BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

NECEDAH AREA TEACHERS ASSOCIATION

and

NECEDAH SCHOOL DISTRICT

Case 16
No. 53519
MA-9381

Appearances:

Mr. Gerald Roethel and Ms. Deborah Byers, Executive Directors, Coulee Region United Educators, appearing on behalf of the Union.

Godfrey & Kahn, S.C., by Mr. Edward J. Williams, appearing on behalf of the District.

ARBITRATION AWARD

The Employer and Union above are parties to a 1995-97 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the grievance of Michael Balliett, concerning his removal from two coaching positions.

The undersigned was appointed and held a hearing on March 19, 1996 in Necedah, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. A transcript was made, both parties filed briefs, and the record was closed on May 7, 1996.

ISSUES:

The Union proposes the following:

1. Did the Necedah School District violate the collective bargaining agreement when it removed two coaching positions from Mike Balliett?

2. If so, what shall the remedy be?

The District proposes the following:

1. For probationary teachers, is the District required to follow requirements of Article 14, Section B of the labor agreement when it dismisses a probationary teacher from an extra curricular assignment?

RELEVANT CONTRACTUAL PROVISIONS:

II. RECOGNITION

The Board recognizes the Necedah Area Teachers Association as the exclusive and sole bargaining representative of all certified teaching personnel of the school district; including guidance counselors and librarians, but excluding Principals, Supervisors, substitute per diem teachers, teachers aides, office and clerical employees.

Unless otherwise indicated employees in this unit will hereinafter be referred to as "teachers".

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VI. A. CURRICULAR ASSIGNMENTS

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2. B. Major extra-curricular duties and assignments (which shall include all assignments listed on the "extra-curricular schedule" except hourly and per event assignments) as well as compensation for such duties and assignments will be listed on an individual extra curricular contract Methods of payment for such duties and assignments are specified in ARTICLE XXII Compensation. The district shall make a reasonable effort to find a satisfactory replacement for any teacher who requests to be relieved of an extra-curricular assignment.

. . .

XIV. DISCIPLINARY PROCEDURE

A. Probationary Period

1. All matters of dismissal or non-renewal during the two years following the first date of the teacher's service in the District shall be governed according to State Law, Wisconsin Statutes 118.22 and all other applicable

statutes, and nothing in this contract shall prohibit the Board from proper action under those statutes.

B. All Other Teacher Discipline

1. In all matters of reprimand, suspension, reduction of compensation, and in all matters of dismissal or non-renewal for teachers who have begun their third year of service to the District, the following procedure shall be followed:

a. The Board or its designee shall promptly notify the teacher in writing of any infraction or delinquency in the teacher's performance according to the rules and regulations of the Board.

b. The Board or its designee shall indicate to the teacher the corrective action required by the Board and specify a reasonable length of time for such correction to be made.

c. The Board will thoroughly investigate any allegation against a teacher which could result in loss of pay, dismissal or non-renewal.

d. Every teacher disciplined under this article shall be entitled at her or his request to a hearing before the Board to refute the allegations and/or defend her or his actions, such hearing to be in closed session if allowed by the law, and shall be entitled to representation by counsel and/or a member of the NATA. At such hearing the Board will not rule against the teacher unless there is a reasonable evidence or proof that the teacher is guilty of the allegations. The degree of discipline administered

by the Board will be reasonably related to the seriousness of the proven offense.

e. The Board shall not discriminate against any teacher in the application of disciplinary penalties.

f. Nothing in this section shall prevent the Board or its designee from immediately suspending a teacher, with pay, when such action is commanded by an emergency or urgent circumstance. Neither will this procedure be required to begin non-renewal procedure in the event of urgent circumstances occurring on or after February 15.

DISCUSSION:

The essential facts are undisputed. In his first year of teaching, in 1994-95, grievant Michael Balliett was assigned to coach three extra-curricular subjects: he served as assistant football coach, as head coach of girls' basketball, and as assistant coach of boys' baseball. In the fall of 1995, when the District was issuing coaching contracts for the forthcoming school year, the grievant was issued only the football contract (a separate document in that year from the basic teaching contract for each teacher) and was informed that he would not be given contracts for the assistant baseball or girls basketball positions. In a September 19, 1995 letter confirming this decision, Superintendent Robert Reinke stated merely that the Board of Education had decided that it "wants a change in direction and a new style in coaching." The District agrees that it did not follow the procedures specified in Article 14, Section B of the Agreement; the dispute is over whether the District was required to follow those procedures.

Testimony established that no probationary teacher had ever been removed from an extra curricular assignment. On one occasion, the District had sought to remove a "veteran" teacher from a coaching assignment; on that instance, in 1986, but under similar language to that still in effect, the District had announced an intention to remove a teacher named Ebert from a curricular assignment, the Union had protested that the District had not followed the requirements of Article 14B, and the District desisted from the attempt. In 1988, the District made an attempt to have coaching duties removed entirely from the requirements of Article 14B, which was rebuffed by the Union and not incorporated in that or successor collective bargaining agreements.

In the negotiations over the 1991-92 collective bargaining agreement, the District proposed that extra-curricular assignments no longer be listed as part of the individual teacher's primary contract of employment, and instead be listed on a separate contract. The Union agreed to this proposal, which appears as Article 6, Subsection 2B of the current agreement. High School Principal Charles Krupa, who prepared this proposal for the District, testified that the intent of the proposal was ". . . because our extra curricular duties and assignments had incorporated so many different areas in regards to pep band, class advisors, many different activities, that when they were tied in with just one contract, we had to be so many times more than one year ahead of time. The teachers were requesting changes, dropping out of other areas of coaching. Our intent was to remove that, have that as a separate contract and that we would issue these contracts on "A", a seasonal basis and "B", as we had needed them". 1/ Gerald Roethel, spokesperson for the Union in the 1991-92 agreement, testified that the change to separate contracts had in fact been made a year earlier, and the language change in 1991-92 merely reflected that.

Frank Worachek, superintendent for many years until he retired in 1990, testified that he negotiated the first contract with the Union, about 1981. Worachek testified that the Employer's intention for the language at issue in this matter was that part A would apply to probationary teachers and part B would apply to veteran teachers. Worachek testified that the Union never told the District negotiators that paragraph B could be applied to co-curriculars for probationers and that it "just made sense" that paragraph A would apply to co-curriculars for probationers. But Worachek, like current superintendent Reinke, also testified that in his opinion paragraph B did not apply to the suspension of a probationary teacher. Krupa testified to the same effect.

The Union contends that Article 14B applies whenever there is a "reduction in compensation" for any teacher, and equates the removal of the coaching duties which Balliett had held to reduction in compensation. The Union contends that paragraph A applies only to the outright discharge or nonrenewal of a teacher, arguing that its reference to Wis. Stats. Section 118.22 implies that no other subject is addressed by that paragraph, since 118.22 is on its face concerned only with the removal of a teacher from his or her primary employment. The Union further argues that paragraph B is constructed in such a fashion that it "requires the application of the phrase reprimand, suspension or reduction in compensation to be applied to all teachers." The Union reasons that to describe the removal of coaching duties as a reduction in compensation is appropriate, given that the grievant lost in excess of $2,500 in overall salary as a result of the District's action. The Union argues that Article 14 does not use the words "teaching contract" or the phrase "reduced as a teachers," and that, therefore, the grievant's compensation for 1995-96 was reduced compared to what it would have been because the District improperly withheld from him two coaching assignments. The Union further argues that the grounds stated for the removal of the grievant from these duties refer only to a "change in direction" and a "new style", and contends that testimony by Reinke to the effect that the "participation" of girls on the

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1/ Transcript page 64.

basketball team was the underlying issue should be read in context of the grievant's testimony that the school board members' daughters were not played as much as the school board members would have wished. The Union contends that this was a petty issue for which the grievant paid a large price, in violation of the Agreement. The Union, finally, argues that the District's conduct was unreasonable, because it allowed the grievant to return to work and only afterwards informed him that his compensation would be some $2,500 less than he had reason to expect. The Union requests as a remedy that the grievant be awarded the coaching salaries for 1995-96, and that the District be ordered to return the grievant to the two coaching positions the District improperly removed from him.

