

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**FOND DU LAC SCHOOL DISTRICT**

and

**FOND DU LAC EDUCATION ASSOCIATION**

Case 54  
No. 55570  
MA-10050

*(Grievance of Dick Diener)*

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Appearances:

**Mr. Armin F. Blaufuss**, Director, WinnebagoLand UniServ, P.O. Box 1195, Fond du Lac, Wisconsin 54936-1195, appeared on behalf of the Association.

**Mr. Mark F. Vetter, Esq.**, Davis & Kuelthau, S.C., Attorneys at Law, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202-6613, appeared on behalf of the Employer.

**ARBITRATION AWARD**

On August 17, 1997, the Fond du Lac Education Association and the Fond du Lac School District requested that the Wisconsin Employment Relations Commission appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. Hearing on the matter was conducted on December 2 and 3, 1997 in Fond du Lac, Wisconsin. A transcript of the proceedings was made, and distributed by June 15, 1998. Post-hearing briefs and reply briefs were submitted, the last of which was received on September 2, 1998.

This Award addresses the discipline imposed on Dick Diener, a basketball coach, for basketball-related conduct alleged to have occurred during the off-season.

### **BACKGROUND AND FACTS**

The event giving rise to the discipline in this matter was a letter sent from Clark Koechel, the Executive Director of the Fond du Lac YMCA to Jim Steinberg, Athletic Director of the Fond du Lac School District. The letter, dated January 10, 1997, provided the following:

Dear Jim,

This is not an easy letter for me to write because of the potential impact the issue may have on the Y, the school district, and the community.

The basketball coaches from Goodrich regularly (for the past several years), have been playing basketball together with their student team members during the off season several times a week at the Y.

A short time ago, a person came to me and said that they suspected the coach's actions were not appropriate and that they had contacted the WIAA to inquire what the rules in fact were.

Jim, when someone goes to this extent, I wonder what their next move might be. As I said earlier, the consequences could be devastating for all concerned. Should someone report this infraction, I am sure investigators would have little trouble finding eyewitnesses. Knowing the individual who made the call as I do, I feel there is reason to be concerned.

The Goodrich basketball coaches have the ability to get the most out of their players, as do many of the other coaches in your system. The other coaches follow the rules and excel. It is my opinion that the basketball team could as well.

The ball is in your court now, and if you would care to discuss the issue further, I will be available.

One of the basketball coaches referred to in the Koechel letter is Dick Diener, the grievant. Diener has been head boys' varsity basketball coach at Goodrich High School since 1984-1985.

Following receipt of the letter, Steinberg indicated that he contacted Diener during the week of January 20, and asked Diener to contact the YMCA. During this conversation, Steinberg testified that he and Diener discussed the WIAA regulations regarding coaches

having contact with their players during the off-season. Diener could not recall a conversation with Steinberg relative to the matter, and indicates that following receipt of the letter in his mailbox, he spoke with Koechel and addressed Koechel's concern that basketball coaches were playing with their players. Diener advised Koechel that under WIAA rules a coach could play against his players, but not with them.

There was no follow-up discussion between Diener and Steinberg, since both men believed the matter to have been addressed.

For a period of approximately 13 years, Diener organized a summer basketball league at Goodrich High School, known as the Wednesday night league. The league was listed on a District-prepared schedule of summer activities. Community members, members of the District's varsity boys' basketball team and other area high school basketball players participated in the league. The league was known and publicized in the community. Despite a policy to the contrary, the District did not require Diener to fill out any building use forms nor to pay any building use fees. District personnel including at least one high school principal and the Athletic Director were aware of the league. Diener was not asked by any school district official to have the Wednesday night league sponsored by the recreation department. Diener believed that league was appropriately formed and operating consistently with his understanding of WIAA rules.

Coach Diener was also involved in playing basketball out of season in the fall in the "Theisen league". Steve Zimmerman, a teacher at Thiesen School, and Diener were among the adults involved in forming and organizing the "Theisen league". It appears that Zimmerman initiated pick-up basketball games at Theisen when his son was a middle-school age student. In 1995 and 1996, this activity evolved into what has been alleged to be a spring league with games played on Tuesday and Thursday nights. It appears that Zimmerman took primary responsibility for arranging use of the building. Diener and other adults, played in the league but not with his players, only against his players, which is permissible under WIAA rules. The "Theisen league" was not sponsored.

A number of adults, including Diener, played out-of-season spring basketball at the local YMCA. Adults and high school students, all members of the YMCA, organized what the Association contends to be the "Y" league. Diener, and other adults, played in the "Y" league, and the record indicates that he played against, but not with, his players. The "Y" league took place at the YMCA on a regular basis in September and October from 4 p.m. to 5:30 p.m. The "Y" league was not sponsored, or recognized as such by the YMCA. The YMCA play is the subject of Koechel's January letter.

During this same time frame, approximately January 1997, Diener first became aware that the School Board was considering a policy relating to “redshirting” which would have an impact on his youngest son, Drake. Diener and his wife had previously held back their oldest sons, Derrick and Drew, one year prior to their entering high school. Derrick and Drew, even though held back, were permitted a full four years of athletic eligibility in high school. The Board policy under consideration would have limited Drake to three years of eligibility. Drake would not have been eligible to compete during his senior year.

In February, 1997, Goodrich High School principal Michael Donnelly met with Diener and his wife. Donnelly informed the Dieners that the Board was working on a new policy that might affect the athletic eligibility of Drake. On April 17, 1997, Diener attended a Board meeting during which the policy was discussed. The policy was passed at the May 12, 1997 Board meeting.

The redshirting issue was a very public and controversial one in the community.

On February 26, 1997, Steinberg held a meeting of head coaches from the high school, which Diener attended. According to Steinberg, he indicated that any athletic activity that was to be conducted during the summer should be run through either the summer school program or through the recreational department. Diener does not recall Steinberg saying anything about recreational department sponsorship. Neither Larry Marchionda, the head varsity wrestling coach, nor Drew Mitchell, the head boys’ and girls’ soccer coach, both of whom were present at the meeting, recall any reference to the recreation department sponsorship.

On Thursday, May 22, Koechel called Steinberg, as a follow-up to the letter he had written in January. During the course of that conversation, Koechel indicated that a follow-up letter would be sent. Steinberg sent Dr. Michael Holmes, District Superintendent, and Donnelly an e-mail advising them of the phone call. His e-mail concludes with the comment, “The pot continues to boil.”

