

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

PESHTIGO EDUCATION ASSOCIATION

and

PESHTIGO SCHOOL DISTRICT

Case 33

No. 56010

MA-10143

(Robert Schneider Grievance)

Appearances:

Mr. James Blank, Executive Director, United Northeast Educators, appeared on behalf of the Association.

Mr. Dennis Rader, Godfrey & Kahn, S.C., Attorneys at Law, appeared on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Association and the District respectively, were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance. A hearing, which was transcribed, was held on June 9, 1998, in Peshtigo, Wisconsin. Afterwards, the parties filed briefs and reply briefs whereupon the record was closed on August 27, 1998. Based on the entire record, the undersigned issues the following Award.

ISSUES

The parties were unable to stipulate to the issue(s) to be decided in this case. The Association framed the issue as follows:

Did the District violate the collective bargaining agreement and past practice when it hired a non-bargaining unit member over a qualified bargaining unit member as the Varsity Girls' Basketball Coach? If so, what is the appropriate remedy?

The District framed the issue as follows:

Is the grievant qualified for the Varsity Girls' Head Basketball Coaching position?

Having reviewed the record and arguments in this case, the undersigned finds the following issues appropriate for purposes of deciding this dispute:

1. Is the grievant qualified for the Varsity Girls' Head Basketball Coach position?
2. If so, did the District violate the collective bargaining agreement when it did not award the grievant that extra-curricular position?
3. If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 1995-1997 collective bargaining agreement contained the following pertinent provisions:

ARTICLE IV

MANAGEMENT RIGHTS

- A. The Board hereby retains and reserves unto itself, without limitation, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and constitution of the State of Wisconsin, and of the United States, including, but without limiting the generality of the foregoing, the right to:

...

9. The direction, supervision, evaluation, arrangement, assignment and allocation of all the working forces in the system, including the hiring of all employees, determination of their qualifications and the conditions for their continued employment, the right to discipline or discharge, for just cause, and transfer employees.

ARTICLE V

ASSOCIATION RIGHTS

- E. Open positions in the school shall be posted and open for consideration to Peshtigo teachers who are qualified to fill such positions. For the purposes of this paragraph, positions shall include all teaching positions and all extra-curricular positions for which compensation is paid but shall not include non-compensated extra-curricular positions. For the purposes of this paragraph, a position shall be deemed to have become vacant when (1) the person then holding that position has indicated a desire to the superintendent or the Board not to return to the same, (2) the District has determined to terminate the assignment with respect to a particular person, or (3) the position itself actually becomes vacant. With respect to any position which becomes vacant and which must be posted under the collective bargaining Agreement, the District shall post at least five days in advance of the time necessary to fill the position except in those cases when the position must be filled immediately, in which case the District shall provide not less than 48 hours notice to the Association. For the purposes of this provision, "days" shall be defined to be those days when the District Office is open, whether during the school term or vacation periods. For the purposes of posting during school vacations, the Association shall, at least once annually, designate two of its members as their representatives, to receive notice of posted positions during non-school times. The District shall satisfy its posting responsibilities during non-school times by informing one or the other of those individuals, so designated, of any available postings. The District may rely upon the Association's most recent designation of its representatives for posting purposes, notwithstanding that such designation may have occurred more than one year prior to the date of the posting in question. The District shall make posting information available to the Association's designated representatives. The District may rely conclusively upon a certified mail return receipt indicating the date received as the receipt of a written notice of posting, should the District elect to utilize that method. Summer school positions shall be assigned by seniority when those positions are open.

...

ARTICLE XIII

TEACHING/EXTRA CURRICULAR ASSIGNMENT AND REASSIGNMENT

- A. Assignment: The superintendent will assign all teachers to their specific positions which will be within the area(s) for which the teacher is certified, excluding extra curricular.

- B. Voluntary Reassignment: Teachers who desire a change in assignment may at any time file a written statement to that effect with the superintendent. Such requests shall be considered at any time that openings occur. All requests must be renewed annually. No openings shall be filled by persons not currently District teachers if a qualified current teacher desires and applies for the position; providing, however, that a qualified teacher is available to fill the vacancy created by such reassignment.

- C. Involuntary Reassignment: An involuntary reassignment will be made only after a meeting between the teacher involved and the superintendent or his designee, at which time the teacher will be notified in writing of the reason therefore. When an involuntary reassignment is necessary, a teacher's current area of instructional competence, major or minor field of study, grade or subject from which reassignment is contemplated, will be considered in determining which teacher will be reassigned. If all other factors are equal, district wide seniority shall be the determining factor.

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BACKGROUND

The District operates a K-12 public school system. The Association represents a bargaining unit of certified teaching personnel in the District. The Association and the District

have been parties to a series of collective bargaining agreements, including the agreement which, by its terms, was effective July 1, 1995 through June 30, 1997.

The various collective bargaining agreements referenced above have contained a posting provision. That provision requires internal posting for all teaching and extra-curricular paid positions. The varsity girls' head basketball coach is a paid position.

