BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NEW HOLSTEIN EDUCATION ASSOCIATION

and

NEW HOLSTEIN SCHOOL DISTRICT

Case 23
No. 56603
MA-10346

Appearances:

Mr. James Carlson, UniServ Director, Kettle Moraine UniServ Council, N7778 Rangeline Road, Sheboygan, Wisconsin 53083, appearing on behalf of the Association.

Davis & Kuelthau, S.C., by **Attorney Paul C. Hemmer** and **Attorney Shawn D. Guse**, 605 North Eighth Street, Sheboygan, Wisconsin 53082-1287, appearing on behalf of the District.

ARBITRATION AWARD

New Holstein Education Association (hereinafter referred to as the Association) and New Holstein School District (hereinafter referred to as the District) jointly selected Daniel Nielsen of the Wisconsin Employment Relations Commission to serve as arbitrator of a dispute concerning the termination of the varsity boys basketball coaching contract for Patrick Geigel. One of the principle issues before the parties was whether the dispute was arbitrable. They submitted the arbitrability question on stipulations. The stipulation was executed and briefs were submitted to the arbitrator. The parties submitted reply briefs, which were received by the arbitrator on October 20, 1998, whereupon the record was closed.

Now having considered the stipulations, the contract language and the record as a whole, the undersigned makes the following Award.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

STIPULATED ISSUES

IT IS HEREBY STIPULATED, by and between the New Holstein School District and the New Holstein Education Association by their respective representatives, indicated below, that the issues before the arbitrator are:

1. Does the arbitrator have jurisdiction to decide a dispute between the parties, involving renewal of the individual coaching contract of Patrick Geigel for the 1998-99 school year?

2. If the dispute is arbitrable, did the decision of the Board of Education not to renew the individual coaching contract of Patrick Geigel for the 1998-99 school year violate the collective bargaining agreement? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE I - RECOGNITION

The Board recognizes the Association as the exclusive collective bargaining representative for all full-time and regular part-time teaching personnel, including guidance counselors and librarians, employed by the District, but excluding substitute per diem teachers, office and clerical employees, the school district administrator, principals and other supervisory employees.

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ARTICLE IV - GRIEVANCE PROCEDURE

The purpose of this grievance procedure is to provide a method for quick and binding final determination of interpretation and application of the provisions under this Agreement, thus preventing the protracted continuation of misunderstandings which may arise from time to time concerning such questions. This procedure shall be the sole vehicle for such determinations.

A. DEFINITION

A grievance is defined as any dispute arising out of the interpretation or application of the written Agreement relating to wages, hours, and working

conditions as defined in the Agreement. The term "days" shall mean day other than weekends and holidays. If both parties mutually agree, a grievance may proceed when school is not in regular session.

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B. STEPS OF GRIEVANCE PROCEDURE

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FIFTH STEP

If the grievance is not satisfactorily adjusted within ten (10) days after the Board commenced discussion with the grievant and/or his/her representative, the matter shall be submitted to arbitration if requested by either party within five (5) days. When a request has been made for arbitration, a three member panel shall be established in the following manner:

> The Board and the Association shall each appoint a member to the panel and shall notify the other of its appointee to the panel within five (5) days of the receipt of the written appeal. The third member who will act as chairperson will be supplied through the Wisconsin Employment Relations Commission with the following categories of disputes identified:
>
> Class One Disputes
>
> Hearings of disputes involving discipline, non-renewal and discharge shall be chaired by an arbitrator selected from a five person panel submitted by the Wisconsin Employment Relations Commission. The employer and employee representatives shall determine by lot the order of elimination and thereafter each shall, in that order, alternately strike a name from the list and the fifth, and remaining name shall act as chairperson of the arbitration panel.
>
> Class Two Disputes
>
> Hearings of disputes regarding issues other than the above mentioned - discipline, non-renewal, and discharge - shall be chaired by an arbitrator assigned from the staff of the Wisconsin Employment Relations Commission.

Any disagreement as to which class a grievance would be processed (sic) would automatically cause it to be a Class One Dispute.