Koechel did send a follow-up letter, dated May 21, 1997 addressed to Steinberg. The letter provides as follows:

Jim,

This letter is in reference to a letter I sent to you on or about January 10, 1997 regarding the Goodrich basketball coaches playing pick-up games with active players during the off-season at the Y.

I rather expected a reply from you, and as yet have not received one. You apparently passed my letter on to the coach who did call me. He did not deny playing pick-up ball with his players, he only said that what he was doing was okay. I asked him to send me a copy of the rules, but he did not respond.

Jim, the current climate could certainly escalate into a much more serious situation if we don't respond to this issue appropriately.

In addition to a copy of the letter I sent you in January, I am also enclosing a copy of an article from the WIAA bulletin (March, 1997) which would seem to indicate that violations have taken place.

I am sending a copy of this letter to Mike Holmes for his file. Perhaps the three of us (Steinberg, Holmes, Koechel) could meet to discuss the issue.

Speaking selfishly (for the Y) we have a fair number of coach supporters in our membership as well as all the Diener families. They have been helpful on occasion and their children have been involved in many of our programs.

Public knowledge would surely result in all kinds of negative consequences for the Y as well as the school district. Somehow, our goal must be "win win" and truth must prevail.

I await your reply.

On June 2, Donnelly and Steinberg met with Koechel. During the course of the meeting, Koechel indicated that he felt that Diener believed that what he was doing was within the rules in that he did it so openly. He further indicated that there was no league in existence, the games were "drop-in and pick-up" games. He indicated that only a select group of players were allowed to play in "Dick's group". The select group consisted of members of the high school team or alumni. He indicated that most of the management and staff had observed the activity, pick-up games involving Dick and players, over the years. Koechel indicated that when the pick-up game extended to the full court and other members of the Y could not get onto the court, a talk with Dick about the complaints improved the situation. Koechel indicated that he had observed scrimmages, and had never observed anything that he could describe as "coaching" taking place. The result of this interview was reported to Dr. Holmes, District Superintendent, on June 5, 1997.

On June 10, 1997, Donnelly sent Diener the two Koechel letters, and an excerpt from a WIAA bulletin. Donnelly further advised Diener that he and Steinberg had talked with Koechel and other YMCA personnel regarding the content of the letters. These documents were sent over a cover letter, a portion of which read:

. . . We need to share with you the details of the conversations we had with YMCA personnel. Indications are that a potential violation of Wisconsin Interscholastic Athletic Association rules and regulations may have taken place. If the investigation results in a determination that a violation of WIAA rules and/or District regulations occurred, disciplinary action may result. . .

On June 11, Steinberg and Donnelly met with two other employees of the YMCA. Donnelly summarized the meeting with Don Sears, Business Manager, to include the following. Sears is reported to have indicated that there is no league play at the YMCA, that Sears directly observed Diener and players on the basketball team playing basketball in the YMCA gym, Diener on the sideline coaching the team and directing what he described as a practice, Diener playing with and against members of the basketball team during the summer of 1996, and coaching them. Donnelly summarizes the interview with Cheryl Moore, an employee of the YMCA, to include Moore's statement that there is no league play at the YMCA, but that games are of a pick-up or scrimmage format.

On June 16, Steinberg and Donnelly met with Diener, Martin C., volunteer boys' basketball coach, and Bob L., junior varsity head coach at Goodrich High School. According to Donnelly's report of the meeting C., L. and Diener all indicated that while at the YMCA they will play basketball in the same gym with players from their respective teams. When involved with play on the same court, they will not enter the game when one of our players is on the court, and will sit out of that segment of play. All three of the coaches stated that they do not play in pick-up games or scrimmages involving our players. All three coaches stated that no league play is scheduled at the YMCA, and that games are scrimmages involving a mixture of people of different ages. Mr. Diener stated that they may have been on the basketball floor when Goodrich basketball players were also present, but the coaches were on a different court."

Following the meeting with the coaches, Donnelly and Steinberg went to the YMCA to meet with Koechel and Mr. Troy Dirke. During that meeting, Koechel indicated that he seldom if ever saw high school kids sitting out of games at the YMCA. He added that Diener seldom sits out of games that he has observed. Dirke indicated that he had observed coaches playing with players from Goodrich High School.

That same day, Donnelly and Steinberg met in Donnelly's office to review what they regarded as inconsistencies in the information provided by the YMCA individuals and that from the coaches. While they were meeting, Diener arrived. Diener indicated that he felt horrible, that he had not been upfront with Donnelly and Steinberg. He advised the men that he had played on a team of adults against a team which included his players in a league at the YMCA. He also advised the men of the Theisen league and the Wednesday night league at Goodrich High School. Diener advised the men that he had participated in the formulation of

the league which had played informally at the YMCA. The YMCA league, consisting of adults and a mixture of high school and junior high school students, consisted of two teams. Diener indicated that the YMCA was not aware of the league, there were no officials involved, and the structure was maintained with no adults participating on the student team. Participants were all YMCA members.

As to the Theisen league, Donnelly reports that Diener indicated that Zimmerman had let them use the gym during evenings the past two springs. There were four teams involved with this league, formed by Diener. Adults never played on the same teams as did students. Diener testified that he indicated that Zimmerman was the prime mover in the Theisen league.

Sometime in late June, Donnelly met with Diener to discuss the format of the Wednesday night league. Diener explained the format of the league and indicated that it had been going on for 13 years.

As a result of his investigation, Donnelly concluded there was a need to contact the Wisconsin Interscholastic Athletic Association to provide a detailed report of the findings. Donnelly had contacted an official of the WIAA to discuss the YMCA and Theisen situations, and had been advised that the activities he described were in violation of WIAA rules. He was subsequently advised that it was the obligation of the District to submit a self-referral to the WIAA relating to those activities.

On June 24, 1997, Donnelly sent an inquiry to the WIAA reporting potential violations of WIAA rules. Diener was not copied on the letter. The letter reports Donnelly's findings of his investigations into the YMCA and Theisen league, and asks that it be treated as a self-referral. The letter is a lengthy description of the correspondence and the content of the various interviews conducted, including the following:

I am writing to you in regard to potential violations, by coaches of the Fond du Lac School District of Wisconsin Interscholastic Athletic Association Rules governing member schools. . .

. . .

Our interviews with the executive director and employees of the YMCA provided the following information.