The record indicates that in the past three rounds of bargaining, the District has tried to change the existing language of Articles V and XIII. That language deals, in part, with the filling of extra-curricular positions. Specifically, the District tried in various negotiations to get the right to unilaterally decide which internal applicant fills extra-curricular positions, to unilaterally assign teachers to extra-curricular positions, to exclude teachers from duty assignments, to subcontract extra-curricular duties that were not filled by bargaining unit members, and to eliminate the existing requirement of posting extra-curricular positions. None of these proposed changes were incorporated into the labor agreement. Thus, the District has not been successful in changing the contract language which deals with the filling of extra-curricular positions.

The record also indicates that in October, 1995, the District adopted a Coaches' Handbook. This document is 33 pages long. One part of that document is entitled "Responsibilities and Duties of the Head Coach." That section essentially contains the job description for a head coach. It lists twelve separate job duties, one of which is as follows:

3. Assign duties to his/her assistants and provide written evaluations to the Athletic Coordinator or Assistant (Appendix "H").

The job duty referenced in number 3 above (i.e. that head coaches evaluate their assistant coaches) was a new job duty. Prior to 1995, someone else (the record does not indicate who) evaluated assistant coaches.

The evaluation form which head coaches complete is contained in the Coaches' Handbook in Appendix "H". That form provides as follows:

PESHTIGO DISTRICT
COACHES EVALUATION

COACH

DATE

SPORT

Administrative:	Outstanding	Effective	Acceptable	Requires Improvement
1. Supervision of Staff				
2. Supervision of Facilities				
3. Supervision of Athletes				
4. Care of Equipment				
5. Adherence to Rules and Regulations				
6. Organization of Practices				
7. Game Management				
8. Eligibility Reports, Inventories, Rosters and Pre-Post Reports				

SKILLS

1. Knowledge of Fundamentals	Outstanding	Effective	Acceptable	Requires Improvement
2. Presentation of Fundamentals				
3. WIAA Rules Knowledge				
4. Conditioning				
5. Game Preparation				
6. Prevention and Care of Injuries				

PUBLIC RELATIONS

1. Positive Communications With Media, Parents and Athletes	Outstanding	Effective	Acceptable	Requires Improvement
2. Motivation of Athletes				
3. Community and Booster Club Programs				

PERSONAL QUALITIES

1. Appearance (Neat at all times)	Outstanding	Effective	Acceptable	Requires Improvement
2. Punctuality				
3. Cooperation				
4. Enthusiasm				
5. Attitude (Demonstrates Good Behavior)				
6. Game Conduct				
7. Commitment				
8. Values (Exhibited And Taught)				

SELF IMPROVEMENT

1. Attends In-District Meetings and Clinics	Outstanding	Effective	Acceptable	Requires Improvement
2. Attends rules Meetings and Out-Of-District Clinics				
3. Keeps Updated by Reading Current Material				

COMMENTS

The signatures indicate the coach and evaluator discussed this report. It does not necessarily denote agreement with all factors of the evaluation.

Coach's Signature

Evaluator's Signature

REBUTTAL

(Each coach has an opportunity to respond in writing in regards to their evaluation)

Head coaches complete this form once a year for all their assistant coaches.

Before the Coaches' Handbook referenced above was adopted, Robert Schneider, the Junior Varsity (JV) Girls' Head Basketball Coach, attended several Board meetings wherein he publicly voiced his opinion concerning the job duty referenced in number 3 above (i.e. that head coaches evaluate their assistant coaches). Specifically, Schneider told the Board members he was philosophically opposed to having the head coach evaluate their assistant coaches because he thought one bargaining unit employe should not evaluate another. Superintendent Kim Eparvier attended the Board meetings where Schneider expressed his opinion concerning the evaluation of assistant coaches by the head coach. As a result, Eparvier was aware of Schneider's view concerning same.

In March, 1997, Schneider was evaluated in his capacity as JV Girls' Head Basketball Coach by the-then Varsity Girls' Head Basketball Coach. After being evaluated, Schneider responded in writing to same. His response concluded with the following two paragraphs:

I am also opposed to this evaluation process. I have questioned this evaluation process from the beginning, and even attended board committee meetings to voice my concerns and opposition. I do not believe that peers should be evaluating each other, regardless of their seniority, or position on the staff. Evaluations that are kept on file should only come from a qualified administrator. Many varsity coaches are not comfortable with this process. I would also like to know where these evaluations are kept on file, who has access to these files, and for what purposes. In addition I would like to know how long each evaluation is kept.

I do not have a problem with being evaluated, just with the process that we currently have.

Robert P. Schneider /s/
Robert P. Schneider – Junior Varsity Girl’s Basketball Coach

The record indicates that for many years, extra-curricular positions have been awarded to the most senior bargaining unit member who applied for the position. At least twelve coaching positions and eight non-coaching extra-curricular positions have been filled in this manner. If there were no internal applicants for the posted position, then the District looked outside the bargaining unit to fill the position. Prior to the situation involved here, the District has never awarded an extra-curricular position to a non-bargaining unit member when a bargaining unit member applied for the position. The instant case marks the first time the District awarded an extra-curricular position to a non-bargaining unit member when a bargaining unit member applied for the position. This case is also the first time a unit member was considered “not qualified” by management for an extra-curricular position.