The arbitration panel shall have no authority to add to, subtract from, or modify this Agreement. The decision of the arbitration panel shall be final and binding upon the Board and the grievant. No appeal from the arbitration panel's decision shall be allowed except for causes as set froth in Section 298.10, Wisconsin Statutes.

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ARTICLE V - CONDITIONS OF EMPLOYMENT

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O. JUST CAUSE

No teacher shall be reprimanded, disciplined, non-renewed, discharged or suspended without just cause. A written notice of reasons therefor and the right to a private hearing with the Board to respond to said reasons will be given to said teacher.

The Association shall be advised of, and provided with, a copy of such written notice.

When in the judgment of the administration a condition or situation warrants, a staff member may be suspended pending action by the board.

. . .

ARTICLE VIII - EMPLOYEE BENEFITS

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I. EXTRA CURRICULAR RESIGNATION

If a teacher resigns an extra curricular activity within thirty (30) calendar days after the official end of the respective season, i.e. close of State meets, the resignation is effective immediately.

If a teacher resigns after thirty (30) calendar days and no replacement is found, the teacher will be assigned the activity one more year and then allowed to drop the activity.

If no teacher volunteers within ten (10) working days during the school term or twenty one (21) calendar days during the summer recess after a position is posted, the School Board reserves the right to hire a person outside of this contract.

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ARTICLE X - APPENDICES

A. The following appendices shall be considered a part of this contract:

1. Salary Schedule Table
2. Extra-Curricular Duties Pay Schedule
3. Athletic Director and Coaches Pay Schedule
4. Helpers at Athletic Events
5. Part-time Teacher's Salary Computation Plan

. . .

APPENDIX 3
PAY SCHEDULE FOR ATHLETIC DIRECTORS AND COACHES

POSITION	MINIMUM PAY	ANNUAL INCREMENTS
. . .		
Boys Basketball Varsity	9%	10 @ 5% of the Minimum Pay

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ARTICLE XI - TERMS OF AGREEMENT

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C. MANAGEMENT RIGHTS - It is recognized by the parties to this Agreement that the Board has, and will continue, to retain the rights and responsibilities to operate and manage the school system and its programs, facilities, properties and school related activities of its employees, except as otherwise expressly nullified by the Agreement.

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STIPULATION AND NARRATIVE STATEMENT OF BACKGROUND

IT IS FURTHER STIPULATED, THAT:

1. The Principal of the New Holstein High School, Mr. Paul Keats, established performance goals for Patrick Geigel with respect to his employment as Boys Varsity BasketbaIl coach during the 1997-98 basketball season.

2. An understanding was reached between Mr. Keats and Mr. Geigel that if Mr. Geigel satisfactorily attained the performance goals which had been established for him, his employment contract for the position of Boys Varsity Basketball Coach would be renewed.

3. The understanding between Mr. Geigel and Mr. Keats was communicated to the Board of Education of the School District at the time the understanding was reached.

4. The understanding between Mr. Geigel and Mr. Keats was known and considered by the Board of Education of the School District at the time the Board voted not to renew the coaching contract of Patrick Geigel for the 1998-99 basketball season.

5. A dispute exists between parties as to whether or not Patrick Geigel satisfactorily achieved the performance goals established for him as Boys Varsity Basketball coach for the 1997-98 basketball season.

6. There is no known collective bargaining history or past practice between the parties addressing the issues in dispute.

IT IS FURTHER STIPULATED, that attached are true and correct copies of the following original documents;

1. Individual employment contract between the New Holstein School District and Patrick Geigel, engaging Mr. Geigel to be the Boys Varsity Basketball Coach for the 1997-98 school year, signed June 11, 1997. (Exhibit A)

2. Collective Bargaining Agreement (CBA) between the New Holstein School District and the New Holstein Education Association, effective July 1, 1995 through June 30, 1997. For purposes of this proceeding, the parties stipulate that CBA is unaffected by the current bargain. (Exhibit B)

3. Letter from Paul Keats, Principal, to Patrick Geigel, dated April 22, 1997, detailing the goals and expectations for the Boys Varsity Basketball Coach for the 1997-98 season. (Exhibit C)

4. Letter from Dr. Charles Basting, School District Administrator, to Patrick Geigel, dated June 18, 1997, notifying Mr. Geigel that the Board of Education did not intend to change the format of his contract but that the contract would be customarily evaluated at the conclusion of the season. (Exhibit D)