1. Names of past and current players observed playing with and against members of our boys basketball coaching staff during the months of July through October of this past year and preceding years.

2. Information that no league play is offered by the Fond du Lac YMCA.
3. Detailed description of the activity observed; playing with and against members of our boys basketball team, junior high school students, and young men from the North Fond du Lac School District.
4. Information regarding the frequency and time frame within which these activities took place.
5. Names of coaches involved with the activities.

Our interviews with members of our boys basketball coaching staff and one volunteer coach provided the following information.

1. Mr. Robert L. stated that he did play basketball with and against members of our varsity boys basketball team out of season. He stated that since he is the Head Junior Varsity Coach and doesn't coach varsity players he believes he is not in violation of WIAA rules regarding out of season contact.
2. Mr. Richard Diener described two "league" situations which he formed.
  - a. Mr. Diener formed two teams to play in an informal league which he developed on his own which played at the YMCA. The activity took place without the knowledge or approval of the YMCA. Play took place during the months of September and October, according to Mr. Diener.

One of the teams consisted of current boys basketball team members from Goodrich High School, junior high school basketball team members from Fond du Lac and members of the North Fond du Lac basketball team.

The other team consisted of Mr. Diener, Mr. C. (volunteer coach), Mr. James Sebert (volunteer coach), Mr. L. (junior varsity head coach), Mr. Diener's brothers and adults from the community.



Games took place at the YMCA and didn't involve any officials, score keepers, or record of wins and losses.

- b. Mr. Diener formed an informal "league" consisting of four teams which played during two preceding spring seasons. As with the situation which took place at the YMCA, this league was not sponsored by or affiliated with any organization. It was an experience developed entirely by Mr. Diener.
- c. Three of the teams formed consisted of current boys basketball team members, junior high school basketball players and members of the North Fond du Lac basketball team.
- d. The fourth team consisted of Mr. Diener, Mr. L., Mr. Sebert, Mr. C., Mr. Diener's brothers, adults from the community and alumni.
- e. No officials were present, no record of wins or losses was kept and no league standings were developed.
- f. These games took place in a Fond du Lac Junior High School gymnasium facility. Mr. Diener stated that he believes that the "leagues" he formed do not violate WIAA rule and fall within the expectations as described in the WIAA Bulletin of March 28, 1997 regarding coaches participating against athletes in the off-season.

Two days after Donnelly submitted the letter to the WIAA, he was approached by a custodian at Goodrich High School who inquired about the basketball activities taking place on Wednesday evenings in the summer at the Goodrich High school gymnasium. Donnelly followed up the conversation to discover that the activity was not sponsored by the recreation department, nor was it a part of the summer school program. On July 1, Donnelly and Steinberg met with Diener to discuss the Wednesday night league. Donnelly reports that Diener indicated that there was in fact a league taking place on Wednesday evenings, that he had been doing this for several years, and that the league involves high school basketball players and adults mixed together in teams. The league collects fees, provides referees, keeps score, and a record of wins and losses. Following that discussion, Donnelly contacted Mr. McCormick of the WIAA and advised him of this situation. McCormick replied that the Wednesday night league was not in compliance with WIAA rules.

On July 1, 1997, Donnelly submitted a second letter to the WIAA relative to the Wednesday night league. The letter describes the structure and the composition of the Wednesday night leagues. Diener was not copied on this letter.

Diener's personal attorney, Mike Fortune, requested a meeting with District officials to discuss the summer basketball league issue, the Wednesday night league. The District had shut down the league and Diener was eager to have it going again. The meeting took place on July 10. During the course of that meeting, Diener saw for the first time Donnelly's June 24 letter. He was given a copy of the letter once the attorney for the District realized he did not have it. Diener did not at that time object to the content of the letter. However, after reading the document at home, he called Fortune and reported what he perceived to be inaccuracies and misstatements.

The following day, July 11, Fortune sent counsel for the District a letter outlining "certain misstatements of fact". Fortune's letter denies that there was any conference between Steinberg and Diener following receipt of Koechel's January 10 letter. Fortune objects to Donnelly's characterization of Koechel's letter as on behalf of the Board of Directors of the YMCA. Fortune objects to the representation of the activity taking place without the knowledge or approval of the YMCA. Fortune points out that all players who participated were members of the YMCA, so there was no need for YMCA approval. Fortune objects to the reference to Mr. Diener forming an informal league consisting of four teams. Rather, Fortune notes that the league was organized by Steve Zimmerman.

On July 17, Donnelly received a letter from the WIAA addressing the situations described in Donnelly's two submissions to that body. That letter provides the following:

Dear Mr. Donnelly:

WIAA rules prohibit basketball coaches from having coaching contact with athletes, outside the school season, that they will be coaching the following school season. We do not differentiate between varsity and junior varsity, meaning that varsity coaches cannot work with those athletes that will be on the junior varsity, in the off season, and vice-versa. We also do not differentiate between paid or non-paid coaches.

Coaches can assume a supervisory role, in an acceptable program, however, supervision does not include situations like playing basketball with athletes, etc. These provisions are spelled out in the WIAA Rules of Eligibility, Article VI, Section 2. The WIAA Board of Control, in April of 1994, approved a change in interpretation, which allows coaches to participate against their athletes in structured league competition during the off-season. Coaches

are never allowed to participate on the same team as their athletes, and can only participate against their athletes in structured league competition. The situations you have described in your letters of June 24, 1997 and July 1, 1997, represent clear violations of WIAA rules:

- 1) the "league" is not acceptable under our provisions. If the YMCA, or recreation department, had established and structured the league that would be a different matter.
- 2) the competition at your high school has apparently been conducted as a school activity because Board of Education policies for non-school use have not been followed.
- 3) all school coaches you have identified have apparently been in violation of WIAA out-of-season rules.

These are considered serious violations. The Rules of Eligibility, Article VI, Section 2,b, indicates student ineligibility for a maximum of one year. The WIAA constitution, under Article VI, Section 3, indicates penalties of:

1. Suspension of membership for not more than one year.
2. Probation for not more than one year.
3. Denial of participation in Association tournament program.
4. Denial of any area of Association services or benefits.
5. Monetary fine equal to Association expense incurred in any investigation and actual reimbursement of costs resulting from the violation.

The WIAA will have no recourse but to work within this structure of penalties in dealing with this situation. We are willing to listen to any proposal you might make relative to corrective action the school might take in lieu of WIAA-imposed sanctions. We will await your response.