FACTS

Schneider is the current Girls’ JV Head Basketball Coach. He has held that position since 1993 when he began his employment with the District as a music teacher. The record indicates he has the following basketball experience: he has been a certified basketball official for 14 years, he has worked with all grade levels of basketball teams from middle school up, he has assisted other basketball teams with practices, and he has scouted for other basketball teams. In the five years he has been JV coach, he has never received any complaints from the administration, parents or players regarding his basketball coaching skill or abilities. District Administrator Eparvier testified that, in his view, Schneider did a competent job as the Girls’ JV Basketball Coach. Athletic Director Strelbel testified that he likewise had no concerns with Schneider’s performance as Girls’ JV Coach.

In June, 1997, the District internally posted the extra-curricular position of Girls’ Varsity Head Basketball Coach. Schneider applied for the position. He was the only internal applicant who applied for same.

After District Administrator Eparvier and Athletic Director Strelbel learned that Schneider was the only internal applicant for the position, they decided to post the position externally and seek other applicants. Their reason for doing so was that both were aware that Schneider had publicly indicated he was opposed to the District policy of head coaches evaluating their assistant coaches.

In late August, 1997, the position was advertised in the Peshtigo and Marinette newspapers. Four external candidates applied for the position. One of those persons, Laurie Bruce, was encouraged to apply for the job by Middle/High School Principal Richard Natynski.

After receiving the applications from the four external candidates, the District announced it would interview all the applicants (i.e. internal applicant Schneider and the four external applicants).

Someone from management then prepared 17 questions to be asked at the forthcoming interviews. 1/ The 17 questions were as follows:

1/ The record does not indicate who prepared these questions.

Varsity Basketball Coach Interview Questions

1. Give us your background as far as basketball/coaching is concerned – any other relevant information that would make you a good candidate. Have you played this sport or coached this sport at a Varsity Level in high school or college within the last five years. If your experience has occurred more than five years prior, evidence that knowledge has been kept up-to-date?
2. Why would you like to coach at Peshtigo?
3. Will your present employment or schedule allow you the necessary time commitment to coach? If we were to call your present employer what would we learn regarding your attendance in performance of your responsibilities.
4. Take two of the following and describe how you would teach this concept/practice. Correct dribbling, passing, catching, shooting, guarding, running skills and basic game strategy.
5. How would you handle a discipline problem of the court, on the bus. How would you handle this if an athletic code violation existed too?

6. A varsity coach is leader of his/her sport. Describe how you interpret your responsibilities and commitment to your program. What commitment (# of years) are you willing to provide to our school and athletes?
7. What is your style of defense? What is your style of offense?
8. Describe your ability to work with athletes, parents, coaching staff, athletic director, administration cooperatively, and present yourself as an appropriate role model.
9. Please give your view of the role of Assistant Coaches in your program.
10. Can you demonstrate knowledge of basic first aid/CPR and athletic taping procedures? Please share your last training dates with us.
11. Describe the need for academic success in relation to athletics and your philosophy.
12. What is your philosophy regarding the playing time an athlete at all levels should/could experience?
13. One of your athletes is injured and taken away in an ambulance. What is your role and program's responsibility regarding this athlete and notification of parents.
14. Describe how you would evaluate the quality of your program? What responsibility would you have to improve your program? Provide some examples.
15. A major element of developing a program is its feeder program. Elaborate your philosophy and responsibility of promoting such a program.
16. Would you be interested in any other basketball position in our program if you are not offered this position?
17. Do you have any questions we could answer for you?

All five candidates were interviewed on September 29, 1997 by a three-member interview panel. The interview panel consisted of Principal Natynski, Assistant Principal/Athletic Director Strelbel and School Board Member Rohde. In each interview, Natynski asked the candidate the above 17 questions. Thus, all five candidates were asked the same 17 questions. As each candidate responded to the questions, the interviewers rated the candidate's response on a scale of one to ten with ten being the highest. Some of the interviewers also took notes of the candidates' responses on their rating sheets. The interviewers scored the candidates independently and did not consult with each other about the candidates being interviewed. The interviewers did not give scores to any of the candidates for questions 16 and 17. Since 15 questions were rated, with a potential rating of ten points per question, the highest potential score was 150. Only the scores given to candidates Schneider and Bruce are relevant here. Two interviewers gave Schneider a score of 118 and one interviewer gave Schneider a score of 117. One interviewer (Natynski) gave Bruce a score of 144, one interviewer gave Bruce a score of 118, and one interviewer gave Bruce a score of 109.