5. Letter from Melvin Jacobson, Athletic Director, to the Board of Education recommending that Mr. Geigel continue in his coaching position. (Exhibit E)

6. Memorandum from Paul Keats, Principal, to Patrick Geigel, dated February 2, 1998, requesting Mr. Geigel to write a self-evaluation for purposes of the Board of Education's review of his contract. (Exhibit F)

7. Memorandum from Paul Keats, Principal, reviewing Mr. Geigel's coaching progress during the prior season to Dr. Charles Basting, School District Administrator, dated February 16, 1998. (Exhibit G)

8. Letter from Joe Pomrening to Paul Keats, Principal, dated February 16, 1998, recommending that Mr. Geigel continue in his coaching position. (Exhibit H)

9. Undated letter from Grant Turner reviewing Mr. Geigel's mid-season progress toward achieving the coaching goals established for 1997-98 season. (Exhibit I)

10. Self-evaluation completed by Patrick Geigel reflecting upon his progress toward achieving the coaching goals established for the 1997-98 basketball season. (Exhibit J)

11. New Holstein School District Job Description for the Assistant High School Principal.

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The grievant, Patrick Geigel, is a teacher who also has worked as the Varsity Boys Basketball Coach at New Holstein High School. At the end of the 1997 season, High School Principal Paul Keats met with the grievant to address some concerns raised by parents of the players. The two men reached agreement on five goals that would have to be met in order for

Geigel to retain his coaching position. Included were (1) creating a more positive environment, (2) improving team morale, (3) improving public relations, (4) creating a positive professional demeanor, and (5) improving instructional and coaching communication. These goals were set out in a letter from Keats to Geigel, which ended by noting:

> In summation, the issues that were expressed at the parent meeting have raised some serious concerns regarding your involvement in the basketball program. It is sincerely hoped that you can address these problems through some of the items that have been outlined above. Please understand that your progress will be monitored carefully during the upcoming season and there will be an expectation that a more positive atmosphere will be created for your players and that morale will be improved. Should you have any questions regarding these goals or their expectations, please feel free to see either myself or Mr. Jacobson. Good luck.

After this agreement was reached, Geigel was proffered the standard extra-curricular contract for coaching during the 1997-98 season, which he signed and returned:

> This is notification of a contract between you and the School District of New Holstein to be the Boys Varsity Basketball Coach for the 1997-98 school year. The pay for the period indicated is $3,351.90* to be paid in one lump sum at the end of the basketball season.
>
> Your signature below will constitute acceptance of this temporary work agreement. Further, it is agreed that because this is a temporary agreement, you waive all rights under Chapter 118.22 of the State Statutes relating to continuing contracts.
>
> Please sign both copies of this notification and return them to our office on or before June 15, 1997. A copy will be returned to you with my signature.
>
> *Will be adjusted when agreement is reached.
>
> /s/ Patrick Geigel 6-11-97
>
> /s/ Dr. Charles Basting
> School District Administrator

In February 1998, during the 1997-98 basketball season, Keats submitted a memo to the Board of Education evaluating Geigel's efforts to meet the goals set for that season. He rated Geigel's efforts in each area positively, and recommended that Geigel be retained. Keats cited evaluations completed by two other administrators, both of which opined that Geigel was successfully working to meet the goals set for him the year before. In early March, Athletic Director Melvin Jacobson sent the Board of Education a letter about Geigel, giving him an "A" for improvements over the past year, and praising his coaching for teaching students "fair play, sportsmanship, honesty, team work, and the desire to win." Jacobson closed by recommending that Geigel be retained as coach for the 1998-99 season.

Notwithstanding the positive recommendations of the administrators, the Board of Education decided to non-renew Geigel as the Boys Varsity Basketball Coach. The instant grievance was filed protesting the decision. The grievance presents two issues. The first is whether it is subject to the arbitration provisions of the collective bargaining agreement. The second is whether, assuming that the matter is arbitrable, the non-renewal decision violated the collective bargaining agreement. This Award addresses only the first of these issues.