The District contends that Section A of the labor agreement expressly covers dismissal as well as nonrenewal of a probationary teacher, and that the grievant was literally dismissed from the two coaching contracts at issue. The District argues that it acted pursuant to Sections 120.12 and 120.13, Wis. Stats., which specify that the Board has the power to manage and supervise the affairs of the District, and that this brings its action within the language of Section A, which refers not only to 118.22 but to "all other applicable statutes."

The District contends that Article 14, Section B establishes a classification of tenure "for those teachers who have successfully completed the two year probationary period." The District contends that the Union's interpretation improperly reads Article 14B as providing all the procedural and substantive protections to a non-tenured teacher as would be provided to a tenured teacher, except for dismissal or nonrenewal of the individual teacher contract. The District argues that this does not comport with the express language of Section A because "dismissals" on its face includes dismissals from co-curricular assignments. The District cites Worachek's testimony as indicating that Section A was to apply to probationary teachers' dismissal from either the individual teacher contract or from a co-curricular assignment.

The District further contends that the Union's interpretation of Article 14B produces a ludicrous result, because the District can clearly, in the Union's view, discharge or nonrenew a probationary teacher outright, but if the lesser discipline of a reprimand, suspension or reduction in compensation is contemplated it must adhere to each and every provision required for veteran tenured teachers. The District notes that a nonrenewal could be regarded by the teacher in question as a reduction in compensation, and regardless of this, there is a rational distinction between Section A and Section B. The District urges the interpretation of this clause as being fundamentally that Section B concerns veteran or tenured teachers, and Section A concerns probationary teachers. The District further points to the possibility that under the Union's interpretation, a teacher could theoretically be nonrenewed from a primary teaching position, but if the District failed to observe the punctilious requirements of Article 14B, the teacher might still have rights to be employed as a coach or other extra-curricular position. The District argues that this is an absurd result, and that common practice in arbitration is to apply contracts in a way that does not produce absurd results.

The District further contends that the Association's attempt to use the Ebert case as grounds for finding that the grievant has rights under Section 14B is inapposite, because the teacher then involved was a veteran teacher, and because co-curricular assignments were at that time incorporated into the primary contract. The District notes that since 1991-92, separate contracts have in fact been agreed to by the parties for co-curricular positions, and argues that this adds weight to its position that "dismissal" from two such contracts was what happened in this case. The District requests that the grievance be denied.

In analyzing the merits of this matter, I must note initially that the formulation of the issue used by the Union is more neutral than that used by the Employer, which by framing the issue in terms of the District "dismissing" a probationary teacher from an extra-curricular assignment impliedly adopts the District's argument that dismissal, rather than reduction of compensation, was what occurred here.

As the District argues, it is customary in arbitration to apply the clear meaning of contract language, where that language is found to be clear. Here, I find to begin with that the District has consistently misread Article 14B. Section 1 of that clause makes a distinction between "all matters of reprimand, suspension, reduction of compensation" and "all matters of dismissal or nonrenewal for teachers who have begun their third year of service . . ." On the face of this clause, it is clear and unambiguous that all matters of reprimand, suspension and reduction of compensation are literally that: all such matters, including those which apply to probationary teachers. Only in dismissal and non-renewal are teachers who have begun their third year of service distinguished from section A's reference to probationary teachers. While it is a close question whether the removal of a teacher from a co-curricular assignment should be regarded as a "dismissal" or a "reduction of compensation" -- the action clearly has aspects of both -- the fact that all of the District's witnesses testified to the effect that even a suspension of a probationary teacher was not covered by Article 14B leads me to the conclusion that the District's witnesses' interpretation of this clause is unreliable generally.

