalf of the grievant to the District Administrator. "Rita Crotty" is the sole signature appearing on the grievance form. 1/ There is no indication anywhere in the grievance that the

1/ Jt. Exhibit No. 10.

Association is a party or grievant in the matter. 2/

In addition, the Administrator did not "advance" the grievance to the Board level as claimed by the Association thus indicating acceptance of the grievance and waiver of any procedural objection. Instead he merely "forwarded" it to the Board for its consideration. In fact, the Board never accepted the grievance in its present form without objection. To the contrary, the Board expressly rejected the grievance because it was initiated by an individual against the Board in violation of the agreement.

The Association next argues that there is a strong presumption in Wisconsin Statute Sec. 111.70(4)(d) which provides in part:

> (d) Selection of representatives and determination of appropriate units for collective bargaining. 1. . . . Any individual employee in any collective bargaining unit, shall have the right to present grievances to the municipal employer in person or through representatives of their own choosing, and the municipal employer shall confer with said employe in relation thereto, if the majority representative has been afforded the opportunity to be present at the conferences. Any adjustment resulting from these conferences shall not be inconsistent with the conditions of employment established by the majority representative and the municipal employer.

to allow an employe to present a grievance to an employer. The Association adds that "The contract language does not unequivocally override this presumption and further, the contract does not provide an express penalty for noncompliance of these requirements." The Association, however, offered no persuasive evidence or argument to support its statutory interpretation. On the other hand, it is undisputed that the grievant is covered by the terms of the parties' collective bargaining agreement and that said agreement contains a grievance/arbitration procedure to resolve disputes "relative to the interpretation or application of" same. Pursuant thereto, the grievant filed her grievance challenging her nonrenewal. The Board, in turn, denied it on procedural grounds, and such a result, as noted herein, is consistent with its contractual authority, and, in the opinion of the Arbitrator, not inconsistent with any rights afforded individual employes to present grievances to the municipal employer by the aforesaid statute. 3/ Therefore, the Arbitrator rejects

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2/ Id.

3/ By letter dated April 15, 1996, the District submitted a copy of the court of appeals decision in Gray v. Marinette County, Case No. 95-1906-FT (March 26, 1996) relative to this issue. However, since this was submitted following completion of the parties' briefing schedule it was not considered in arriving at the above conclusion.

this claim of the Association.

The Arbitrator will address the Association's related claim that the Arbitrator should not dismiss the grievance on arbitrability grounds because the contractual grievance/arbitration procedure does not provide an express penalty for noncompliance with its requirements when discussing the Association's reliance on Arbitrator Raleigh Jones' decision in Chippewa County below.

The Association also argues that no procedural defect exists with regard to the nonrenewal grievance because the Association had a right to "speed up the timeline process by having the Association initiate the grievance at the administrative level or the Board level," because "the only grievance step which was pertinent to nonrenewal is the board level grievance step." (Emphasis supplied) As pointed out by the District, the Association misses the point. The dispute here is not about skipping steps or at what level a grievance can be initiated but about whether an individual such as Rita Crotty can initiate a grievance against the Board. (Emphasis supplied) To put it simply, the argument is not at what level this grievance could be initiated, but by whom. On this basis, the grievant looses.

The Association further relies on Arbitrator Joseph R. Rocha, Jr.'s decision in Astro-Valcour, Inc. (Leominster, Mass.) and United Textile Workers of America Local 680, August 11, 1989 in support of its argument that the procedural defect should be overlooked. The Association states in its brief: "In Astro-Valcour, an employer objected to the arbitrability of a grievance based, in part, on the fact that the department steward did not sign the grievance as required in the contract." The Association notes the arbitrator found the grievance was arbitrable based on a reading of the contract as a whole because "Another contractual provision provided employees the power to file grievances without a steward's signature and the arbitrator ruled that 'it would be unreasonable to construe the agreement so that one provision empowers an employee to initiate a grievance and another part denies her the same right.'" The Association adds that "the arbitrator reasoned that addition of the steward's signature would be a 'mere formality, and is not essential to the validity of the grievance under the circumstances.'"

However, as pointed out by the District in its brief, clear contract language in Astro-Valcour required a finding that "an aggrieved employee, alone has the authority to launch a formal grievance." (Emphasis supplied) Here, the contract language is clear that only the Association may initiate a grievance against the Board, not an individual employe (teacher) like the grievant. As noted previously, the record is clear that the grievant, not the Association, filed the grievance. In addition, the grievance challenges a Board action -- nonrenewal of the grievant's extra curricular contract -- thus requiring contractually that the grievance be filed by the Association, not the grievant, as argued by the District.

Finally, the Association cites an arbitration decision involving the Chippewa County Deputy Sheriff's Association, Wisconsin Professional Police Association/LEER Division and

Chippewa County issued by Arbitrator Raleigh Jones in 1994 in support of its position. Here, according to the Association, the arbitrator found, despite the employer's claim that the union's grievance did not comply with the contractual grievance procedure in a number of respects i.e. filed by the union rather than the employe, not filed on the required form, not filed with the proper party, that the grievance was procedurally arbitrable since the grievance procedure did not provide an express penalty for noncompliance with these requirements.

However, the agreement herein provides at Step V Arbitration that "The sole function of the arbitrator shall be to determine whether or not the rights of a teacher have been violated by the school district contrary to an express provision of this agreement." It follows then that the Arbitrator cannot ignore an express provision of the agreement that requires the Association, not the grievant, to initiate a grievance against the Board. Said contract provision also states: "The arbitrator shall have no authority to add to, subtract from or modify this agreement in any way." (Emphasis added) By failing to enforce this provision, as harsh as the result may seem to the grievant and the Association, the Arbitrator is of the opinion that he would be altering the meaning of the disputed contract language if he interpreted it in the manner advocated by the Association.

As pointed out by the District, arbitrators recognize that the grievance procedure, when adhered to, advances peaceful and constructive employment relations, and benefits labor, management, and the public alike. Moreover, arbitrators realize that the success of arbitration itself may be jeopardized if the grievance procedure is not followed carefully. Consequently, arbitrators require the parties to pay due respect to the grievance procedure, not only by using it, but by complying with its formal requirements. Such compliance is a condition precedent to the presumption of jurisdiction of arbitrators. 4/

Therefore, as a general rule arbitrators expect parties to comply with the technical requirements of the grievance procedure although arbitrators have sometimes ruled that substantial compliance will suffice, or accepted some special justification for failure to meet a technical requirement. 5/ The Association has offered no persuasive evidence, argument or reason as to why the grievance/arbitration requirements should not be followed in the instant case.

Based on all of the above, and absent any persuasive evidence or argument to the contrary, the Arbitrator finds that the answer to the procedural issue, as framed by the District, is NO, the grievance is not arbitrable under the master agreement which provides in Section A, Article VII, Sub Section B that a grievance may be initiated by the Association against the Board because the grievant, not the Association, filed her nonrenewal grievance against the Board. Because the grievance is not arbitrable, the Arbitrator is precluded from exercising his jurisdiction to decide the merits of the grievance challenging the District's nonrenewal of the grievant, Rita Crotty, as the head volleyball coach following the 1994 volleyball season.

4/ See Elkouri and Elkouri, How Arbitration Works, 198 (Fourth Edition, 1989).

5/ Elkouri and Elkouri, supra. at 160.

In light of all of the foregoing, it is my

AWARD

That the grievances in Case Numbers 17 and 18 are hereby denied and the matters are dismissed.

Dated at Madison, Wisconsin this 6th day of June, 1996.

By Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator