BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MENOMONEE FALLS EDUCATION ASSOCIATION

and

MENOMONEE FALLS SCHOOL DISTRICT

Case 69
No. 61367
MA-11904

(5-9-02 grievance - non-selection as head high school wrestling coach)

Appearances:

Ms. Ellen MacFarlane, Executive Director, TriWauk UniServ Council, 13805 West Burleigh Road, Brookfield, WI 53005, appearing on behalf of the Association.

von Briesen & Roper, S.C., by **Attorney James R. Korom**, P.O. Box 3262, 411 East Wisconsin Avenue, Suite 700, Milwaukee, WI 53201-3262, appearing on behalf of the District.

ARBITRATION AWARD

At the joint request of the parties, the Wisconsin Employment Relations Commission (WERC) designated the undersigned, Marshall L. Gratz, as arbitrator to hear and decide a dispute concerning the above-noted grievance under the parties' 1999-2001 Professional Agreement (Agreement) which the parties stipulated was not changed in ways material to this dispute for the 2001-2003 period.

The Arbitrator heard the dispute on September 5, 2002, at the District office in Menomonee Falls, Wisconsin. Following preparation and distribution of a transcript, the parties summed up their positions in post-hearing briefs exchanged by the Arbitrator on October 4, 2002, marking the close of the hearing.

The parties requested award issuance on or before October 15, 2002, and agreed that the Arbitrator could issue the award in a shortened form.

ISSUES

The parties authorized the Arbitrator to frame the issues for determination. The Arbitrator frames those issues as follows:

1. Did the District violate the Agreement by its selection of James McMahon in May of 2002 as Head High School Wrestling Coach?

2. If so, what shall the remedy be?

PORTIONS OF THE AGREEMENT

SECTION 1 - RECOGNITION

1.1 UNIT CLARIFICATION
Recognition: The District recognizes the . . . Association as the exclusive collective bargaining representative for all regular full time and regular part time teachers, all guidance counselors, Directors of guidance, Assistant Athletic directors, and limited term teachers. The provision of the contract shall be applicable to the employees noted above, but will be exclusive of substitute teachers, teacher aides, office and clerical employees, psychologists, psychometricians, social workers, reading consultants, Director of Reading, Area Coordinators, Administrators, Supervisors, and those employees not holding a teacher's certificate.

All jobs described and paid for under this contract are bargaining unit work. (Appendix B) Bargaining unit work shall be performed only by individuals who are members of the bargaining unit subject only to the exceptions described in this section and Section 11 (Transfers, Reassignments and Vacancies.) . . . Summer school instruction and summer curriculum work will be paid at the rate set by the contract, but are not exclusively bargaining unit work.

. . . . All members of the bargaining unit shall be issued an individual contract, the terms and conditions of which shall be subject to the provisions of the Master Contract.

. . .

1.3 DEFINITION OF EMPLOYEES
Regular Full Time Teachers: Regular full time teachers are defined as teachers who carry a regular full time teaching load as defined by this Agreement. Regular full time teachers shall be entitled to all benefits under the terms of this Agreement.

. . .

SECTION 5 -- MANAGEMENT RIGHTS CLAUSE

The District . . . retains and reserves unto itself without limitation all power, 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:

. . .

To hire all employees, and subject to the provision of law, to determine their qualifications and the conditions for their continued employment or their dismissal or demotion subject to terms of this negotiated agreement; . . .

. . .

The exercise of the foregoing powers, rights, authority, and responsibility by the district, 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 then only to the extent such specific and express terms thereof are in conformance with the Constitution and laws of the State of Wisconsin and the Constitution and laws of the United States.

. . .

SECTION 9 - GRIEVANCE PROCEDURE

9.1 PURPOSE
The grievance procedure is designed to insure adequate resolution of all questions concerning the alleged violation of employment policies and/or this Agreement, . . . but not to prevent the continuation of rapport between employees, principals, the superintendent, his staff and Board of Education.

9.2 DEFINITION
For the purpose of this Agreement a "grievance" is defined as any complaint, controversy or dispute concerning an alleged violation of this Agreement . . . .

The term "grievant" as used herein shall include any employee or employees covered by this Agreement and/or the association. The Association shall have the right to file and process grievances on its own behalf or on behalf of any

member(s) of the bargaining unit and the exercise of such right shall not be dependent upon obtaining approval or signature of any bargaining unit member affected by such grievances.