Schneider's interview differed from the other four interviews in the following respect. While all five candidates were asked how they would evaluate the basketball program (question 14 referenced above), in Schneider's interview the focus then shifted to evaluating assistant coaches. This happened when one of the interviewers asked Schneider if he still believed that the head coach should not evaluate the assistant coaches. Schneider replied in the affirmative and said he thought it was the athletic director's and the principal's responsibility to evaluate assistant coaches. Principal Natynski then asked Schneider if he (Schneider) was saying that it was his (Natynski's) responsibility to evaluate assistant coaches, to which Schneider responded that if he (Natynski) was busy, then Strelbel could do it. Insofar as the record shows, there were no further questions or responses about evaluating assistant coaches during the interview. At no point in the interview was Schneider asked straight out if he would evaluate assistant coaches if he was head coach. During the interview, Schneider did not tell the interviewers that he would evaluate assistant coaches if he was head coach. Schneider was the only candidate interviewed who was asked about evaluating assistant coaches.

Following the interviews, management awarded the position of head coach to Laurie Bruce.

On October 8, 1997, Schneider was called into a meeting by Principal Natynski. Schneider took Mike Pelletier, the Association's grievance chair, with him to this meeting. During the short meeting, Natynski told Schneider and Pelletier that the District had hired Laurie Bruce as the Girls' Varsity Head Basketball Coach. Natynski stated that the reason Bruce was hired was that she (Bruce) was considered the only "qualified" candidate. Natynski did not say at this meeting why Schneider was considered "not qualified" for the Varsity Coach position.

Two days later, the Association filed a grievance contending the District violated the contract by not awarding the Varsity Girls' Head Basketball coaching position to Schneider.

After the grievance was filed, a hearing was held before the School Board. At this Board hearing, Schneider told the Board members that he knew evaluations were part of the head coaches' job duties, and that he would fulfill same.

The Board subsequently denied the grievance and the grievance was appealed to arbitration.

At the arbitration hearing, Schneider testified that if he had been asked straight out during the interview if he would evaluate assistant coaches, he would have answered in the affirmative.

The record indicates that several years ago, bargaining unit member Randy Fochesato applied for an assistant coaching position. In the course of doing so, he told head coach Sam Kopp that he would not do scouting. Scouting is one of the duties required of an assistant coach. Fochesato was given the assistant coaching position even though he would not do scouting.

POSITIONS OF THE PARTIES

Association

The Association contends the District violated the labor agreement when it did not select the grievant as the Girls' Varsity Head Basketball Coach. It makes the following arguments to support this contention.

First, the Association comments on the District's argument that the grievance should have been filed when the outside posting was made. The Association maintains that if the District intends by this argument to make a timeliness argument, it cannot do so because the District never raised any procedural objection during the processing of the grievance. In the Association's view, the issue of when the grievant filed the grievance is simply not an issue in this case.

Second, the Association contends that Articles V and XIII provide that extra-curricular positions are to be filled by giving internal applicants absolute preference. In the Association's view, that language limits filling vacancies to the internal applicants who post for them and does not allow the District to consider outside applicants. In other words, the Association believes the District cannot consider an outside candidate if there is an available inside candidate. The Association argues that since that did not happen here, the District violated those sections of the contract.

Third, the Association claims that the contract interpretation just noted is buttressed by a long-standing and firmly-established past practice. According to the Association, the practice is this: unit employees get the extra-curricular positions they apply for. The Association asserts the existence of this practice and its procedures are so well understood by the parties that there has never been an instance anyone can recall in over 30 years where a non-unit person obtained an extra-curricular position over a bargaining unit member. In the Association's view, the routine manner in which unit members received extra-curricular positions came to be considered automatic. The Association avers that until this case arose, no bargaining unit member has ever been turned down for an extra-curricular position on the grounds they were not qualified. The Association maintains that this practice is entirely consistent with the clear contract language contained in Articles V and XIII. The Association argues in the alternative that even if the arbitrator finds the contract language is ambiguous, the practice just referenced clarifies what the parties intended the provision to mean (namely, that unit members are given preference for extra-curricular jobs and non-unit members are only considered if there are no internal applicants). As the Association sees it, the District's decision here to not give the extra-curricular position to the grievant (the only internal candidate) is contrary to this established practice.

Fourth, the Association argues that the grievant is qualified for the head coach position. In support thereof, it notes at the outset that the contract language in Articles V and XIII does not state that the unit member must be the "most qualified" or "more qualified" than the other bidders; rather, the language simply says that the internal applicant must be "qualified". The Association avers that Schneider was, at the very least, minimally qualified for the head coach position for the following reasons: he is a certified teacher, he has five years' coaching experience as the current JV girls' basketball coach, he has been a certified basketball official for 14 years, he has worked with all levels of teams from middle school up, he has assisted other teams with practices, he has scouted for other teams, and he has assisted the former varsity coach implement a zone defense. The Association also points out that while the grievant has been JV coach, he has never received complaints from the administration, parents or players regarding his coaching skills or abilities. According to the Association, the foregoing experience and attributes establish that Schneider is more than qualified for the varsity head coaching position and therefore should have been awarded the position. The Association submits that just because Schneider has voiced a negative opinion of head coaches evaluating assistant coaches does not make him "unqualified" for the head coach position.

