

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

PESHTIGO EDUCATION ASSOCIATION

and

PESHTIGO SCHOOL DISTRICT

Case 40
No. 61248
MA-11863

(Schneider Grievance)

Appearances:

Mr. James A. Blank, Executive Director, United Northeast Educators, 1136 North Military Avenue, Green Bay, Wisconsin, appearing on behalf of Peshtigo Education Association and Rob Schneider.

Davis & Kuelthau, S.C. by **Mr. Dennis W. Rader**, Attorney at Law, 200 South Washington Street, Suite 401, P.O. Box 1534, Green Bay, Wisconsin appearing on behalf of the Peshtigo School District.

ARBITRATION AWARD

Peshtigo Education Association, hereinafter "Association," requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Association and the Peshtigo School District, hereinafter "District," in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot, of the Commission's staff, was designated to arbitrate the dispute. Hearings were held before the undersigned on January 7, 2003, and February 11, 2003, in Peshtigo, Wisconsin, and were transcribed. The parties submitted post-hearing briefs and reply-briefs, the last of which was received on June 10, 2003. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties agreed at hearing that there were no procedural issues in dispute, but were unable to stipulate to the substantive issues.

The Association views the issues as follows:

1. Was the termination of the Grievant's contract as varsity girls head basketball coach too severe a penalty when the Grievant informed the Administration that he had a beer in a restaurant with other adults away from students after his girls' team had won a regional basketball tournament game, and if so, what is the appropriate remedy; and

2. Was the decision to terminate the Grievant's coaching position in any way related to the Grievant's prior successful prosecution of his grievance over the administration's refusal to offer him the varsity girls head basketball coaching position in the first place, and if so, what is the appropriate remedy?

The District views the issues as follows:

Did the Peshtigo Board of Education violate the contract, specifically, Articles 12 and 14, when it terminated Mr. Rob Schneider from the girls varsity basketball coach position on May 9, 2002; and if so, what is the appropriate remedy?

After considering the record and arguments of the parties, I do not find it necessary to address the anti-union animus component of this case and therefore conclude that the issues are:

1. Whether the Peshtigo Board of Education violated the collective bargaining agreement when it terminated Mr. Robert Schneider from the Girls Varsity Basketball Coach position on May 9, 2002?

2. If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE IV

MANAGEMENT RIGHTS

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

1. The executive management and administrative control of the school system and its property and facilities and the work related activities of its employees.

. . .

5. The maintenance of discipline of students and employee control and use of the school system and facilities.

. . .

8. The enforcement of reasonable rules and regulations now in effect and to establish reasonable new rules and regulations.

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

ARTICLE XII

DISCIPLINE AND DISCHARGE

- A. It shall be the policy of the District to use progressive discipline where appropriate.
- B. No probationary teacher shall be suspended without pay, discharged, or non-renewed for arbitrary or capricious reasons.
- C. A non-probationary teacher shall not be refused employment, dismissed, suspended or discharged except for just cause. The following tests shall be used in whole or in part to determine whether just cause exists:
 1. Did the Board or designee forewarn the teacher of the possible consequences of his/her conduct?
 2. Was the rule or order involved reasonably related to proper school operations and/or performance the Board or designee might properly expect from an employee?

3. Before administering discipline, did the Board or designee make an effort to discover whether the teacher did, in fact, violate or disobey the order?
4. Was the Board's or designee's investigation conducted fairly and objectively?
5. In the investigation, did the Board or designee obtain substantial evidence or proof of the teacher's guilt?
6. Has the Board or designee applied its rules, orders and penalties even-handed to employees in like circumstances?
7. Was the degree of discipline related to the seriousness of the offense and the teacher's past record?

ARTICLE XIV

TEACHING/EXTRA CURRICULAR ASSIGNMENT AND REASSIGNMENT

. . .

D. Coaching, Cheerleading Advisor, and Department Head Positions:

. . .

There will be a two-year probationary period for newly selected coaches/cheerleading advisors/department heads who are PEA members. It is understood that at any time during this period, said employees are subject to disciplinary action consistent with provisions of the contract. Upon successful completion of the probationary period, all PEA coaches/cheerleading advisors/department heads shall come under the provisions of the contract as it pertains to disciplinary action. It is understood that all current PEA coaches/cheerleading advisors/department heads all come under these same provisions effective the day the bargaining agreement is signed by the District and the PEA.

It is understood that coaching, cheerleading advisors, and department head positions currently held by non PEA members will not be open for PEA members until such time as the District decides to make a change and post for new candidates. Posting for coaches cheerleading advisors and department heads shall be done internally and externally at the same time, if the District desires to seek outside candidates.

No external candidates for “department head” shall be selected if a qualified internal applicant has applied.

ARTICLE XX

MISCELLANEOUS

. . .