9.3 STEPS OF GRIEVANCE PROCEDURE
Grievances shall be processed as follows:

Step 1 The grievant(s) shall orally submit the grievance within ten (10) work days after the grievant(s) knew or should have know of the occurrence giving rise to the grievance to the grievant's immediate supervisor in an attempt to resolve the dispute. . . .

. . .

Section 11 - ASSIGNMENTS, TRANSFERS, REASSIGNMENTS AND VACANCIES

. . .

11.4 EXTRA-CURRICULAR
The District encourages the participation of both students and professional staff in co-curricular activities. It is the intent of the District to maintain these programs and provide enriching experiences of the highest quality. To facilitate these goals the District is desirous of staffing the co-curricular programs with highly skilled volunteers.

In the event a vacancy exists in a co-curricular position (as described in Section 13 of the contract) identified as coaching, intramural or formula pay schedules, the Board may staff those positions using the following procedure:

1. The position will be posted simultaneously for fifteen (15) school days in an appropriate location in each school and throughout the community.

2. In the event there is more than one (1) qualified volunteer from the bargaining unit for a co-curricular position, the District reserves the right to select in its sole discretion the more qualified bargaining unit member.

3. If there is only one (1) qualified volunteer from the bargaining unit and there are volunteers from outside the unit, the District may select an outside applicant it believes to be more qualified than the unit volunteer. Such unit volunteer shall be given the reason(s) for his/her rejection and may grieve the rejection. The issue to be resolved in such a grievance is whether the unit member is as qualified as the non-unit member.

4. If there are no qualified unit members or non-unit volunteers, the District may assign a qualified unit member involuntarily to that co-curricular position for up to two (2) successive years in year-long activities or up to two (2) successive seasons for seasonal athletic activities. Those employees who already have voluntarily assumed one (1) extra curricular assignment shall be exempted, during that school year, from this provision. Unit members who are assigned involuntarily and believe a more qualified volunteer from the unit was rejected may grieve that rejection.

Following the completion of an involuntary assignment to a co-curricular position covered by this Section (11.4), the unit member will be exempt from any involuntary assignment to these positions (covered in 11.4) for two (2) years. No unit member will be required to assume more than one (1) involuntary assignment at one time. In the event that a unit member is required to assume a co-curricular position involuntarily, the performance in that position shall not affect the employee's professional teaching contract with the District.

5. If the District assigns a co-curricular activity to a non-bargaining unit employee, it may maintain that same non-bargaining unit employee in that same co-curricular position for a period of up to three (3) years. It must then post the position and fill it under the other provisions of this section. This section shall apply only to co-curricular positions and not to instructional support assignments.

SECTION 13 - PAY SCHEDULE

. . .

13.8 FAIR SHARE

A. All employees in the bargaining unit shall be required to pay, as provided in this Article, their fair share of the costs of representation by the Association. No employee shall be required to join the Association, but membership in the Association shall be available to all employees who apply, consistent with the constitution and by-laws of the Association.

B. The District shall deduct in equal installments from the monthly earnings of all employees in the collective bargaining unit, except exempt employees [Association members paying dues by dues deduction or some other manner authorized by the Association], shall pay their fair share of the cost of representation by the Association, as provided in Section 111.70(1)(f), Wis. Stats., and as certified to the District by the Association. The District shall pay said amount to the treasurer of the Association on or before the end of

> the month in which such deduction was made. The date for commencement of these deductions shall be determined by the Association; however, all employees, except exempt employees, shall be required to pay their full fair share assessment regardless of the date on which their fair share deductions commence. The District will provide the Association with a list of employees from whom deductions are made with each monthly remittance to the association.

BACKGROUND

In March of 2002, Jeff Dillman informed the District that he would not continue in his extra-curricular position of Head High School Wrestling Coach in the 2002-03 school year. The District announced a vacancy in that position internally and externally. In response to that announcement, applications were received from the following five individuals on the following dates: James McMahon (3-14-02); John Ryan (4-7-02); James Lubbad (4-10-02); Steven LeBre (4-14-02); and Mark Filter (4-24-02).