On July 29, 1997, following receipt of the WIAA letter, counsel for the District submitted the essence of Mr. Fortune's letter to the WIAA and asked for reconsideration. By letter of August 4, 1997, counsel for the WIAA acknowledged receipt of that document and indicated that "the additional information set forth therein has not changed the position of the WIAA."

It appears that Diener had not seen the District's July 1 letter to the WIAA until sometime after receipt of the WIAA letter of July 17, 1997. By letter of July 28, UniServ Director Armin Blaufuss, Diener's union representative, requested, among other documents, a copy of Donnelly's July 1, 1997 letter.

On August 19, 1997, representatives of the District met with Diener and Blaufuss to discuss what was to be sent to the WIAA. Diener had an opportunity to address the June 24 and July 1 letters at that meeting. At the August 19 meeting, Diener was handed a copy of the District's already prepared proposed corrective actions letter. It was intended to be submitted to the WIAA, and included certain disciplinary action against Diener. Diener provided his side of the story, which included advising the District that the elimination of a volunteer basketball coach would be highly detrimental to the program. Following the meeting, the letter was amended to allow for one volunteer basketball coach. During the course of this meeting, Diener also indicated that there existed a "can of worms" in that several other investigations were ongoing into conduct that he regarded as more egregious than his own.

Following this meeting, on August 21, 1997, the District forwarded a letter to the WIAA proposing to take the following corrective actions:

. . .

With assurance from the WIAA that students will continue to have the opportunity to participate in WIAA programs of interscholastic competition and, further that no WIAA penalty regarding eligibility will be imposed on any students who may have been involved in the circumstances which led to the determination by the WIAA that certain rules had been violated, the school will take the following corrective actions:

. . .

. . .a formal, written reprimand citing the WIAA determination and response of July 17, 1997 will be issued to and permanently placed in the file of Varsity Basketball Coach, Mr. Richard Diener and Junior Varsity Basketball Coach, Mr. L.

Varsity Basketball Coach, Mr. Dick Diener, and Junior Varsity Basketball Coach, Mr. L. shall be immediately placed on a two-year probation with such probation extending through June 30, 1999. . .

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For the duration of the two-year probationary period referred to above . . .Basketball programs combined shall be limited to a single volunteer coach. . .

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Any further material (substantive) violations of WIAA rules; school district policies or procedures; and/or administrative directives shall result in the immediate termination of the coaching responsibilities of Mr. Diener and/or Mr. L.

Because the so-called "Classic League" was found to be in violation of WIAA rules and involved the use of school district facilities without explicit approval as required by Board of Education policy, and it is alleged that a participation or registration fee was charged, Mr. Diener shall make a full accounting regarding the receipt and dispersal of any and all funds involved in the "Wednesday Night Classic League"

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Effective immediately, any and all future "leagues" that are permissible within WIAA rules and adhere to applicable school district policies and procedures shall be established and structured through the Recreation Department.

A mandatory rules meeting for all district middle level and high school coaches to be conducted by representatives of the WIAA will be scheduled at the earliest possible time.

By letter of August 25, the WIAA accepted the District's self-imposed actions and indicated there would be no further WIAA-imposed sanctions.

On August 27, 1997, Diener was given a letter of reprimand which consisted of the various components set forth in the District's August 21 letter to the WIAA. That discipline was grieved and is the subject of this dispute.

In 1997, the school district investigated a number of school-related programs. Investigations were initiated for a variety of reasons. There appear to have been a flurry of investigations launched following the Diener matter. Of the various investigations, the

Association has identified four, occurring in the football, softball, soccer and hockey programs that it contends contrast in form and substance with the Diener investigation.

Coach Diener and his attorney made a series of allegations relating to the summer passing league (football). Those allegations were investigated and found to be essentially without merit. The District sent the WIAA two letters relative to the passing league. The first letter indicates that a sheet of passing plays (routes) is distributed and questions the propriety of that activity. The second, more complete letter sets forth the allegations made and the results of the investigation.

The WIAA responded that it felt there were no violations.

On June 30, 1997, Principal Donnelly observed softball team members practicing. He immediately talked with the coach involved and was told the activity had been approved by the Assistant Athletic Director. Donnelly immediately terminated the session. The District promptly reported the incident to the WIAA, with a description of the activity and the following comment: "My review of . . . leads me to believe that the activity described above is a violation of the rule."

It appears that the WIAA response indicated that, other than a cease and desist directive, no corrective action was warranted.

The soccer coach approached Steinberg and asked for guidance relative to an indoor soccer league he was involved with. A detailed letter was sent to the WIAA seeking directions, and if violations existed, serving as a self-referral.

It appears that the WIAA response contained two cautions, but evidenced no major concerns.

On the day hockey equipment was handed out, players were put through a conditioning test, and shown a video. When advised, Steinberg telephoned the WIAA and was advised that it appeared to be a violation.

It appears that the WIAA indicated that there was a violation, and that the appropriate sanction was loss of a day's practice. This was done.

Each of the coaches involved above had a non-disciplinary letter placed in his/her file.

### ISSUE

The Association believes the issue to be:

Has the District violated rights granted Dick Diener under Articles IV, V, VIII and IX of the Master Agreement by issuing a letter of reprimand to Dick Diener, dated August 29, 1997? If so, what is the remedy?

The District regards the issue to be:

Did the District act in an arbitrary or capricious manner when it issued the August 29, 1997 letter of reprimand to Dick Diener? If so, what is the appropriate remedy?

**RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT**

**ARTICLE IV**

**MAINTENANCE OF STANDARDS**

Nothing contained herein shall be interpreted and/or applied so as to eliminate, reduce, or otherwise detract from standards of employment existing prior to the effective date of this agreement that have a major impact on wages, hours and conditions of employment. Standards to be maintained are:

1. Those that have been in existence for a prolonged period of time.
2. Those that uniformly apply to all teachers, and
3. Those that are mandatory subjects of bargaining.

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**ARTICLE V**

**BOARD RIGHTS**

The Board, on its own behalf, and on behalf of the District, 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 the Constitution of the State of Wisconsin, and of the United States, including but without limiting the generality of the foregoing, the right:

1. To the executive management and administrative control of the school system and its properties and facilities, and the professional activities of its employees;
2. To hire all employees and, subject to the provisions of law, to determine their qualifications and the conditions of their continued employment, of their dismissal or demotion, and to promote, and transfer all such employees;
3. To establish grades and courses of instruction, including special programs, and to provide for athletic, recreational and social events for students, all as deemed necessary or advisable by the Board;
4. To decide upon the means and methods of instruction, the selection of textbooks and other teaching materials, and the use of teaching aids of every kind and nature;
5. To determine class schedules, the hours of instruction, and the duties, responsibilities, and assignments of teachers and other employees with respect thereto and with respect to administrative and non-teaching activities, and the terms and conditions of employment.

The exercise of the foregoing powers, rights, authority, duties, and responsibilities by the Board, the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this Agreement and Wisconsin Statutes; Section 111.70, and then only to the extent such specific and express terms hereof are in conformance with the Constitution and laws of the State of Wisconsin, and the Constitution and laws of the United States.

In the exercise of the Board function, the District or Administration shall not act in an arbitrary or capricious manner.



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## ARTICLE VIII

### PERSONNEL POLICIES

#### A. TEACHER CONTRACTS

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5. No teacher shall be dismissed or suspended without just cause.
6. No non-probationary teacher shall be reduced in compensation or otherwise disciplined in writing without just cause.
7. Subsections 5 and 6 shall not apply to coordinator and extracurricular positions. Removal for coordinator or extracurricular positions shall not adversely affect a teacher's continued employment as a teacher except for just cause.
8. Teachers holding coordinator or extracurricular positions shall notify the superintendent no later than June 1 of their resignation from the coordinator or extracurricular position.

NOTE: Letter of understanding stating that Subsection 7 is evaporated if District evaporates voluntary status of extracurricular duties.

It is understood that an arbitrary and capricious standard applies to teachers in Subsection 7.

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#### U. TEACHER RIGHTS

The personal life of any teacher shall not be used as criterion for evaluation provided that such would in no way affect the teaching performance of the teacher.

Nothing contained herein shall be construed to deny or to restrict any teacher such rights as the teacher has under the laws of Wisconsin and the United States or other applicable laws, decisions and negotiations. The rights granted to teachers hereunder shall be deemed to be in addition to those provided elsewhere.

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## ARTICLE IX

### FRINGES AND SALARIES

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#### B. EXTRACURRICULAR ACTIVITIES DEFINITION

An extracurricular or extra duty activity is defined as any organized student activity that must be supervised by a staff member outside the regular assigned teaching activity or day.

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Continued teaching is not conditioned on accepting extracurricular assignments.

...

### RELEVANT PROVISIONS OF THE WIAA COACHES HANDBOOK

## ARTICLE VI

### NON-SCHOOL PARTICIPATION

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#### Section 2. Out-of-season.

- A. It is the philosophy of this Association that while athletes should not be unreasonably restricted, except during the actual school season of a sport, no activity in which they are engaged should resemble in any way a school team practicing or competing out of season.
- B. A student becomes ineligible in a sport for a maximum of one year from date of last offense for participation during other than the same sports designated school season in any program which appears to be practice or competition out-of-season
  - 1. An acceptable program or activity is one which is not limited to students on the basis of a school affiliation, athletic experience, team status, etc.

- NOTE: By interpretation, a team made up of students from a given school competing outside the season, but during the school year, must include a minimum of two players that are not a part of that school's program in that sport.
2. There are no restrictions relative to voluntary assembling (without school/coach involvement) of students during the summer. (When school is not in session).
  3. The person who will be coaching a student in the following school season shall not be permitted to coach that student other than during the designated school season for that sport, except that:
    - a. baseball, cross-country, golf, gymnastics, softball, swimming and diving, tennis and track and field are exempt from this requirement during the summer, provided the program is not limited to students as described in B, 1 of this section.
    - b. This provision shall not prevent a coach from having supervisory responsibilities outside the designated season of a sport. Supervisory involvement, however, does not include situations like playing basketball with athletes, running with athletes, working out (such as wrestling activity), club team coaching (such as swimming and diving, except in summer), driving (or accompanying) student to competition or training (clinics, camps, etc.), conducting drills, running through plays, demonstrating techniques, or any other activity which could be regarded as coaching or instructing.
    - c. Coaches are allowed to use some or all of their athletes, as clinicians, when conducting a clinic for youngsters who have just completed eighth grade on down. This may be done for a maximum of six days, during the summer (when school is not in session), and must conclude no later than the last Saturday in July.

**EXCERPT FROM WIAA BULLETIN – VOL. 73 – NO. 14 (DATED 3/28/97)****Coaches Participating Against  
Athletes In The Off-Season**

WIAA rules indicate that coaches can provide supervision for athletes during the off-season, but such supervisory responsibilities do not include situations like playing basketball with athletes. This rule, and its interpretation, has prevented coaches from participating against their athletes, in structured league competition, during the off-season. The WIAA Board of Control, at their April 15, 1994 meeting approved a request by the WIAA staff for a change in interpretation. The new interpretation allows coaches to participate against their athletes in organized league competition, during the off-season. This means a volleyball coach, for example, could be participating in a volleyball league which included his/her volleyball players as members of other teams.

It continues to be a violation of WIAA rules for coaches to participate on the same team as their athletes in out-of-season play, and to be involved in playing pick-up activity with their athletes during the off-season. . .

**POSITIONS OF THE PARTIES**

The Association contends that the conduct of the Employer must be measured against an arbitrary and capricious standard. Whether or not the District satisfied that standard, contends the Association, is dependent upon the answer to a series of questions advanced: 1) Was the District's reprimand warranted given its acceptance of the Wednesday night league and WIAA's lack of a written definition of organized or structured league competitions? 2) Did the District act, once it knew of concerns, in a timely fashion? 3) Was Dick Diener afforded a fair and unbiased investigation? 4) Was Dick Diener treated in the same manner as others who violated WIAA rules?

The Association argues that the District's disciplinary action is based on a false premise, that Dick Diener played with some of his players in non-structured league competition. The Association contends that it is certain that Diener did play against his players. This play occurred in the Theisen league in the spring of 1997 and the "Y" league during the fall of 1996. At no time did Diener play with his players. Out-of-season contact between Diener and his players is governed by WIAA rules. Article VI, Section 2 of those rules govern out-of-season activities. WIAA rules do not define league competitions. Nor do they define what is meant by "structured or organized league competitions."

The Association contends that for 13 years Diener organized a summer basketball league. He did not play in the league. The Wednesday night league was held at Goodrich High School with full District knowledge. The District even published the existence of the league on its stationery and distributed it.