- L. Any complaint regarding a teacher made to the administrators and/or School Board by any person, shall be called to the attention of the teacher by the superintendent before any action is taken.
 - 1. Such complaint shall be referred to the teacher for a conference.
 - 2. If the conference with the complainant and the teacher fails to resolve the complaint, a conference with the complainant, teacher and building principal shall be scheduled.
 - 3. If the problem is still not resolved at the conference with the principal, a conference with the complainant, teacher, building principal and superintendent will be scheduled.
 - 4. If the complaint deals with a potential discipline matter, the referral begins at the second step with the teacher having the right to have an Association representative present.

. . .

RELEVANT DISTRICT RULES AND POLICIES

522.1

DRUG-FREE WORKPLACE

During working hours, no employee shall manufacture, distribute, dispense, possess or use alcohol or a controlled substance in any school building or on school premises; any school-owned vehicle used to transport students to and from school or school activities; or off school property during any school-sponsored activity, event or function where students are under the jurisdiction of the district.

All employees shall be expected to abide by this policy. Failure to abide by this policy shall result in disciplinary action in accordance with provisions of the current employee agreement or other procedures established by the Board.

. . .

A copy of this policy shall be distributed to all employees, published annually and posted in each building in the district. In addition, the district administrator shall annually inform employees about: (a) the dangers of alcohol and other drug abuse in the workplace; (b) the district's drug-free workplace policy; © [sic] any available alcohol and other drug counseling, rehabilitation and employee assistance programs; and (d) penalties that may be imposed upon employees for alcohol or other drug abuse violations occurring in the workplace.

. . .

CROSS REF.: Article XI, PEA Contract

. . .

APPROVED: May 8, 1991

872-Rule

PROCEDURES FOR HANDLING COMPLAINTS ABOUT SCHOOL PERSONNEL

The following procedures shall be adhered to when handling complaints about school personnel:

1. All complaints relating to a staff member's job performance shall be retained in the staff member's personnel file.
2. Complaints shall be provided to professional staff members if they are to be utilized in a subsequent nonrenewal or discharge hearing.
 - a. The administrator shall document, in writing, the fact that the professional staff member has either seen or been provided a copy of the complaint.
 - b. Individual incidents which require disciplinary action shall be documented.

- c. All documentation shall, in summary form, identify the events which occurred, the disposition/conclusion of each case and all actions taken by an administrator to correct, discipline and/or assist the deficient staff member.
- d. All documentation shall be maintained chronologically in the staff member's personnel file.

REVISED:

APPROVED: September 11, 1997

BACKGROUND AND FACTS

The Grievant, Robert P. Schneider, is a ten-year teacher of music education who divides his teaching day between the elementary school and the middle/high school. The Grievant was a veteran basketball coach with the District, five years at the junior varsity level and three years in the position of Varsity Girls Basketball Coach until his coaching contract was terminated in May 2002. Schneider's supervisor in his coaching capacity was Mr. Chad Sodini, Athletic Director/Assistant Principal at the high school.

The essential facts giving rise to this grievance are not in dispute. The Grievant, in his capacity as Girls Varsity Basketball Coach, was returning via school bus from a regional basketball game on Thursday, February 21, 2002, after his team had "come from behind" to beat their rival, the Florence high school girls basketball team. The team stopped at Dina Mia's Pizza, a Florence restaurant and bar, to eat. Upon entering the restaurant, the Grievant and volunteer assistant coach, Mr. Pat Tobin provided the players with quarters to play video games in the game room area, ordered pizzas and then the Grievant ordered two beers, one for himself and one for Tobin. The Grievant consumed part of his beer. After the players ate the pizza, the Grievant paid the bill for the pizza and soda with the District credit card and paid for the beers with cash. Players, parents and community members were present in the restaurant and observed the Grievant drinking his beer. The Grievant, Assistant Coach Julie Trzebiatowski, and Tobin, were responsible for supervision of the basketball team while at the restaurant and on the return bus ride to Peshtigo.

As a result of the basketball team's win over Florence, they played another game on Saturday, February 23, 2002, against Crandon. During the bus ride to the game, player H.M. approached Trzebiatowski and inquired as to whether Trzebiatowski would be consuming alcohol after the game. The basketball team did not win their game against Crandon and as a result, their season ended.

Six days after the incident, the Grievant approached Sodini and confessed to having consumed alcohol after the Florence regional game, explaining the situation, and characterizing his actions as “poor judgment.” Earlier that same day, two students, C.K. and H.M., went to Superintendent Mr. Kim Eparvier and informed him that the Grievant and Tobin had consumed alcohol after the Florence game. Upon receipt of the students information, Eparvier telephoned Sodini and requested that he conduct an investigation of the allegations. Sodini was aware of the incident before the Grievant informed him.