It is undisputed that Lubbad and LeBre were members of the bargaining unit at all material times and that Filter and Ryan were not bargaining unit members at any material time. McMahon's status in that regard is disputed. During the 2001-02 school year, he was employed as a teacher and coach in the Whitnall School District. On or about May 1, 2002, after applying and interviewing, McMahon was offered and accepted an individual teaching contract as a District High School science teacher for the 2002-03 school year. McMahon's signature accepting that teaching contract is dated May 1, 2002. The signatures on that contract for the Board of Education are dated May 2, 2002.

After reviewing the five Head High School Wrestling Coach applications, the District rejected Ryan's application outright and invited the remaining four applicants to interview on a date identified in the record as May 2 or shortly thereafter. The four applicants were interviewed by District Athletic Director David Petroff, High School Principal Richard Woosencraft, and Michael Burling an Assistant coach of both football and track. A fourth interviewer, parent Polly Lommel was also scheduled to participate in the interviews. However, because she arrived late, she missed the interviews of LeBre and Lubbad and participated only in the interviews of McMahon and Filter.

After completion of the four interviews, Petroff discussed the four interviewees with the three other interviewers. Petroff testified that although LeBre and Lubbad were both capable and valued assistant coaches, he ultimately concluded that of those interviewed only McMahon was qualified to be the Head High School Wrestling Coach and that McMahon would be selected for the position. Shortly thereafter, Petroff informed McMahon that he had been selected. He also informed LeBre, Lubbad and Filter that they were not selected for the position. Extra-curricular contracts for wrestling are customarily issued and signed in mid-October, so no such contract had been issued regarding the Head High School Wrestling Coach position as of the time of the hearing in this case.

The grievance giving rise to this arbitration was filed on May 9, 2002 by Association Grievance Chairperson Marsha Denny. The grievance, as more fully stated in a May 20, 2002 appeal, asserts that:

> Our position is that the individual chosen to be the Head Wrestling Coach is not a member of the bargaining unit. A person is either in the MFEA or not. All individuals mentioned in our professional agreement are members of the MFEA. We do not represent future employees. Mr. Lubbad was denied the position as Head Wrestling coach. Our contract clearly states in Section 11.4, lines 29-31, that if more than one (1) person from the bargaining unit applies for the coaching position, the District reserves the right to select the more qualified bargaining unit member. There were 2 qualified individuals that applied for this position from our bargaining unit. Therefore the more qualified of these MFEA members should be selected.
>
> According to the application submitted by Mr. Lubbad, he has 11 years of experience with the wrestling team. He has a vested interest in this program and comes highly recommended by both the current coach and parents.

The grievance was variously denied at the pre-arbitral steps of the parties' procedure. The May 15, 2002 response of the Principal and the Athletic Director asserts, in pertinent part, that

> I am denying the grievance due to the fact that the high school awarded the position to Mr. McMahon after he had already signed a contract to teach in the Menomonee Falls School District. This contract was signed before Mr. McMahon was interviewed for the head wrestling coach position. We assumed, in good faith, that a signed contract meant that Mr. McMahon was already part of the bargaining unit. We felt Mr. McMahon was the strongest candidate and have verbally named him head wrestling coach. He will sign his wrestling contract when the school year begins.

At the hearing, the Association presented testimony by LeBre and Lubbad. The District presented testimony by Denny, Petroff, Woosencraft and District Superintendent of Schools Keith Marty. Additional factual background is noted in the summaries of the parties' positions and in the discussion, below.

POSITIONS OF THE PARTIES

The Association

The District's selection of McMahon violated Agreement Sec. 11.4(2). McMahon was not a member of the bargaining unit in May of 2002 when the District selected him as Head High School Wrestling Coach because he was employed by a different school district at that time and because his individual teaching contract with the District provided only for employment by the District "commencing on or about the 27th day of August, 2002." Treating McMahon as a member of the bargaining unit before that date for purpose of Sec. 11.4 would circumvent and defeat the evident purpose of that section, which is to give a preference to bargaining unit members over non-bargaining unit members when extra-curricular selections are made.