POSITIONS OF THE PARTIES

The Initial Brief of the District

The District takes the position that the decision not to offer an individual coaching contract is not a matter subject to the grievance procedure. Arbitration is a matter of contract, and no party can be compelled to arbitrate any matter that it has not agreed to submit to arbitration. The grievance procedure obligates the parties to submit to arbitration only those matters "arising out of the interpretation or application of the written Agreement relating to wages, hours, and working conditions as defined in the Agreement." (Emphasis added). This is a narrowly drawn definition of a grievance, and it cannot be read to include general working conditions not specifically mentioned in the written agreement. The contract is completely silent as to the extension, administration and renewal of coaching contracts. The sole reference is to the pay for coaches, and no one contends that Geigel was improperly compensated for his work. Since the instant dispute does not fall within the agreed-upon definition of a grievance, it is outside of the arbitrator's jurisdiction. Accordingly it should be dismissed.

The District notes the collective bargaining agreement includes a just cause standard for non-renewing teaching contracts. By its terms, this provision is limited to the non-renewal of a teacher. While Geigel is a teacher in the District, his teaching contract is unaffected by the decision to dispense with his coaching services. Mr. Geigel equates the agreement he reached with Principal Keats with a just cause standard, and seeks to bootstrap this dispute into an Article V just cause case. This argument must be rejected. Article V speaks to reprimands,

suspensions and discharges. None of these occurred. Mr. Geigel was simply denied another fixed term contract. No misconduct is alleged, and as noted his individual teaching contract remains in effect. The Article also refers to non-renewals, but this clearly refers to non-renewals under Section 118.22. The coaching contract, by its express terms, waives the application of Section 118.22. There is a clear distinction between the substantive and procedural protections afforded a faculty member in his normal teaching duties and the very limited recourse available for the termination of a coaching contract. There is no basis in the individual coaching contract, the letter from Keats, or the collective bargaining agreement, for somehow tying the failure to extend his coaching contract to the non-renewal and arbitration clauses of the labor agreement.

In challenging the discontinuation of his coaching assignment, the grievant relies on the oral understanding he reached with Principal Keats. This was clearly an individual agreement between the teacher and the principal, reached without input from other employes, and not concerned with the rights, privileges or obligations of other employes. The Association has not contended, nor can it claim, that this agreement is a collective bargaining agreement as that term is commonly understood. Since the agreement is distinct from the labor contract, it cannot be enforced through the labor contract's grievance procedure. Even if the District is bound by this oral agreement, and even if the District somehow violated this oral agreement, Mr. Geigel's remedy cannot be found in arbitration under the labor contract.

For all of these reasons, the arbitrator must conclude that he is without jurisdiction, and should dismiss the grievance.

The Initial Brief of the Association

The Association takes the position that the dispute between Mr. Geigel and the District is arbitrable under the collective bargaining agreement, and that the arbitrator should so find and then proceed to a hearing on the merits. The familiar rule is that questions concerning arbitrability should be resolved in favor of arbitration, unless it may be said with "positive assurance" that the arbitration clause is not subject to an interpretation covering the dispute. Arbitrators and courts continue to follow this well-established rule, and the burden is on the District to prove by clear evidence that the parties never intended to arbitrate this type of dispute. They have not done so, and on the contrary, there are numerous items of proof indicating that termination of an extra-curricular contract falls within the scope of the arbitration provisions.

The first and most important item in favor of arbitration is that the District has waived any objection to arbitration. Arbitration is the final step of the grievance procedure, and anything that may be termed a grievance is therefore subject to arbitration. Mr. Geigel filed a

grievance over this matter, and the grievance was processed through the normal procedure to the final step -- arbitration. Having acknowledged the dispute as a "grievance" under the contract, the District may not now refuse to arbitrate it.

In addition to the clear waiver of any objection to arbitration, the grievance before the arbitrator clearly implicates several express terms of the collective bargaining agreement. According to the labor agreement ". . . A grievance is defined as any dispute arising out of the interpretation or application of the written Agreement relating to wages, hours, and working conditions as defined in the Agreement." The Association notes that the labor contract contains a broad just cause provision, which precludes the non-renewal of any teacher's contract unless the District can show that there was just cause. The District admits that it never sought to exclude coaching contracts from the reach of this provision and that the Association never expressly or implicitly agreed to exclude those contracts from just cause protection. Inasmuch as the just cause provision is capable of an interpretation which includes coaching non-renewals, the dispute must be found to be arbitrable.