In advance of any discipline being imposed on the Grievant for the beer consumption incident, the Grievant received his 2002 evaluation from Sodini on March 5, 2002. 1/ The evaluation read as follows:

Administrative:	Outstanding	2/	Effective	Acceptable	Requires Improvement
1. Supervision of Staff			X		
2. Supervision of Facilities		X			
3. Supervision of Athletes		X			
4. Care of Equipment		X			
5. Adheres to Rules and Regulations	X				
6. Organization of Practices	X				
7. Game Management			X		
8. Eligibility Reports, Investigatories, Rosters and Pre-Post Report	X				
SKILLS:					
1. Knowledge of Fundamentals		X			
2. Presentation of Fundamentals		X			
3. WIAA Rules Knowledge	X				
4. Conditioning		X			
5. Game preparation		X			
6. Prevention and Care of Injuries	X				
PUBLIC RELATIONS					
1. Positive Communications with Media, Parents and Athletes		X			
2. Motivation of Athletes			X		
3. Community and Booster Club Programs		X			
PERSONAL QUALITIES					
1. Appearance (Neat at all times)		X			
2. Punctuality		X			
3. Cooperation	X				
4. Enthusiasm		X			
5. Attitude (Demonstrates Good Behavior)		X			
6. Game Conduct					X
7. Commitment		X			
8. Values (Exhibited and Taught)					
SELF-IMPROVEMENT					
1. Attends in-district Meetings & Clinics			X		
2. Attends rules Meetings and Out-of-District Clinics			X		
3. Keeps Updated by Reading Current Material			X		

Comments:

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

Robert P. Schneider /s/
Coach's Signature

Chad Sodini /s/
Evaluator's Signature

REBUTTAL

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

**PESHTIGO SCHOOL DISTRICT
COACHES EVALUATION**

Coach Rob Schneider, Basketball

Administrative:

Coach Schneider does a good job of supervising his staff and keeping the Athletic Director aware of any concerns. Coach is aware of concerns that were present in regards to his volunteer assistant. Coach has addressed his staff professionally regarding these concerns. Coach is conscious of any defects in facilities and equipment. Coach's supervision of athletes is excellent and understands that we cannot leave athletes unattended. Coach has kept an accurate inventory of all of his equipment. Coach has adhered to all rules and regulations of his sport and being an official understands the implementation of each rule and opportunity to succeed. Coach has given each of his coaches' specific tasks to work on in relation the game. Coach has been on time and accurate with all reports.

Skills:

Coach Schneider is very knowledgeable in the fundamentals of his sport. Coach ensures his players are fundamentally sound through the use of his coaching staff and presentation of skills. Coach is up to date on all rule changes established by the WIAA by being a licensed official. Coach conditions his athletes very well understanding that mental preparation is just as important as physical conditioning. Coach uses the athletic trainer very well and follows all guidelines set forth by our trainer.

Public Relations:

Coach Schneider understands the importance of positive public relations and takes advantage of this outlet. Coach's relationship with media ensures that the coverage is always presented in a positive manner even when there is a loss. Coach motivates his players in different ways by using both positive and negative reinforcements. Coach is also very open with the parents and welcomes conversations with them. Coach is very active in the booster club organization and has also volunteered to be on the Parent Athletic Advisory Council.

Personal Qualities:

Coach Schneider's appearance is always neat and professional. Coach is well dressed and his staff is appropriately dressed for games. Coach takes pride in representing the school and community. Coach has always been cooperative and open to communicate with myself and

community members. Coach is also aware of two concerns regarding sideline game conduct. 1) Mrs. Pearce phone call and 2) an inappropriate comment regarding "a player playing with their head up their association". Coach Schneider and I have discussed both issues and Coach is aware that his sideline conduct will need to improve. Coach's committed to the sport of basketball. Coach also understands that certain values are taught though basketball and athletics and we are currently under investigation of a separate situation.

Self-Improvement:

Coach attends all in-district meetings and clinics when they are available. Coach will attend the Girls State Tournament and has attended other meetings related to basketball. Coach attends all rules meetings and is up to date on the changes involved in his sport.

1/ The Grievant's 2001 Coach Evaluation contained six entries of "Outstanding," nine "Effective" entries and 13 entries of "Outstanding/Effective." Evaluator Sodini characterized Schneider's 2001 evaluation as "good".

2/ This column represents "x" marks entered onto the evaluation form on the vertical line that separates the "outstanding" column from the "effective" column.