In contrast, LeBre and Lubbad were both members of the bargaining unit in May of 2002. The evidence establishes that both of them were excellent coaches who were qualified to be the Head High School Wrestling Coach. The District's judgment that LeBre and Lubbad were not qualified was arbitrary, capricious, unreasonable and worthy of no deference. The District's selection process was procedurally flawed and unprincipled in various respects, including the facts that one of the interviewers was not present for the interviews of LeBre and Lubbad, that Petroff's note taking was inconsistent candidate to candidate, and that the District did not check the candidates' references. The qualifications the District used in making the selection were not posted and were based on Petroff's non-objective preferences rather on anything contained in the District's published head coach job description. The testimony of Petroff and Woosencraft also revealed that they improperly confused "not being the most qualified" with not being qualified for the position. The District must have considered LeBre and Lubbad minimally qualified for the position or it would have chosen not to interview them, just as it chose not to interview Ryan.

Under Sec. 11.4(2), the District was therefore required to select one of those two qualified bargaining unit applicants and was precluded from selecting the non-bargaining unit member, McMahon. By way of remedy, the Arbitrator should order the District to select whichever of the two qualified bargaining unit member candidates -- LeBre or Lubbad -- the District considers to be more qualified. The Association adds that, in its opinion, Lubbad is the more qualified of the two.

The District

The grievance should be denied in all respects. It should be denied procedurally because it is premature in that the District has not yet issued anyone a contract for the coaching position in question for the 2002-03 school year.

In any event, Sec. 11.4 provides only that "[i]n the event a vacancy exists in a co-curricular position . . . the Board may staff those positions using the following

procedure: . . ." The parties' use of the word "may" means that the District is authorized but not required by the Agreement to comply with the language of 11.4(2) relied on by the Association.

In any event, because 11.4(2) preserves bargaining unit work but not seniority-based preferences, McMahon was a bargaining unit employee for Sec. 11.4(2) purposes once he and the District entered into an individual teaching contract on May 1 and 2, 2002. Section 11.4 refers only to "bargaining unit member," not "current" bargaining unit member. McMahon will unquestionably be a bargaining unit member at the time the coaching position at issue is "staffed" as provided in Sec. 11.4, i.e., the time in the fall when an individual extra-curricular contract is issued for the position of Head High School Wrestling Coach. Moreover, from the time he and the District signed his individual teaching contract, McMahon was covered by some of the provisions of the Agreement, including the Sec. 1.1 requirement that "all members of the bargaining unit shall be issued an individual contract, the terms and conditions of which shall be subject to the provisions of the Master Contract." Section 11.4 is another of the several Agreement provisions applicable by their terms to McMahon once he and the District signed his individual teaching contract. Since McMahon was a bargaining unit member for purposes of Sec. 11.4 beginning on May 2, and since he was clearly qualified for the position, his selection did not violate Sec. 11.4(2).

Even if McMahon was not a bargaining unit member when selected as Head High School Wrestling Coach, that selection did not violate the Agreement. The evidence supports Petroff's conclusions that neither LeBre nor Lubbad was qualified for the position. The Management Rights Clause in Sec. 5, preserves the District's rights to determine qualifications subject only to limits found in the Agreement and the law. Section 11.4 contains no such limits; the District's judgments have not been shown to have been arbitrary, capricious or unreasonable; and the Arbitrator should, therefore, defer to the District's judgments as to the candidates' qualifications and not substitute his judgment for that of the District. The fact that neither LeBre nor Lubbad was qualified for the position would make Sec. 11.4(4) rather than 11.4(2) applicable, and the District's actions were entirely consistent with 11.4(4). If LeBre or Lubbad but not both are deemed qualified, the District's selection of McMahon would comply with the Agreement since in that case Sec. 11.4(3) would be applicable, and the evidence clearly establishes that neither LeBre nor Lubbad is as qualified as McMahon.

Finally, even if the Arbitrator finds that the District has violated 11.4(2), the Arbitrator would be required by the language of that provision to leave it to the District to select between LeBre and Lubbad.

DISCUSSION

The Arbitrator concludes that the grievance is not prematurely filed. The District unequivocally announced its selection of McMahon and its non-selections of LeBre and Lubbad when it informed each of those individuals of the results of their interview. That was an

exercise of the District's Sec. 11.4 functions to "staff" co-curricular positions and to "select" from among applicants for such positions. It was also an "occurrence" within the meaning of Sec. 9.3 (Step 1). To deny the grievance as premature would be inconsistent with the "adequate resolution" purpose of the grievance procedure stated in Sec. 9.1 in that it would inappropriately prevent the Association from pursuing a grievance procedure review of and remedy for an alleged violation of the Agreement at a time when all of the facts concerning the alleged violation have occurred and are relatively fresh in the minds of the participants.