Extra-curricular assignments are clearly matters of "wages, hours, and working conditions as defined in the Agreement." The contract specifically addresses extra-curricular assignments, by establishing pay schedules for coaches. These pay scales are calculated as percentages of the negotiated teacher salary schedule, and payment of these wages is tied to the pay dates established by the contract. The negotiated agreement permeates the assignment and administration of extra-curricular positions. By implication, the right to retain these earning opportunities should be protected by the other terms of the contract. The subject of extra-curricular assignments must be treated as having been comprehensively addressed by the collective bargaining agreement. A labor contract should be read as a coherent whole, and cannot be parsed so finely as the District suggests. Finally, the contract incorporates the concepts of performance evaluations as a working condition, and the District cannot seriously argue that the outcome of that contractual process is not subject to arbitral review.

The District entered into a clear agreement with Mr. Geigel. Mr. Geigel lived up to his responsibilities under the agreement, while the District breached that agreement. It now seeks to block his enforcement of the deal. The law is clear that arbitration is presumptively available for employment disputes of this type. The District has waived its right to object to arbitration, and even if it had not, its arguments against arbitration are plainly incorrect. As a matter of both law and equity, the District should be ordered to proceed on the merits and a hearing should be set.

The Reply Brief of the District

The District denies that it waived any objection to substantive arbitrability, representing that the appropriateness of the grievance was discussed early on in the procedure even though this is not reflected in the stipulation. Notwithstanding this omission, as a matter of law

challenges to subject matter jurisdiction cannot be waived by implication, and may be raised at any point of the proceedings. An arbitrator cannot confer jurisdiction on himself, and if the parties never agreed to arbitrate disputes over coaching non-renewals, it does not matter when that fact is first mentioned.

Contrary to the Association's claim, the District has not conceded that the parties never attempted to exclude or agreed to exclude coaching non-renewals from the arbitration clause. The parties' stipulation is that: "There is no known collective bargaining history or past practice between the parties addressing the issues in dispute." The subject has not been discussed, for the simple reason that the contract does not apply to coaching non-renewals and the Association has not previously made it an issue.

The District notes that the contract contains a Management Rights Clause, reserving to the School Board exclusive authority to act in areas not specifically addressed by the contract. The Association's suggestion that the District has a duty to negotiate a specific exclusion for coaching contracts if it doesn't want them covered by the contract is directly refuted by this provision. On the contrary, the burden is on the Association, and there is nothing to show it has even attempted to shoulder that burden.

The Association notes that the contract has a coaching pay schedule, and the District agrees. However, that proves nothing. This is not a dispute over pay. The Association does not identify any bridge between this provision and the right to arbitrate a dispute over a coaching non-renewal. The fact that one aspect of coaching is addressed in the contract does not mean that all aspects are addressed. Again, the burden is on the Association, and it has not carried it.

Finally, the District notes the recent court decision in KIMBERLY AREA SCHOOL DISTRICT ET AL. VS. SUSAN ZDANOVEC AND KIMBERLY EDUCATION ASSOCIATION, CASE NO. 98-0783 (CT. APP. DIST. III, SEPT. 15, 1998). In that case, a teacher tried to argue that the terms of a collective bargaining agreement could be applied to a separate settlement agreement between the teacher and the District. The Court held that the settlement agreement was a separate and coordinate document to the collective bargaining agreement, but it neither cited not supplemented the labor contract. While the labor agreement's arbitration provision would apply to a subsequent contract supplementing the labor agreement, it would not apply to a collateral instrument. Where the subsequent contract establishes obligations unique to one teacher, it is collateral. In this case, the coaching contract is dissimilar and distinct from the collective bargaining agreement. It does not allow for arbitration, and does not implicate any other member of the bargaining unit. Thus as a matter of law there is no linkage between the decision not to extend another coaching contract to Geigel and the just cause or arbitration provisions of the labor contract.