Following the completion of the District's investigation, the Grievant met with Sodini, Association President Mr. Patrick Devine and High School Principal Mr. Rich Natynski on March 6 and was provided two options by the District; he could either resign his position as Varsity Basketball Coach immediately or the Administration was going to recommend termination to the District Board of Education. The Grievant was afforded 24 hours to make his decision. The Grievant requested an extension of time to make his decision because he was leaving the District the next day to attend the State girls basketball tournament. The request was denied and the Grievant did not resign the coaching position. As a result, a memorandum was issued to the Grievant which read as follows:

FROM: Rich Natynski – Principal
Chad Sodini – Athletic Director and Assistant Principal

CC: Mr. Schneider Personnel File
Mr. Eparvier

DATE: 3/7/2002

RE: Discipline regarding your admission to purchasing and consuming alcohol while in a coaching/supervisor capacity

Mr. Schneider, by our own admission and the testimony of other witnesses you purchased and consumed alcohol while on school business in our coaching/supervisory capacity on the evening of Thursday, February 21, 2002

at Dina Mia's Pizza restaurant. This was while you were acting in the capacity as the Girl's Varsity Basketball Coach supervising your athletes on an away event and in the presence of student athletes, coaches, and community members.

This occurrence is unacceptable and due to the severity of this incident Administration is making the recommendation to the Board of Education for your immediate termination of duties as Girls Varsity Basketball Coach.

At a special meeting of the District Board of Education, the Board voted to "support the recommendation of Administration that Mr. Schneider be terminated from his position as Girls' Varsity Basketball Coach based on the investigation and information presented at this hearing on May 9, 2002." In addition to the beer consumption incident, the Board of Education based the Grievant's termination on two complaints, both of which were referenced in the Grievant's 2002 evaluation.

The first complaint arose out of the Lena versus Peshtigo basketball game when the Grievant yelled for one of his players (H.M.), to "get from the far end of the court and get over here" (to the bench) after she had received a technical foul for throwing an opposing player to the floor after gaining possession of the ball. This incident came to the attention of the Grievant's supervisor, Sodini when he received a telephone call from Mrs. Shirley Pearce, a vocal member of the community, who expressed her displeasure with the Grievant's conduct. Following receipt of the telephone call, Sodini confronted the Grievant, discussed the incident and indicated to the Grievant that yelling at players/students was inappropriate. Sodini did not inform the Grievant that their conversation was disciplinary and an Association representative was not present. The District did not refer Mrs. Pearce to the District Complaint Procedure.

The second complaint followed a game in Wausaukee on or about February 9. A player (M.M.) had received numerous traveling violations and immediately after the referee called the player for another traveling violation, the Grievant directed a comment to the bench area stating to effect that the player was playing with "her head up her ass/butt." Players on the bench heard the Grievant make the comment and informed the player during halftime. The player was visibly shaken, refused to play during the second half and quit the basketball team the following Monday. Sodini was not present at the game, but was made aware of the incident by the player's father. Sodini approached the Grievant who admitted to making the comment. Sodini informed the Grievant that the comment was inappropriate, but did not indicate that the Grievant was being disciplined for the comment. An Association representative was not present during Sodini's conversation with the Grievant. The District did not utilize the District Complaint Procedure to address this complaint.

The Grievant assumed his responsibilities as Girls Varsity Basketball Coach during November, 1998, following a successful arbitral challenge to the District's decision to offer the position to a non-teaching staff member instead of the Grievant. In addition to the arbitration

decision awarding the Grievant the Girls Varsity Basketball Coach position, the Grievant and Administration have been involved in an ongoing conflict regarding the Grievant's use of the name "Peshtigo Lady Bulldog Basketball Camp" on a checking account and for a credit card. The District believed that the name causes confusion, requested that the Grievant provide a detailed history of the accounts to the District, and requested that he close the accounts. The Grievant maintained that the accounts were personal and therefore not subject to District review, although he changed the name on the accounts. The Grievant was not disciplined for either of these accounts.

On May 20, 2002, the Association filed the pending grievance alleging violations of Article XII, Discipline and Discharge; Article XIV, Section D, Teaching/Extracurricular Assignment and Reassignment; and a violation of MERA, retaliation and anti-union animus.

POSITIONS OF THE PARTIES

The District

The District argues that the dismissal of the Grievant from the Girls Varsity Basketball Coach position was justified, consistent with the principles of just cause and consistent with community expectations. There is no question that the Grievant was wrong to consume alcohol while supervising the Girls Basketball team; he admitted so. The question then is what is the consequence. The District maintains that due to the severity of the incident and the Grievant's pattern of impulsive and irresponsible actions as evidenced by the two complaints, the termination was justified.

The Board had just cause to terminate the Grievant's coaching position. The Grievant admitted to consuming alcohol while supervising student athletes. Since no other employee engaged in the same inappropriate conduct and violation of rule, an allegation of differential treatment is unsubstantiated. The Grievant's conduct was sufficiently serious to require that he be terminated; in addition to consuming alcohol during supervision, the Grievant acted inappropriately on two prior occasions during the 2001-2002 basketball season. Whether these two instances as noted in his 2002 evaluation as "improvement required" are formal discipline or not is immaterial because there is no question that he was informed his behavior needed to improve. Given that the just cause standard in this case is not the same as it would be if the Grievant's teaching contract had been terminated (a loss of \$3,052.50 and not his teacher salary), the school district and the community's enhanced desire to curb alcohol and drug usage and Schneider's direct impact on the youth of the Peshtigo community, the termination was justified.