Fifth, with regard to the grievant's interview, the Association calls attention to the fact that question 14 asks about evaluating the basketball program, not evaluating assistant coaches by the head coach. The Association asserts that during the interview, the grievant was not asked straight out by the interviewers if he would evaluate his assistant coaches. The Association opines on this as follows: "It's strange to think that an area of such great concern

to all those involved in the interview and selection process was not specifically addressed during the interview.” The Association surmises that the reason the grievant was not asked this question during the interview was because the interviewers did not want to run the risk of hearing the grievant say that he would perform all of the duties of the head coach position regardless of personal opinion. The Association then goes on to aver that if the grievant had been asked if he would perform the duty of evaluating assistant coaches, he would have responded in the affirmative. To support this premise, it notes that the grievant was asked this very question at the Board hearing on this grievance, and he responded that he would do it (i.e. evaluate assistant coaches if he was head coach). The Association also points out that he was asked this same question at the arbitration hearing, where he also responded that he would do it (i.e. evaluate assistant coaches if he was head coach). Given the foregoing, the Association believes the District’s basis for denying the grievant the position is unfounded.

Next, the Association alleges that the process which the District used to disqualify the grievant from the head coach position was flawed for the following reasons. First, the Association submits that the decision to deny the grievant the position was not based on objective criteria from either the job posting or the 17 interview questions. Instead, as the Association sees it, the District invented a reason to disqualify the grievant, namely that his well-known opposition to the District policy of head coaches evaluating their assistant coaches made him “unqualified”. The Association avers that during the grievant’s interview, the District placed major emphasis on conducting performance evaluations, but did not apply this same emphasis to the other candidates. The Association notes in this regard that none of the external candidates were asked their opinion about evaluating assistant coaches. The Association contends this made the interview process defective and discriminatory. Second, the Association believes that the District had a preconceived bias against the grievant. According to the Association, this bias goes back to when the grievant gave his input on the coaches’ handbook. Additionally, the Association asserts that Natynski had a preference for Laurie Bruce even before the interview was conducted because he encouraged her, and only her, to apply for the job.

Next, the Association argues that the District applied a double standard to the grievant. To support this premise, it cites the situation of Randy Fochesato. In that situation, Fochesato applied for an assistant coach position and, in the course of doing so, specifically told the head coach that he (Fochesato) would not perform scouting duties. Fochesato was given the position anyway. The Association points out that while Fochesato openly refused to perform a duty of the extra-curricular position (i.e. scouting), Schneider has not refused to perform the duty of evaluating assistant coaches.

Finally, the Association avers that the parties’ bargaining history supports their position in this case. In support of this premise, it notes that the District has tried unsuccessfully in the last three rounds of bargaining to change the existing language of Articles V and XIII (which,

as has been previously noted, deals with the filling of extra-curricular positions). The Association argues that since the District has not been successful at the bargaining table in changing that contract language, it should not be successful in getting it through arbitration.

In conclusion then, the Association argues that since the District failed to give Schneider the head coach position, it violated the contract. In order to remedy this alleged contractual breach, the Association asks that the grievant be made Girls' Varsity Head Coach for the 1998-99 basketball season and made whole financially by paying him \$959 which is the difference in pay between the Girls' Varsity Head Coach and the Girls' JV Head Coach positions.

District

The District contends it did not violate the labor agreement when it did not select the grievant as the Girls' Varsity Head Basketball Coach. It makes the following arguments to support this contention.

The District notes at the outset that one of the duties of a head coach is to evaluate assistant coaches. It notes that this job duty is specified on pages 6 and 7 of the Coaches' Handbook (Item 3) which it characterizes as the "job description" for a head coach. It also notes that Schneider was aware that this was a job duty for a head coach. Additionally, the District characterizes this particular job duty as an essential part of the job.

Second, the District stresses that Schneider had previously made his opinion known to both Board members and District staff that he disagreed with this job duty (i.e. head coaches evaluating assistant coaches). It also notes in this regard that he repeated his opposition to this evaluation process when he responded in writing to his evaluation in March, 1997.

Third, given Schneider's prior outspoken position on the evaluation process, the District asserts that at his interview he had "some responsibility to clarify the confusion he may have caused." According to the District, he failed to do so. It notes in this regard that during the interview, Schneider did not reverse his position or indicate any change whatsoever from his position (on evaluating assistant coaches). Instead, he told the interviewers that he had not changed his position and that someone else should do the evaluations (i.e. either Natynski or Strebel). The District asks rhetorically what were the interviewers supposed to do at that point: "Get down on [their] knees and beg Schneider to evaluate coaches?" The District submits that "sometimes a person says something so clearly that the interviewers need ask no further questions when deciding the person's qualifications for the job." According to the District, that was the situation here because the grievant told the interviewers he was unwilling to evaluate assistant coaches. The District acknowledges that at the subsequent

Board hearing and arbitration hearing, Schneider indicated he was willing to do evaluations. It points out that during the interview however, Schneider said nothing which would lead the interviewers to believe that he would do evaluations. As the District sees it, Schneider “blew it by not telling the interview team” (he would do evaluations). The District maintains that the interviewers did not have the power to read Schneider’s mind. The District avers that since the interviewers were aware of Schneider’s negative position toward evaluating assistant coaches, it was up to Schneider to tell them during the interview that he was now willing to perform evaluations. In the District’s view, the interviewers did not have to ask Schneider whether he would evaluate his assistants because, if it did, it would be asking different questions of Schneider than it asked of the other candidates.