I note in this connection that all of the testimony with respect to bargaining history fails to establish any probative reason why one interpretation should be preferred over the other. While each of the witnesses' testimony tended to support the position of his party, none alleged outright that the other party had made any clear representation during bargaining on the specific point at issue and the record establishes at most that the District believed throughout that probationary teachers could be removed from a co-curricular assignment at will, while the Union believed otherwise. Nor does the District's argument of absurdity of result carry much weight under the circumstances present here. Perhaps there is something a little odd, at first glance, about an employment situation in which the employer may take the ultimate act of discipline against a probationary teacher at will, but must follow more stringent requirements if a lesser act of discipline is contemplated. Yet the Agreement here is far from the only teacher contract in the State of Wisconsin which makes exactly this distinction. Furthermore, the fact that on its face this Agreement does make that distinction for reprimands, suspensions and reductions of compensation

means that there is no intrinsic reason why removal from a co-curricular assignment should be regarded as a "dismissal" deserving of less protection than a reduction of compensation of some other variety.

The fact that a separate contract is involved bears close examination, and initially tends to support the District's claim that what occurred here was a dismissal rather than a reduction of compensation. Krupa's testimony as to the reasons for the change, however, establish that the Board's motivation was not related to a desire to have greater flexibility with respect to probationary teachers. It is clear from Krupa's undisputed testimony that the purpose of making the change was to allow the District to issue the seasonal coaching contracts on a more timely basis, which would take greater account of the desires of the teachers to change assignments from time to time. This not only is unrelated to the significance which the District wishes to place on the existence of the separate contract for purposes of this case, it also is consistent with the fact that all of the District's witnesses believed that the District's rights already included the ability to not only remove a coaching contract from a probationary teacher at will, but also suspend, reprimand or reduce that teacher's compensation at will.

At the same time, the reference in Section A to Section 118.22, as the sole named statute governing dismissal or nonrenewal of a probationary teacher, does support the Union's interpretation. That statute clearly is concerned only with the removal of a teacher from the primary position of teacher, and makes no reference to extra-curricular assignments. The District's explanation that the "all other applicable statutes" means in this context Section 120.12 and .13 is a valiant effort to draw meaning from the statutes which could apply to extra curriculars, but these sections do not make any specific reference to any particular term of employment of teachers, and clearly do not overcome the specific contractual references in Article 14B. I conclude that the language of Article 14A is most reasonably interpreted as being concerned with the outright discharge from the basic teaching contract, as well as nonrenewal, and that there is no persuasive reason to interpret it as applying to the removal from a co-curricular assignment. This is supported by the fact that the most obvious form of "reduction in compensation" available to the District (without arguably violating the salary scale) would be removal from an extra-curricular assignment.

A final argument of the District which deserves serious consideration is the contention that Article 14B, if interpreted as the Union argues, could result in the absurd situation of a teacher remaining employed for co-curriculars while having properly lost his or her basic teaching position. I agree that such a result would be absurd, and if it were the logical result of the Union's interpretation, that would probably compel a decision that the District's interpretation of Article 14B was the more reasonable despite its other weaknesses as noted above. But I do not read that as the inevitable result of the Union's position. If the District were to nonrenew or dismiss a probationary teacher outright, while failing to apply Article 14B to any co-curriculars held by that teacher, my reading of the Agreement as a whole is that that individual teacher would no longer be "certified teaching personnel of the school district" within the meaning of the Agreement's

recognition clause. Since a teacher thus discharged would no longer be a teacher within the meaning of the recognition clause, such a teacher could not in my opinion claim reinstatement or on-going pay for the ancillary assignments, which depended upon the basic employment which underlay them. This interpretation, of course, not only affects the reasonableness of the Union's interpretation of Article 14B, but also applies to the remedy which the Union seeks: since the parties have stipulated that the grievant will not return to the District for 1996-97, no reinstatement to the co-curricular assignments is appropriate.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That Necedah School District was obligated to follow Article 14B when it contemplated removing coaching assignments from the grievant.

2. That by failing to follow Article 14B of the Agreement, the District violated the collective bargaining agreement when it removed the grievant's girls basketball and assistant baseball coaching assignments.

3. That as remedy, the District shall, forthwith upon receipt of a copy of this Award, pay Michael Balliett a sum of money equal to the amounts he would have earned from the lead girls' basketball and assistant boys' baseball coaching extra curricular assignments for 1995-96. Reinstatement is not required.

Dated at Madison, Wisconsin this 16th day of August, 1996.

By Christopher Honeyman /s/
Christopher Honeyman, Arbitrator