The District has the right to hold the Grievant to a higher standard of conduct since he serves as a role model to students and the community. The Grievant failed to uphold this standard and violated the trust placed in him as a coach. Students are expected to comply with

the District's athletic code and drug-free policy and when a coach violates the policy in the presence of students following an athletic event, his breach is a serious offense warranting discharge. The District's expectations of the Grievant are representative of the community sentiments. The District applied the "role model" standard of its community that was well within its rights as articulated by Arbitrator Thomas Yaeger in SHAWNO-GRESHAM SCHOOL DISTRICT, CASE 19, NO. 53417, MA-9349 (YAEGER, 8/97).

The District reviews the line of arbitral authority that supports the proposition that arbitrators should not substitute their judgment for that of management unless the penalty imposed is excessive, unreasonable or an abuse of discretion. In as much as the employer is the most informed judge of the seriousness of the impact of the infraction, management must be afforded the prerogatives to determine the appropriate disciplinary penalty. In this instance, it is clear from the testimony of respected citizens of the community, including past teachers, the District's decision was reasonable.

With regard to the Association's assertions that anti-union animus contributed to the Board of Education's decision, the District finds the argument contrived, unsubstantiated and so lacking in merit that a specific response is unnecessary.

The Association

The Association asserts that the discipline meted out to the Grievant fails to meet three essential elements of just cause, and as such, violated the Grievant's contractual rights. The Grievant was never forewarned of the possible consequences of his actions; he was not treated in the same manner as another employee in a similar situation; and the degree of discipline was not reasonably related to the seriousness of the offense. The Association further asserts that the termination was motivated by anti-union animus.

The District did not fulfill its responsibility to forewarn the Grievant of the possible consequences of his behavior. Sodini testified that he never reviewed the District's Drug-Free Workplace Policy or the Coaches Handbook with the Grievant. The Drug-Free Workplace Policy is to be distributed to all employees and posted in each building. It was never distributed and reviewed with employees.

The District's decision to rely on the two complaint incidents as referenced in the Grievant's March 5 evaluation as reprimands in support of his termination is inconsistent with progressive discipline and is no more than an attempt to fabricate evidence to strengthen the District's case. The District has treated the Grievant disparately. When dealing with complaints alleged against Coach Komp, the District followed the Complaint Procedure and imposed two formal letters of reprimand in his personnel file. In the Grievant's case, the District failed to follow the Complaint Procedure and asserts that it imposed discipline through the Coaches' Evaluation Form. The only logical explanation for the disparity is that the

District did not find the two complaints serious enough to pursue formal discipline and it was only when it needed to justify the Grievant's termination that the complaints, although not warranted, became serious.

The Association acknowledges that some form of discipline is warranted under the circumstances, but to terminate the Grievant after he turned himself in is too severe a penalty. Numerous witnesses testified that termination was too severe. Maybe witness Mr. Carl Gullicksen, Jr. is correct in his belief that "somebody was laying for him."

The record supports that the District has engaged in a pattern of anti-union animus behavior that has been detrimental to employees that have exercised their MERA rights. Retaliation exists in the form of reassignment, degrading letters, hanging up during telephone calls and culminating with the Association President being advised by Eparvier that he should be fearful of the ramifications should Schneider win this case. Recognizing that the Union has the burden of showing that the District's action was taken in part, due to anti-union animus, this has been established due to the pattern of anti-union behavior and intimidation. In addition, during the Spring of 2001, Eparvier, in the context of another grievance, compared and referred to the Grievant's prior successful grievance and explained to the potential grievants that he would not expend \$10,000 on another grievance. There is anti-union animus present in this case in sufficient degree to that articulated in *MUSKEGO-NORWAY C.S.J.S.D. No. 9 v. WERB*, 35 Wis.2d 540 (1967) and thus the termination must be overturned.

The District Reply Brief

The Grievant knew he was wrong when drank beer while supervising students – he didn't need to see the Drug-Free Workplace Policy. Eparvier testified that the Policy was posted.

The District followed progressive discipline. At the time when it was considering what discipline to impose on the Grievant for the beer drinking incident, it reviewed the Grievant's file and prior evaluations. This is a perfectly acceptable process. The comments contained in the Grievant's 2002 evaluation put him on notice that his game conduct needed serious improvement and if it did not improve, his job would be on the line. As to the Association's argument that the District was "fabricating additional evidence" by relying on the two incidents, it is entirely unsubstantiated. The two incidents occurred; regardless of whether the Association chooses to downplay their significance. In fact, the District contractually needs only apply progressive discipline when it is appropriate and discretion is allowed.