The Association contends that the Theisen and "Y" leagues were formed after the WIAA changed its rules to permit coaches to play against their players during out-of-season. With the District essentially endorsing the Wednesday night league for 13 years, Diener had every reason to believe that his involvement in the Theisen and "Y" leagues was appropriate. The Association points its finger at the WIAA as being at fault for not having any written definition of organized or structured league competitions. Equally at fault, contends the Association, are high school principal Mike Donnelly and Athletic Director Jim Steinberg. Had either of them taken the time to properly investigate the concerns raised by Koechel in January, this matter would likely have been resolved with Diener getting recreation department sponsorship for all three of the leagues. The record establishes that Diener has always been responsive to directives to conform to rules.

The Association contends that the District made matters much worse by not investigating Clark Koechel's January, 1997 concerns. Had either Steinberg or Donnelly followed up on Koechel's January 10 letter, it would have immediately been obvious that the "Y" league did not have appropriate sponsorship. The Theisen and Wednesday night leagues could also have been discussed. Diener could have quickly remedied the situation by gaining necessary sponsorships.

The Association speculates as to the District's motives in not following up more promptly in January. Pointing to Steinberg's "the pot continues to boil" comment on May 22, the Association infers that the "pot" is the redshirting policy and its impact on the Diener family and the community. The Association contends that there is nothing else in the record that could be so described.

The Union takes issue with the impartiality of the District's investigation. In its brief, the Association attacks the testimony and credibility of both Steinberg and Donnelly. The Association contends that the intensity of the investigation and the resolve of the administration to conclude that Diener did something wrong stands in stark contrast to the District's handling of other reported WIAA violations. The Association is critical of its view of the tone and character of the District's investigation. In the Association's eyes, the District assumed discipline to be warranted. The Association is further critical of the District's failure to provide Diener an opportunity to respond to its findings prior to sending them to the WIAA. The Association contends that the District's refusal to allow Diener the opportunity to correct inaccuracies, misstatements and incomplete statements on the June 24 and July 1 letters left the WIAA no option but to conclude that serious violations of WIAA rules occurred. The

Association offers a list of corrections to both the June 24 and July 1 letters that Diener could have, and would have, made had he been afforded the opportunity. At the conclusion of the list, the Association does acknowledge that there is no doubt that the WIAA would have concluded the activities described violated WIAA rules.

The Association notes that the WIAA expressed a willingness to listen to “any proposal” the District might make regarding self-imposed directive actions. There is nothing that indicates that the WIAA required Diener to be reprimanded.

It is the contention of the Association that the District applied a different set of rules in its conduct toward Diener. It eagerly accepted hearsay in the Diener matter, but subsequently insisted that anyone making accusations should do so in writing over his signature. The Association points to other coaches who are alleged to have committed WIAA violations and alleges that Diener was singled out from among them for purposes of discipline.

The Association attacks the letters submitted to the WIAA, claiming that they practically beg a finding of guilty. In contrast, the Association contends that the letters involving the football program appear balanced. The Association attacks the fact that Diener was not allowed an opportunity to present his case either before the submissions to the WIAA or before a determination that disciplinary action was to be considered. This is alleged to be in contrast to the treatment afforded the other coaches. The Association relies upon Article 8 a. for support of its contention that the Employer may not act in an arbitrary and capricious manner with respect to Diener’s employment as a head boy’s basketball coach. The Association also relies upon Article 4, the Maintenance of Standards clause, which assures that standards of employment will be administered uniformly, consistently and fairly.

In its reply brief, the Association acknowledges that in some cases, WIAA review of district athletic programs did not conclude that violations occurred. However, contends the Association, it is clear from the evidence that the out-of-season sponsorship by the summer school or the recreation department is required. Neither the football program nor the soccer program had such sponsorship. The Association contends it is clear that the soccer coach did not follow Board of Education policies for non-school use of facilities.

It is the position of the District that the only provisions of the Master Agreement relevant to this case are the provisions which grant the District the right to issue a reprimand so long as it is not arbitrary or capricious. In response to a lengthy list of contractual provisions alleged by the Association to have been violated, the District reviewed a number of provisions of the Agreement, and argued and concluded that none were applicable to this dispute. The District concludes that Article 5 provides that the only limitation on the District’s exercise of the rights contained therein, is that it not act in an arbitrary or capricious manner.

The District confronts the Association's contention that Mr. Diener was the victim of discipline due to events in his personal life. The contention is that Diener's filing of a lawsuit against the District regarding its policy prohibiting redshirting was the basis for his reprimand as a coach. The District contends that the only evidence in the record to substantiate that is Diener's testimony that it was his "personal feeling" that that was occurring. Diener testified that he did not believe that Donnelly or Steinberg were out to get him, but that they were being directed by people above them.

The District contends that an arbitrary and capricious standard requires only that the discipline be reasonable based upon the facts presented. The District cites arbitral authority for a number of propositions which limit the scope of review available under the arbitrary and capricious standard. The District concludes that Diener's reprimand should not be disturbed absent a showing that its imposition was unreasonable.

The District contends that it conducted a fair and objective investigation prior to issuing the letter of reprimand. The District notes that its staff engaged in a detailed and comprehensive investigation prior to the issuance of the August 29 letter of reprimand. The investigation involved meetings with 13 individuals to address the three league situations. With respect to the YMCA league, the District notes a series of meetings, including three with Diener. With respect to the Theisen league, the District notes one meeting, that with Mr. Diener. With respect to the Wednesday night league, the District notes a series of four meetings, one of which occurred with Mr. Diener. Additionally, the District notes that it met on July 10, 1997 with Diener and his attorney to review the June 24 letter to the WIAA and to obtain Mr. Diener's statements in reaction to the contents of the letter.

The District contends that the discipline it imposed was exceedingly reasonable in view of the seriousness of the offense. Following the investigation, the WIAA responded in clear and emphatic terms that the league situations described in the District's letters constituted clear violations of WIAA rules. The WIAA letter went on to list a series of very serious penalties that could be imposed against the District. It further indicated that it would have no recourse but to work within the structure of those penalties in dealing with the situation. It is in that context that the WIAA letter expressed a willingness to consider corrective action the District might take in lieu of a WIAA-imposed sanction. The District's plan falls far short of the WIAA structure of penalties, but directly addressed the source of the violations, Mr. Diener. It was Diener's actions which constituted clear violations of WIAA rules that were considered serious violations.