Fourth, the District argues that since the grievant had repeatedly stated that he was opposed to the District’s evaluation process, and that he would not perform that duty and evaluate assistant coaches, the grievant was “unqualified” for the head coach position. In support of this premise, the District stresses again that the grievant stated in the interview that someone else should be doing the evaluations. In the District’s opinion, this was reason enough for disqualifying him.

Fifth, the District contends that since it has the right to set qualifications, its determination that the grievant was unqualified must be upheld by the arbitrator. The District argues that its decision to find the grievant unqualified has not been shown by the Association to be arbitrary, capricious, discriminatory or unreasonable. It also avers that its decision to hire Bruce for the position was not part of a predetermined plan to hire Bruce over the grievant.

Sixth, the District tries to distinguish the Fochesato case from the instant case. As the District sees it, the Fochesato case can be distinguished from this one on the grounds that in that case, Head Coach Kopp was willing to do the task (scouting) that Fochesato was unwilling to perform. Here, though, if the head coach would not evaluate assistant coaches, the Athletic Director would have to do so.

Next, the District addresses the Association’s past practice argument. In doing so, the District acknowledges that prior to the situation herein, internal applicants who applied for extra-curricular positions received them. The District asserts that in each of those situations however, the employe was found by the District to be qualified for the position. Thus, none of the internal applicants who were previously chosen for extra-curricular positions were found by the District to be unqualified. In this case though, the District argues that the internal applicant (Schneider) is unqualified for the position. That being so, the District submits that its decision to not give the job to Schneider is not inconsistent with any practice because Schneider is not qualified for the position. In making this argument, the District calls attention to a recent situation involving the filling of a teaching position. In that case the internal

applicant (Patsey Bovin) was found by the District to be unqualified. The District notes that the Association did not grieve the District's decision therein. The District alleges that given the foregoing, the Association's past practice argument fails.

Next, the District comments on when the grievance was filed. The District maintains that if the Association truly believed that internal (teacher) applicants are automatically entitled to job openings, then it would have grieved the District's actions when the District decided to post the position externally. It notes that did not happen.

Finally, the District comments on the process which it used to fill the position here (i.e. interviewing all the candidates [both internal and external applicants] and using a standard set of interview questions.) It avers that since the grievance does not specifically challenge either the District's decision to interview all the candidates or the District's use of a standard set of interview questions, the Association is conceding that the foregoing do not violate the contract. The District submits that were it otherwise, the Association would have grieved same.

Based on the above, the District asks the arbitrator to uphold the District's determination that Schneider was unqualified for the position and dismiss the grievance.

DISCUSSION

At issue here is whether the District complied with the labor agreement or violated same when it did not select the grievant as the Girls' Varsity Head Basketball Coach. The Association contends the District violated both past practice and the contract by selecting someone other than the grievant for that position. The District disputes those assertions.

A. Structure of the Discussion

In contract interpretation cases such as this, I normally focus attention first on the contract language and then, if necessary, on the evidence external to the agreement such as an alleged past practice. In this case though, I have decided to structure the discussion so that this normal order is reversed. Thus, I will address the alleged past practice before looking at the contract language. My reason for doing so is this: if I address the contract language first and find it to be clear and unambiguous, there would be no need to look at any evidence external to the agreement (i.e. an alleged past practice) for guidance in resolving this contract dispute. Were this to happen, the case could be decided without any reference whatsoever to the alleged past practice. The problem with this approach is that the Association sees this case, in part, as a past practice case. Thus, if I were to decide this case without reviewing the alleged past practice, I would not have addressed one of the Association's main contentions. I have therefore decided to use this unique structural format and review the Association's past practice contention in order to complete the record.

Any matter not addressed in the discussion which follows has been deemed to lack sufficient merit to warrant individual attention.

B. Past Practice

Past practice is a form of evidence which is sometimes used or applied to clarify ambiguous contract language. The rationale underlying its use is that the manner in which the parties have carried out the terms of their agreement in the past is indicative of the interpretation that should be given to the contract. Said another way, the actual practice under an agreement may yield reliable evidence of what a particular provision means. In order to be binding on both sides, an alleged past practice must be the mutually understood and accepted way of doing things over an extended period of time. Additionally, it must be understood by the parties that there is an obligation to continue doing things this way in the future.

For purposes of this discussion, it is assumed that the practice is as claimed by the Association, namely that bargaining unit employees get the extra-curricular positions they apply for; if there are no internal applicants, then the District goes outside the unit to fill the position. In other words, internal applicants who applied for extra-curricular positions received them and non-unit members are only considered if there are no internal applicants. The Association contends the District violated this practice because it did not award the extra-curricular position in question to the internal applicant.