With regard to comparing the Grievant to Komp, if Komp chose to have a beer following one of his games while supervising students, he also would have been terminated.

As to the Association' argument that the discipline was too severe, most of the Association witnesses admitted they were unaware of the two unacceptable game conduct incidents. In contrast, the District witnesses felt the drinking incident to be sufficient for termination. As to witness Gullickson, his testimony is unreliable and prejudicial.

Moving to the Association's reliance on the Grievant's confession, it was neither timely nor relevant. District witnesses testified that they did not find that the Grievant's coming forward and informing his supervisor of his lapse in judgment made any difference in their assessment of the correct level of punishment.

Finally, the District vehemently denies that any credible evidence of anti-union animus was proven at hearing and further, that it played a part in the District's decision-making process. Factually, the instances of anti-union action are neither credible nor can they be linked to the Grievant's termination. District Board of Education agendas are consistent with a decision issued by Attorney General Bronson LaFollette dated June 29, 1977, which articulated that it is at the discretion of the governmental body whether to include the name of a specific person. The Association's allegations fail to meet the criteria necessary to establish an anti-union discrimination case as articulated in LACROSSE COUNTY (HILLVIEW NURSING HOME), DEC. NO. 14704-A (WERC, 78), AFF'D DANE COUNTY CIRCUIT COURT 1980.

For all of the above reasons, the District requests that the Arbitrator dismiss the grievance in its entirety.

The Association Reply Brief

The Association focuses on the question "was the degree of discipline reasonably related to the seriousness of the offense and the Grievant's past record as a coach" and concludes that the District did not have just cause to terminate the Grievant's coaching position.

The District has failed to show it had just cause to terminate the Grievant's coaching contract. The Grievant should have received a letter of reprimand just like Komp who engaged in a similar infraction. The District's decision to terminate the Grievant's contract not only was in violation of the just cause provision, but also was the direct result of its anti-union animus. At best, it is only Sodini that believes the notations in the Grievant's evaluation are discipline yet he failed to follow the disciplinary process in the contract, did not notify the Grievant that the comments were disciplinary and did not allow the Grievant to write a rebuttal. The Association requests that the Arbitrator decide whether the two alleged incidents are disciplinary.

With regard to the Grievant's role model status, the Association does not dispute that teachers are held to a higher standard of conduct. But, these cases in which the District relies are extreme and the offenses are more serious than that of the Grievant. The Association

maintains that the Grievant did not lose respect or damage the basketball program after he drank a beer in public after the Florence basketball game, especially when the District is a supporter of the summer golf event where alcohol is consumed by adults in the presence of students that have been recruited by the District to be present.

The District's argument that the application of the industrial model of just cause is not applicable. That model is to be distinguished from that which is applied in public settings. The District, through its own actions, has caused this incident to be a public matter. Had the District followed its regular practices and not called the Grievant's situation to the attention of the press and public, it would have remained a matter in which the industrial model would apply. The District cannot benefit from its own advertising of the Grievant's situation.

As to the District's assertion that the Association witnesses' opinions are irrelevant, then so, too, are the District's witnesses. If the Arbitrator accepts that the Association witnesses offered testimony that was biased, self-serving and espousing the Association line, then the same is true of the District's.

Given that the District's actions were excessive and unreasonable, the Association seeks the Arbitrator to reduce the Grievant's termination to a written letter of reprimand, reinstate him as the Head Girls Basketball Coach for the 2003-2004 season and order the District to cease and desist from its anti-union practices.

DISCUSSION

The essential facts in this case are not in dispute. The Grievant was the Girls Varsity Basketball Coach until May 9, 2002 when he was removed from this position. The Association challenges the removal on the basis' that it violated just cause and that anti-union animus was a factor in the District's decision thus negating its validity. The parties have defined just cause for purposes of this analysis in Article XII, Discipline and Discharge, and have negotiated this protection to apply to extra-curricular coaching positions. The Association challenges sub-sections 1, 6 and 7 of this section, and therefore the appropriate place to start is with these sub-sections.

Did the Board or designee forewarn the teacher of the possible consequences of his/her conduct?

The District supports its decision to impose discipline in the form of termination on the Grievant with its Drug-Free Workplace Policy. The Policy, in pertinent part, subjects an employee to discipline should he use alcohol while at an "off school property during any school-sponsored activity, event or function where students are under the jurisdiction of the district." The Association challenges this sub-section asserting that the Policy was not posted

on bulletin boards throughout the District and that the Grievant was not aware of the consequences of his action since the District did not review the Drug-Free Workplace Policy with him.