In its reply brief, the District notes that the investigation results contain a summary of Mr. Diener's description of the "leagues". It is the absence of formal leagues that form the core of the WIAA termination of violations.

The District notes Diener's objection to the lack of a definition of organized and structured league competition. The District dismisses that definition, noting in the context of a basketball league the terms "organized" and "structured" would certainly include no less than the use of officials, a scorekeeper and a record of wins and losses. Such a definition would also likely include a formal schedule of games, a registration procedure, a registration fee, and insurance coverage for the league organizers. There was nothing organized or structured about the league activities other than the existence of teams. The District claims that a coach with Mr. Diener's extensive basketball coaching experience should have quickly arrived at the same conclusion.

The District argues that Diener had specific knowledge that the Wednesday night league must be run through the summer school program or recreation department. It is irrelevant how long the activity existed or who knew about it, claims the District. The District relies upon the February 26 meeting where it claims that all coaches were advised that any athletic activity that was going to be conducted during the summer would have to be run through the summer school program or the recreation department.

The District notes that Diener had already violated the WIAA rules when the District received Mr. Koechel's January, 1997 letter. The District claims that the matter was not immediately pursued following Steinberg's meeting with Diener because Steinberg believed Diener was aware of the rules and would, as promised, address the situation. However, by January, 1997, Diener had already played against members of his team in the Theisen league during the spring of 1996, and the YMCA league during the fall of 1996. These two violations had already occurred when the District received Koechel's letter.

The District notes that Diener would have made 11 corrections to the District's June 24 and July 1 letters to the WIAA. The District reviews each of those proposed corrections and concludes that none were relevant to the findings of the WIAA. The District notes that the Association acknowledged that they would not have precluded the WIAA findings.

The District contends that Diener was treated the same as all other District employees who were the subject of investigations. During 1997, the administration conducted 13 investigations of its student athletic, curricular or co-curricular programs. Of those, 12 were conducted by the high school administration. The District notes that the Association identifies only four investigations in support of its argument. The District reviews those four programs. In each, the District claims the process of investigation was the same as was applied to Diener. With respect to the hockey program, a self-referral corrective action plan was submitted. That plan involved the team forfeiting a day of practice. The penalty was related to the violation and was approved by the WIAA. A memorandum summarizing the situation was placed in the hockey coach's personnel. With respect to the softball situation, the WIAA found a violation



of its rules. The WIAA did not believe the situation serious enough to warrant sanctions. The District, on its own accord, placed a memorandum in the personnel file of the individuals responsible.

With respect to the soccer program, the WIAA found only a possible violation in the soccer program, and went on to note no major concerns. In response, the District included a memorandum in the soccer coach's personnel file.

The football program also ran a Wednesday program. The WIAA concluded that there were significant differences between the basketball and the football program. The differences were such that they removed the behavior of the football program from the category of being in violation of WIAA rules.

In contrast, Mr. Diener's behavior with respect to the basketball program not only violated WIAA rules, but those violations were treated as serious violations.

### DISCUSSION

The parties in this dispute agree that the question for my decision is whether or not the District's discipline was arbitrary and/or capricious. Each of them submitted views as to what defines the "arbitrary and capricious" standard. Suffice it to say that I believe that a decision must be rational and grounded in fact to avoid the arbitrary and capricious tag. In the context of this dispute, the decision must not be pretextual.

In its post-hearing brief, the Association asks that the case be analyzed by addressing four questions which it advances. This award attempts to do that. The first question posed by the Association:

- 1) *Was the District's reprimand warranted given its acceptance of the Wednesday night league and WIAA's lack of a written definition of organized or structured league competitions?*

I believe the answer to this question to be "yes". The Wednesday night league was only one aspect of the charges confronting Coach Diener. The Wednesday night league does not stand alone. The absence of definitions of "league", "organized" or "structured league competition" is a legitimate criticism of the WIAA and its review process. If the facts here were different, it would be a legitimate concern. But with respect to at least the YMCA activities, there is not even the pretense of organization and/or structure. Additionally, Diener is not a hapless layman. Dick Diener has coached a competitive basketball program for 13 years, as of the date of discipline. The events described are not a single, chance occurrence. Coach Diener was involved with three out-of-season "leagues". Given the nature of the

activities and his position, he could have, and should have, investigated the matter. As a practical matter, Coach Diener was aware of many of the rules governing this area. He was instrumental in bringing about change relating to the WIAA rule governing playing with, versus playing against, one's players. The record also demonstrates his sensitivity to the necessity of league status to enable non-season play.

2) *Did the District act, once it knew of concerns, in a timely fashion?*

Again, I believe the answer to be "yes". My review of the record suggests that the passage of time from January through May, 1997 occurred either because the District believed that Diener had resolved the matter and/or because the District hoped it would go away. There is nothing to suggest a cynical desire to allow Diener to dig himself a deeper hole.

3) *Was Dick Diener afforded a fair and unbiased investigation?*

I believe the investigation was sufficient to satisfy an arbitrary and capricious standard. The investigation was lengthy, and involved thorough investigation and interview of witnesses. The results of the investigation were reduced to writing and preserved. There were flaws. I believe that the District should have allowed Diener to review the June 24 and July 1 letters to the WIAA prior to their submission. However, I do not believe the procedural shortcomings to be significant enough to cause the process to be fairly viewed as either arbitrary or capricious.

4) *Was Dick Diener treated in the same manner as others who violated WIAA rules?*

I believe the District proceeded using the same basic format in its investigation of all alleged Athletic Department violations. I further believe the discipline was assessed proportionate to the culpability of the individuals under investigation. My answer to question 4 is that Coach Diener was not singled out for disparate disciplinary treatment.

The Association attacks the discipline on a number of grounds. Each will be taken up and addressed individually. The Association's first contention is that Dick Diener did not play with his players in out-of-season games. The Association contends that Dick Diener did play *against* his players, a practice which is allowed by WIAA rules. Donnelly's letter of June 24<sup>th</sup> to the WIAA indicates that there were allegations that Diener played both with and against his players. Donnelly's letter goes on to indicate that Diener describes his behavior as playing on a team against his players. From the record, it appears that Donnelly accurately captured the contentions of all those he interviewed. His self-referral letter to the WIAA does not purport to reconcile the differences in those statements. The District would have this contention disregarded, arguing that the WIAA did not predicate its conclusion that violations occurred on

Diener's playing basketball with his players. I disagree. The WIAA letter is ambiguous in this regard. What is clear from the WIAA letter is that the WIAA rejected the notion that there was league play involved.