The Reply Brief of the Association

The Association asserts that the District misses the point of the Steelworkers Trilogy, focusing on the statement that a party cannot be compelled to arbitrate something it has not agreed to arbitrate and ignoring the Supreme Court's strong presumption in favor of arbitrability. The Association likewise dismisses the District's citation of several prior WERC decisions, noting that the arbitrator in LITTLE CHUTE (DEC. NO. 35333 (CROWLEY, 1986)) and the Examiner in BLOOMER JT. SCHOOL DISTRICT NO. 1 (DEC. NO. 16228-A (ROTHSTEIN, 8/80)) made decisions on the merits and did not address arbitrability. In point of fact, Examiner Rothstein found that the Association in BLOOMER had violated its duty of fair representation by not taking a coaching non-renewal to arbitration. The lesson of those cases, if any, is that coaching non-renewals are generally subject to arbitration on their merits. Finally, the District misstates the facts when it claims that there was merely an oral agreement between Geigel and Keats. Keats reduced their agreement to writing in his letter after the 1996-97 season, clearly stating that Geigel would retain his coaching position if he met identified goals. The District's effort to renege on that written agreement is the underlying cause of this dispute.

DISCUSSION

The issue before the arbitrator has nothing to do with whether Mr. Geigel is a good coach. If the record shows that Geigel is a great coach, that he met or exceeded every goal set for him, and that the District blatantly violated its deal with him, but the grievance procedure is closed to his claim, then the grievance must be dismissed and a remedy must be sought elsewhere. By the same token, if the record shows that he is a terrible coach, who fell far short of the goals and richly deserved to be fired, but also shows that the parties agreed to submit the question of his re-employment to arbitration, this portion of the grievance must be awarded in the Association's favor and the parties must proceed to a hearing on the merits. The issue is arbitrability, and the narrow question is: Did these parties intend to use arbitration as the forum for resolving disputes over a decision not to offer him a 1998-99 coaching contract?

Waiver

The initial question is whether the District waived objections to substantive arbitrability by failing to raise them before the arbitration step. The simple answer is "no." While there is a division of opinion among arbitrators as to whether a party may waive, or be estopped from asserting, a challenge to procedural arbitrability through silence or delay, substantive arbitrability is a far more durable objection. This is because substantive arbitrability goes to subject matter jurisdiction, and a question of subject matter jurisdiction may be raised at any

point in the proceedings. The authority of an arbitrator is solely derived from the agreement of the parties to grant him or her that authority. If the parties never agreed to give an arbitrator jurisdiction over a category of disputes, the arbitrator cannot acquire jurisdiction by bootstrapping.

Sources of Jurisdiction

There are three potential sources for arbitral jurisdiction over the re-employment decision. The principal source is the collective bargaining agreement itself. Another would be the individual coaching contract. The third would be the verbal agreement between Keats and Geigel, memorialized in the April 1997 letter. On careful review of these three, the only arguable access to arbitration is through the collective bargaining agreement.

The April 1997 letter may well be a source of substantive rights for Geigel, in that it can plausibly be read as establishing a standard for him to meet in 1997-98 and a commitment to re-employ him for the following season if he met those standards. However, as noted above, the possession of substantive rights does not automatically mean that they can be enforced before an arbitrator rather than a court. The letter from Keats says nothing about how to resolve disputes over the District's commitment. Likewise the individual coaching contract is silent on this point. Its only reference to a venue for disputes over re-employment is in the negative -- the contract specifically waives the application of Section 118.22. Under either of these documents, if Geigel were a coach hired from outside of the bargaining unit, no one could reasonably infer that he could access the grievance procedure and pursue a claim before an arbitrator. If he has a right to arbitration, it flows from his status as a teacher covered by the collective bargaining agreement.

The collective bargaining agreement allows for the filing of grievances and provides arbitration as the final step of the procedure. Not every dispute between a teacher and the District constitutes a contractual grievance. In order to qualify as a grievance within the meaning of the contract, a controversy must arise "out of the interpretation or application of the written Agreement relating to wages, hours, and working conditions as defined in the Agreement." Thus if the decision not to re-employ Geigel is properly a grievance, it must be because it implicates some written term of the labor contract.