The parties agreement replicates Arbitrator Carroll Daugherty's seven tests to establish just cause. GRIEF BROS. COOPERAGE CORP., 42 LA 555, 557-59 (DAUGHERTY, 1964). Daugherty's expectation was that actual communication, either in writing or verbally, had to occur to inform the employee of the rules and penalties unless the communication was not necessary since some offenses are so serious that the employee could be expected to know the conduct is improper and subject to a heavy punishment. Discipline and Discharge in Arbitration, Norman Brand, (BNA, 1998) p. 31. The District did not verbally inform the Grievant that drinking alcohol while supervising students was inappropriate and there is conflicting testimony as to whether it was communicated in writing. Although Eparvier testified that he posted the Drug-Free Workplace Policy on all bulletin boards throughout the District, this occurred "several years ago." (Tr. 364) Other witnesses testified that they had not seen the policy posted. I find guidance in Devine's testimony. He testified that although he did not see the Policy posted, he believed it to be "common knowledge" and "common sense" that possession or use of alcohol during a school event was forbidden.

Use of alcohol while supervising students is a serious offense, so serious that I conclude that it meets the exception created by Daugherty. Further, I am convinced that the Grievant knew his actions were inconsistent with the District expectations, as well as community norms and as such, would subject him to potential discipline. The Grievant, upon reflection, came forward and confessed to a lapse in judgment. 3/ This occurred without review of the District's Drug-Free Workplace Policy. Although the Grievant testified that his memory was jogged when he viewed the student activity code cards during end of season equipment consolidation, this Arbitrator notes that the Grievant was wise enough on the evening of the incident to separately pay for his and Tobin's beers with cash while paying for the student pizza's with the District credit card. Accordingly, I find that the Grievant was forewarned that use of alcohol while supervising students was inappropriate and that consequences would result from such conduct.

3/ The timing of the Grievant's confession to Sodini and the reporting of the incident to Superintendent Eparvier by students C.G. and H. M. is either coincidental or contrived. In addition the presence and/or involvement of the same student in each of the three incidents is suspicious.

The Association also challenges the District's failure to properly post the Drug-Free Workplace Policy as directed by the Policy. As previously addressed, the record is unclear as to whether or not the Policy was posted. Given that the Grievant was aware of the content of the Policy, I conclude that even if the Policy was not posted on or about February 21, 2002,

the failure to post is a technical error. Moreover, since the Policy indicates that discipline shall be administered consistent with the parties' collective bargaining agreement, the Grievant has not been harmed by having not viewed the document.

Has the Board or designee applied its rules, orders and penalties even-handed to employees in like circumstances?

The Association and the Grievant believe his discharge amounted to disparate treatment *vis-a-vis* another employee in the District. The other employee, Mr. Sam Komp, was given a written reprimand for use of profanity and derogatory comments. Komp's discipline followed numerous student/parent complaints which were investigated by the District and negotiations between the Association, the District and the attorney for the parents. The Association challenges both the District's handling of the Komp complaints and the penalty imposed concluding there was differential treatment.

The Grievant's supervisor, Sodini testified that he disciplined the Grievant for the two incidents arising out of the complaints received from Mrs. Pearce and M.M.'s father and further, that he believed that inclusion of the items in the Grievant's 2002 evaluation constituted discipline. This is inconsistent with the contractual requirements of Article XX, Section L; the requirements of Rule 872, PROCEDURES FOR HANDLING COMPLAINTS ABOUT SCHOOL PERSONNEL; and with the manner in which the District received and responded to the complaints received regarding Komp.

The parties have negotiated in Article XX, Section L, how complaints lodged against teachers will be addressed. 4/ The process requires the complainant, the building principal and the teacher/coach meet to discuss and attempt to resolve the issue, and if that does not occur, then a meeting with all of the already identified individuals and the Superintendent will occur. Section L further states that if potential disciplinary action should result, then the process begins with the second step of Article VII, Grievance Procedure, which would allow the Grievant the option to have an Association representative present. Eparvier testified and the record supports that this procedure was utilized when the Komp complaints were received which lead to Komp's written disciplinary action. When the District received the Komp complaints, he was apprised of the content of the complaints, was afforded a hearing at which time he disputed the allegations, and was provided a formal written letter that informed him that he had been disciplined for the proven incidents. The record establishes that this process was not utilized by the District when it received the complaints from Mrs. Pearce and M.M.'s father.

4/ The Association argues that the procedure that the District followed when responding to the Komp complaints was not followed for the Grievant. The Association does not specify whether it believes Article XX, Section L and/or Rule 872 is controlling. As such, I have addressed both.

When Sodini received the telephone calls from Mrs. Pierce and M.M.'s father, he discussed it with the Grievant in a hallway or like location at the next available time in which he and the Grievant were together. There was never a meeting between the Grievant, Sodini and/or the building principal and the complaining party nor did the District proceed to Step 2 of the Grievance Procedure. The record is void as to whether the Grievant was offered an Association representative during his conversations with Sodini, but it is clear that one was not present during either of the conversations. Given that the collective bargaining agreement spells out how the District is to respond to complaints if discipline is contemplated and that the District followed this procedure when it responded to complaints against another teacher/coach Komp, I conclude that the District failed to treat the Grievant in the same manner as Komp.