The Association argues that there is no definition of "league", "organized" or "structured". This argument is directed at the WIAA. As noted above, there is nothing to suggest any organization and/or structure in the "Y" league. In his initial interview with Donnelly and Steinberg, with other coaches present, Diener and the other coaches indicated there was no league play at the "Y". Those coaches also inferred that there was no coach participation in games where high school players were involved. In a subsequent meeting, occurring that same day, Diener returned to clear up his own misrepresentations and indicated that a league did exist at the YMCA and that he played *against* players, but not with them. At least on the surface, it would appear that the YMCA league was formed between investigatory interviews.

The Association attacks the timing of the investigation. The Association argues that had the matter been brought to a head in January, Diener could have gotten sponsorship for all three leagues and avoided controversy. While that is true for prospective activity, it is not possible for prior behavior. The overwhelming majority of conduct complained of had occurred prior to January, 1997. The Association contends that a failure to investigate the matter promptly made matters worse, and attributes this to the District's hostility to the Diener family's decision to redshirt their children. The Association points to the "pot boiling" comment found in Steinberg's e-mail.

The context in which the e-mail was created was the follow-up telephone call and letter by Koechel, whose initial action was prompted by an alleged fear that some third party would pursue and expose the matter. I suspect the "pot boiling" comment was indeed directed at the controversy surrounding the redshirting proposal, as well as the realization that the YMCA incident, and its instigator, would not go away. Koechel's letter complains of coaches playing with their basketball players at the YMCA. To credit Steinberg's testimony, he addressed the matter to Diener. Diener advised him that he had acted within the rules and would straighten the matter out with Koechel. Crediting Diener's testimony, he became aware of the letter through its being placed in his mailbox. He thereafter met with Koechel and assured him that he was in conformance with the rules. January, 1997 was the time period in which the school board was initially considering a redshirting policy. The matter was evidently controversial. Had the administration immediately launched an investigation based upon Koechel's letter, it would have set itself up to be accused of engaging in a witch hunt, particularly in the context of Diener's claim that he had acted within the rules, and straightened the matter out. It appears to me that the administration wanted to stay out of the fray.

The Association attacks the investigation as being unfair. The Association attacks the testimony and credibility of both Steinberg and Donnelly, pointing to instances of these witnesses' inability to recall certain events, or to recall them only after their memories were refreshed. I do not regard either witnesses' testimony to be incredible. There was nothing in the record sufficient to impeach either of these witnesses' testimony. To the contrary, Donnelly maintained a detailed record of his investigatory interviews. He identified individuals with quotes and specific allegations. These notes were made a part of the record and provided to the Association, which had an opportunity to examine the individuals who were investigated. Donnelly's investigation was the basis of the letters submitted to the WIAA. If that investigation was in error, or unfairly portrayed the claims made, there was ample opportunity at the hearing for that to have been pointed out.

The District sent the June 24 and July 1 letters to the WIAA with no opportunity for Diener to review them and/or to offer correction. I believe this to be a procedural flaw. I agree that Diener should have seen the substance of the allegations, and been provided an opportunity to challenge or rebut those allegations before they were sent to the WIAA. I believe that to be consistent with fundamental notions of fairness. However, I do not believe that flaw to be fatal to the discipline. The Association noted that there were several corrections it would have urged in each of the letters. However, the Association concedes that it would not have changed the decision of the WIAA. Additionally, Diener and his counsel, were subsequently provided the letters and provided an opportunity to respond with corrections. Those corrections were forwarded to the WIAA. Admittedly, the corrections were submitted *after* the WIAA acted. However, it appears that the WIAA considered the proposed corrections, and refused to modify its stance. Finally, Donnelly and Steinberg interviewed Diener as a part of the investigation. His perspectives formed a part of the submission. This is not a scenario where the grievant was left out of the evidence gathering. Rather, Diener was a key witness in the gathering of evidence that led to the submission.

The Association attacks the District's use of hearsay in this matter. The original letter cites an unnamed person as the instigator behind the complaint. The District and Diener sought the name of the individual, which was not forthcoming. The result was that the District did not act. The District's failure to launch an investigation, based upon this unidentified complainant has been attacked by the Association as inappropriate. The District acted only after Diener had ostensibly taken care of the matter and Koechel persisted. In this context, the District walked a fine line between potential allegations that it was singling Diener out for an unfriendly investigation versus protecting one of its own in the face of evidence of wrongdoing. I do not believe that there is anything in the record to suggest that the District initiated the investigation with a malicious intent.

The Association alleges disparate treatment in the application of discipline. Four instances are cited. I have reviewed all of the documents submitted relative to all of the investigations ongoing in 1997. The approach to these investigations appears common. The format of the correspondence submitted to the WIAA appears to be virtually standardized. There was self-reporting in other instances. There was pre-reporting contact with the WIAA where disclosures were made. The District appears to have divulged potentially culpable behavior in most, if not all instances. The behaviors of the parties differed. The conduct which was the object of the scrutiny was very different. With respect to the investigations noted by the Association, with the exception of Diener, the WIAA found either no violation or little concern, in contrast with its characterization of the basketball violations as constituting serious violations with substantial potential penalties.

The Association claims that the tone and tenor of the letters submitted relative to Diener invited sanctions, in contrast to the letters addressing other sports. The Diener letters are more detailed. That reflects the nature of what was described. I do not see a significant disparity in tone, tenor, or approach.

The Association complains that Diener's request that he be heard prior to the District's formulating any discipline, was rejected. That is a common courtesy. However, the District's failure to do so does not render the discipline either arbitrary or capricious. The proposed discipline was prepared before the meeting with Diener. He was given an opportunity to be heard, and an opportunity to comment. He did so, and the letter was modified, at least in one respect.

On balance, I believe that the discipline imposed was reasonably related to the conduct, and was based upon the Employer's investigation and conclusions as to the evidence. The discipline was an effort to stave off a far more consequential sanction that could have been forthcoming from the WIAA, and would have compromised the ability of students to participate in the basketball program. There is nothing in the record that suggests that the motives for the imposition of discipline were pretextual.

**AWARD**

The grievance is denied.

Dated at Madison, Wisconsin this 26th day of March, 1999.

William C. Houlihan /s/  
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William C. Houlihan, Arbitrator