There is a problem however with applying just the above-noted practice here. The problem is this: the practice presents an incomplete picture. What is missing from that picture is what role, if any, qualifications have in filling extra-curricular positions. The contract language completes the picture by specifically addressing that point. While the contract language dealing with the filling of extra-curricular positions has yet to be reviewed, suffice it to say here that the contract language requires that the person who fills the position must be qualified. Were I to ignore this contract requirement and apply just the above-noted practice, this would in effect nullify express contract language.

That said, the undersigned is persuaded that the practice and the contract language can still be reconciled. The following shows how. For background purposes, it is again noted that the practice is that unit employees get the extra-curricular positions they apply for; if there are no internal applicants, then the District goes outside the unit to fill the position. Again for background purposes, it is also noted that the contract language provides that the person who fills a position must be qualified. When the practice and the contract language are applied together, the result is this: unit employees get the extra-curricular positions they apply for so long as they are found to be qualified.

In all previous instances where an internal applicant applied for an extra-curricular position, the District found the applicant to be qualified. The Association contends this history establishes that all internal applicants are automatically considered qualified for the extra-curricular positions they apply for. I disagree. In my view, the Association reads too much into the fact that the District has found all previous internal applicants qualified. Each case is factual specific. Just because the District has found all previous internal applicants qualified for the extra curricular positions they applied for does not mean that the District has waived or surrendered its right to decide whether a given candidate is qualified. The District still has the right to make that call. That being so, the fact that the District's decision in this case differs from previous cases proves nothing.

As just noted, what makes this case unique from previous cases where the District filled extra-curricular positions is that the District has never previously found an internal unit applicant unqualified for an extra-curricular position. While there has been one instance where the District found an internal unit applicant unqualified for a teaching position (i.e. Patsey Bovin), this case involves an extra-curricular position, not a teaching position. Thus, this is the first time there has been an issue about whether an internal unit applicant is qualified for an extra-curricular position. Attention is now turned to making that call.

C. Contract Language

The contract language applicable here is Article XIII (which is entitled "Teaching/Extra-Curricular and Reassignment"), Section B. It provides in part:

No openings shall be filled by persons not currently District teachers if a qualified current teacher desires and applies for the position; providing, however, that a qualified teacher is available to fill the vacancy created by such reassignment.

My analysis of this language begins with the following overview. This sentence specifies how teaching and extra-curricular positions will be filled. Specifically, it provides that open positions cannot be filled by non-unit members if a qualified current teacher applies for the job. Thus, if a "qualified" internal applicant (i.e. a "District teacher") applies for an extra-curricular position, they get it. Having identified what the language says, the focus turns to what it does not say. First, this language does not bar the selection of an outside applicant merely because a member of the bargaining unit seeks the extra-curricular position in question. To the contrary, this language gives the District the right to go outside the unit if it is determined that there were no qualified internal applicants. Second, this language does not guarantee that internal applicants will always get the extra-curricular positions they apply for or that they are automatically entitled to same. Had the parties intended that even an unqualified internal applicant would be guaranteed or automatically entitled to an extra-

curricular position before outsiders were considered, they could have said so. They did not. Third, this language does not say that the internal applicants must be the most qualified or more qualified than the outside applicants. Instead, it simply states that the internal applicant needs to be qualified. Fourth, the language does not say how determinations of qualifications are made. Thus, it is silent concerning same.

The focus now turns to the final point made in the preceding paragraph. It is a well-established contractual principle that when a contract is silent as to how determinations of qualifications are made, an employer has the inherent management right to determine qualifications and decide which applicants meet those qualifications so long as its decision is not arbitrary, capricious or unreasonable. Lest there be any question about it, it is specifically noted that the Management Rights clause gives the District the right to determine qualifications (Article IV, 9).

D. The District's Determination That The Grievant Was Not Qualified

As has previously been noted, the District decided that the grievant was not qualified to be the Girls' Varsity Head Basketball Coach. It seeks to have the arbitrator uphold that decision. I decline to do so based on the following rationale.

I begin my discussion by noting at the outset that the grievant is the current Girls' JV Head Coach. The record does not show any problem, deficit in, or dissatisfaction with his performance in that job. Since he has held that job for five years, this means that management has decided for five years running that he is "qualified" within the meaning of Article XIII, B, to be the Girls' JV Coach. It is against this backdrop that the District decided the grievant was not qualified to move from being the Girls' JV Coach to the Varsity Coach.

The District's stated basis for finding the grievant unqualified for the Varsity Coach position is that the grievant was opposed to evaluating assistant coaches. The District knew the grievant was opposed to same because he had publicly told the Board that in 1995 when the Board was considering adopting the Coaches' Handbook. Additionally, the District knew that when the grievant was evaluated in his capacity as the JV Coach in 1997, he indicated in writing that he was opposed to the District's evaluation process (wherein the head coach is responsible for evaluating their assistant coaches).