The Arbitrator also concludes that the procedure set forth in Sec. 11.4(1)-(5) is a contractual mandate, and not merely a provision that the District may comply with or not in its discretion. The term "may" in the first sentence of the second paragraph of Sec. 11.4 appears to have been chosen to reflect the fact that the District is not required to fill a vacancy if it does not choose to do so. However, where, as here, the District chooses to fill a vacancy, the detailed and precisely-crafted language of the procedure set forth in 11.4(2)-(5) must be complied with.

The Arbitrator also concludes that it is appropriate to treat McMahon as a bargaining unit employee within the meaning of Sec. 11.4 in May of 2002 when the District selected him as Head High School Wrestling Coach for 2002-03. It is undisputed that McMahon's individual teacher contract was for employment "beginning on or about the 27th day of August, 2002," such that in May of 2002 he was not subject to the Agreement fair share provisions or covered by the various insurance and other fringe benefits provided for in the Agreement. However, the evidence also establishes that once he and the District entered into his individual teaching contract on May 1 and May 2, 2002, McMahon would have been: subject under Sec. 11.4(4) to being involuntarily assigned to extra curricular assignments for which no bargaining unit employee volunteered; protected by the requirement of Sec. 1.1 that the terms and conditions of his individual teaching contract be subject to the provisions of the Agreement; subject under the terms of his individual teaching contract to being required by the District pay liquidated damages if he breached his commitment to be employed by the District for the next school year; and eligible to vote in a representation election among teacher staff members employed by the District if such an election had been conducted after he entered into his individual teaching contract but before his first day of work for the District under that contract. See, e.g., ASHLAND SCHOOLS, DEC. NO. 7090-A (WERC, 5/65); APPLETON SCHOOLS, DEC. NO. 7151 (5/65); and ADAMS-FRIENDSHIP JOINT SCHOOL DISTRICT, DEC. NO. 14525-C (WERC, 8/75). Reading Sec. 11.4 as a whole and together with the parties' general objectives expressed in the second paragraph of Sec. 1.1, Sec. 11.4 persuasively appears intended to balance the Association's interest in having co-curricular work "be performed only by individuals who are members of the bargaining unit . . ." with the District's interest in "staffing the co-curricular programs with highly skilled volunteers." Treating a person in McMahon's circumstances in this case as a bargaining unit employee within the meaning of Sec. 11.4 promotes both of those interests. While Sec. 11.4 gives preference to teacher bargaining unit personnel, it does not give preference to those with a greater length of bargaining unit service. For those reasons, and because the Association has not shown that the

District hired McMahon as a teacher at an abnormally early date for such a hiring, the Arbitrator is not persuaded that the District has improperly circumvented or defeated the purpose of Sec. 11.4 in this case.

There remains the question of whether there is any other basis on which to interfere with the District's selection of McMahon. The Arbitrator concludes that there is not. That is because the Arbitrator is persuaded that McMahon is more qualified for the position than either LeBre or Lubbad. McMahon has experience as a head high school wrestling coach -- one year as a tri-head coach and one year as a sole head coach, both at Madison West High School. Neither LeBre nor Lubbad have comparable high school wrestling head coaching experience. So, assuming -- without deciding -- that LeBre, Lubbad or both were qualified to be Head High School Wrestling Coach, the selection of McMahon is nonetheless consistent with the requirements of Sec. 11.4(2).

Given that conclusion, the Arbitrator finds it unnecessary to decide whether LeBre or Lubbad were qualified to be Head High School Wrestling Coach or whether the District's interview and selection process was sufficiently flawed to eliminate any deference that might otherwise be given to District judgments regarding employee qualifications.

For all of the foregoing reasons, the Arbitrator finds it appropriate to deny the grievance in all respects.

DECISION AND AWARD

For the foregoing reasons, and based on the record as a whole, it is the decision and award of the Arbitrator on the ISSUES noted above that

1. The District did not violate the Agreement by its selection of James McMahon in May of 2002 as Head High School Wrestling Coach.

2. The subject grievance is denied in all respects, and no consideration of a remedy is necessary or appropriate.

Dated at Shorewood, Wisconsin, this 14th day of October, 2002.

Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator

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