The labor contract speaks to coaching assignments in a number of areas. Article VIII, §I defines a teacher's right to resign from extracurricular activities, the circumstance under which they may be held over in such assignments, and the District's limited right to go outside of the bargaining unit for these services. Article X, Appendix 3 specifies the compensation for coaching duties. These provisions do indicate that coaching assignments are considered bargaining unit work, but neither of them is directly implicated in this case. Geigel did not resign and there is no dispute over his pay. The most likely source of a right to contest this case before an arbitrator is found in Article V, §O:

> No teacher shall be reprimanded, disciplined, non-renewed, discharged or suspended without just cause. A written notice of reasons therefor and the right to a private hearing with the Board to respond to said reasons will be given to said teacher.

On its face this dispute could fit, more or less comfortably, under this language. The District contends that the language applies only to teaching contracts, because it refers to "No teacher" being subject to discipline or non-renewal without just cause. The Association notes that there is no express exclusion for extra-curricular contracts in the language, and that the grievant is a "teacher," which is all that the contract requires. Given the presumption of arbitrability enunciated by the courts and some arbitrators, it may be that the Association has the better of this argument. 1/ However, under the peculiar facts of this case, it is not necessary to determine whether the just cause standard extends to contracts beyond the standard teaching contract. Even if one assumes that it does, the decision to deny re-employment to Geigel cannot be made to fit into any of the categories of employer decisions regulated by the just cause standard.

1/ I would note that the creation of a strong presumption favoring arbitrability in the STEELWORKERS TRILOGY was an exercise in judicial self-restraint. The presumption exists to discourage courts of general jurisdiction from involving themselves in disputes over the meaning of labor contracts, which may require them to impermissibly delve into the merits of grievances -- matters that the parties have reserved for arbitration. Where the question of arbitrability is submitted directly to an arbitrator, there is still some presumption in favor of arbitrability, but the arbitrator has much greater latitude than a court to look closely at the substance of the contract and the underlying facts of the case, and to draw reasonable inferences relative to arbitrability.

The just cause protection of Article V covers two situations: discipline for misconduct and non-renewal based upon job performance problems. There is no suggestion of misconduct in this case, and Geigel's claim must be viewed as a challenge to a non-renewal. However, after he and Keats reached agreement on the goals for the 1997-98 season, and the promise of continued employment if the goals were met, Geigel signed a standard individual coaching contract. Included in that contract is an acknowledgment that the assignment is temporary and does not automatically renew from year to year. The individual contract expressly waives all rights under Section 118.22:

> Your signature below will constitute acceptance of this temporary work agreement. Further, it is agreed that because this is a temporary agreement, you waive all rights under Chapter 118.22 of the State Statutes relating to continuing contracts.

In the face of this clear and unequivocal waiver, it is impossible to classify the Board's failure to extend a new coaching contract a "non-renewal." There is no renewal. By the terms of the individual coaching contract, each school year is distinct and there is no continuing employment obligation once the season has ended. Instead there is a decision to offer a new contract, or not offer a new contract. If no action is taken, there is no contract at all.

This is more than merely an exercise in semantics. The difference here is between a decision to terminate a continuing employment relationship -- a non-renewal -- and a decision to initiate a new employment relationship. In the former case, the incumbent has a vested right to the job and the employer must explain why it should be allowed to terminate that right. In the latter case, there is no incumbent. There may be a class of people with claims on the opening -- by virtue of membership in the bargaining unit, or seniority, or, as may be the case here, because of a prior commitment by the District. Those claims are premised on some restriction on the Employer's right to hire, not on the just cause provision. An asserted right to claim the job by seniority over a junior teacher, or to claim the job over a non-teacher, would clearly be arbitrable, as they would be based in the collective bargaining agreement. The grievant's claim to the job is based on the oral contract and the April 1997 letter. This may be an enforceable contract between the District and him, but it is not a claim under the collective bargaining agreement. His remedy, if any, lies with the courts.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

The arbitrator does not have jurisdiction to decide a dispute between the parties, involving renewal of the individual coaching contract of Patrick Geigel for the 1998-99 school year. The grievance is denied.

Dated at Racine, Wisconsin, this 12th day of January, 1999.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

DN/mb
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