Set against this backdrop, management officials wondered aloud when the grievant applied for the job whether he would be able to evaluate his assistant coaches if he became the head coach. In my view, these concerns were understandable because any employer has the right to expect that job applicants will perform the duties which are assigned to a job. The District decided several years ago that one duty of a head coach is to evaluate their assistant coaches. Such was their right. For the purpose of this decision, it does not matter whether

this particular duty is characterized as an essential duty of the job, a minor duty, or something in between. All that matters here is that evaluating assistant coaches is a duty that a head coach must perform. Having made that decision, the District has the right to expect that whoever is head coach will perform that duty and evaluate their assistant coaches.

At the grievant's interview, the District had the opportunity to address their concerns about whether the grievant would evaluate his assistant coaches. This happened in the grievant's interview when the focus shifted from evaluating the basketball program to evaluating assistant coaches. Had the interviewers asked the grievant straight out during his interview if he would evaluate his assistant coaches, and he responded that he would not, then that particular answer would have indeed disqualified him from consideration for the position because that response indicates he would not perform one duty of the job (i.e. evaluating assistant coaches). However, that is not what happened. Specifically, the grievant was not asked straight out if he would evaluate his assistant coaches, and he never said that he was refusing to evaluate them either. Instead, the grievant was asked during the interview if he still "believed" that the head coach should not evaluate the assistant coaches. That was the wrong question to ask because it does not matter what the grievant "believed". What is critical is what the grievant would *do* about his beliefs. Simply put, would he evaluate assistant coaches or not? If he would evaluate his assistant coaches, it does not matter what his personal philosophy is concerning same. The District acknowledges this point in their reply brief on page 14 when it states "the key factor here is that Schneider could have qualified himself by merely stating he would follow the evaluation process set forth in the coaches' manual." In other words, all he had to do to be "qualified" was say "I don't believe in evaluating assistant coaches, but I will do it anyhow." If that was so, and what this case really boils down to is the grievant's failure to say those magic words during the interview, then either the interviewers should have asked that question directly or the grievant should have affirmatively told the interviewers that he would do evaluations.

Both sides point the finger of blame at the other for what was left unsaid at the interview concerning evaluating assistant coaches. The Association contends that the interviewers should have asked the grievant straight-out if he would evaluate his assistant coaches, while the District contends it was up to the grievant to tell the interviewers that he was now willing to perform evaluations. I find that since the District was the side running the interview, it was also the side responsible for asking that particular question. Thus, the District's interviewers should have asked the grievant straight out during the interview if he would evaluate his assistant coaches. In so finding, the undersigned has considered the District's contention that the reason it did not have to ask the grievant that question was because if it had, it would have been asking a question of Schneider that was not asked of the other candidates. I find this contention unpersuasive because none of the other candidates were asked about evaluating assistant coaches – only the grievant was. Having opened the door and asked him (and only him) about evaluating assistant coaches, the District then

became obligated to ask him the proverbial \$64,000 question: whether he would evaluate his assistant coaches.

The Association surmises that the reason the grievant was not asked this question directly was because the District did not want to run the risk of the grievant responding to this question in the affirmative. That is certainly what happened later because the grievant testified at both the Board hearing and the arbitration hearing that he would evaluate his assistant coaches. The District argues that it does not matter that the grievant later said those magic words at the Board hearing and arbitration hearing because he did not say them at the interview. I disagree. In my view, what is important is that the District ultimately got the assurance it says it was looking for (i.e. that if the grievant was head coach he would evaluate his assistant coaches) even though that assurance was not given at the interview. Since the District's stated basis for finding the grievant unqualified to be head coach is that he was opposed to evaluating assistant coaches, and the grievant ultimately gave the District his assurance that he would indeed evaluate his assistant coaches, the District's stated basis for finding the grievant unqualified does not pass muster.

The undersigned also finds that the District applied a double standard to the grievant. The following shows why. This is not the first time the District faced a situation where an internal applicant for a coaching position was opposed to performing a duty which had been assigned to a coaching position. This also happened in the Fochesato case. In that case, not only was the employe opposed to doing the duty, he expressly refused to perform it. The District gave him the coaching job anyway. In doing so, the District obviously overlooked not only the employe's opposition to doing the duty, but also his expressed refusal to perform it. Here, though, the District would not do so for the grievant, even though he, unlike Fochesato, never expressly refused to perform the duty.

Given the above, it is concluded that the grievant was qualified for the Varsity Girls' Head Basketball Coach position within the meaning of Article XIII, B. He therefore should have been awarded the position. Since he was not, the District violated the contract when it did not award him that extra-curricular position.

Based on the foregoing and the record as a whole, the undersigned makes the following

AWARD

1. That the grievant is qualified for the Varsity Girls' Head Basketball Coach position;
2. That the District violated the collective bargaining agreement when it did not award the grievant that extra-curricular position; and

3. That in order to remedy this contract violation, the District is directed to make the grievant the Varsity Girls' Head Basketball Coach and make him whole financially.

Dated at Madison, Wisconsin this 20th day of October, 1998.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

REJ/gjc
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