Similarly, Rule 872 requires that when the District receives a complaint regarding a staff member, the District will facilitate a discussion between the person complaining and the staff member. This rule also provides that if the complaint will be utilized in a discharge hearing, then the incident(s) shall be documented and copies of all documentation, including the disposition and actions taken, shall be provided to the staff member. The record is void of any documentation of the complaints from either Mrs. Pearce or M.M.'s father and the Grievant was not informed that he had been disciplined for the incidents.

The Association does not specify whether its challenge to the disparity in the handling of the Grievant's complaints is based on a deviation from Article XX, Section L or Rule 872. Regardless of which procedure it is challenging, the evidence supports that the District followed one or both of the procedures when responding to the Komp complaints and did not follow either in the Grievant's case. It is certainly the District's prerogative and obligation to evaluate complaints and based on that evaluation, determine how it will proceed. But once the District makes a decision to not follow the contractual and policy created disciplinary path, it must live with that decision. The District was obligated to not only follow Article XX, Section L and Rule 872, but to also treat the Grievant in the same manner as it did Komp, a similarly situated teacher/coach disciplined as a result of complaints, and its failure to do so violates the just cause component of sub-section 6.

The Association next argues that Grievant should have received the same penalty as that imposed on Komp. Regardless of the number of complaints or the infractions alleged in the complaints lodged against Komp, there was only one offense upheld through the District's investigation and that was the use of using profanity and derogatory language. That is not the same as drinking alcohol while supervising students. If the Association is arguing that if it was the District's intent to discipline the Grievant for the two complaint incidents, it should have issued written letters of discipline rather than include notations in his evaluation for the two complaint incidents, I agree.

Was the degree of discipline related to the seriousness of the offense and the teacher's past record?

As Arbitrator Paul N. Guthrie stated, a discharge "must stand or fall upon the reason given at the time of the discharge." Elkouri and Elkouri, How Arbitration Works, 5th Edition, p. 922 (1997) citing WEST VIRGINIA PULP & PAPER CO. 10 LA 117, 118 (1947). The record

establishes that the termination was based on the two “disciplinary” incidents as noted in the Grievant’s 2002 evaluation and the alcohol consumption incident following the Florence basketball game on February 23, 2002. Although Sodini testified at hearing that he considered the notations to be discipline, it is clear to this Arbitrator that the two notations were not discipline. As previously addressed, the District did not follow Article XX, Section L or Rule 872 and the Grievant was never informed that he had been disciplined. Moreover, had the Grievant been disciplined for the two incidents, the Administrators would have referenced them in its memorandum to the Board of Education recommending the Grievant’s termination.

It is clear to this Arbitrator that the Board of Education determined it needed to rely on the two incidents, in conjunction with the alcohol consumption incident, to support the Grievant’s contract termination. It did so to its own peril. When an employer fails to notify an employee of alleged infractions at the time of the occurrence it is precluded using the notations to support disciplinary action at a later date”. Elkouri and Elkouri, How Arbitration Works, 5th Edition, p. 926 (1997) citing CONSOLIDATED VULTEE AIRCRAFT CORP., 10 LA 907, 909 (DWYER, 1948). Because two of the three bases on which the District reached its decision are invalid I find that the District's determination of penalty is excessive and violates just cause.

The District, in its brief argues that even if the Arbitrator does not find the two incidents to be formal discipline, the same purpose was served since the conversations placed the Grievant on notice that should he continue to engage in impulsive and irresponsible activity, his continued coaching employment was in jeopardy. I do not agree. Discipline is a formal process that serves as a wake-up to call to an employee that his continued employment is in jeopardy should inappropriate behaviors continue. The conversations with Sodini placed the Grievant on notice that the behaviors at the Lena and Wausaukee games were inappropriate and should not occur again, but the fact that the District did not subject the Grievant to formal discipline also communicated to the Grievant that the incidents did not rise to the level of severity necessary to warrant discipline.

The District next argues that it is entirely appropriate to consider the Grievant’s past record when determining the level of discipline to be imposed and given the pattern of conduct as noted in the Grievant’s 2002 evaluation, in conjunction with the alcohol incident following the Florence game, termination is warranted. I concur that an employee’s past record is fair game when determining the proper penalty for an offense, but I do not ascribe to District’s view of the Grievant’s past record. Sodini testified that the Grievant’s 2000-2001 evaluation was “good.” The 2001-2002 evaluation contains one “needs improvement” mark, six “outstanding” marks, 14 “outstanding/effective” marks and six “effective” marks. The narrative section 2001-2002 evaluation is relatively positive, but for the two sentence explanation of the “needs improvement” mark. I find it fundamentally unfair to characterize the Grievant’s evaluation as one that supports termination.

The question then becomes what is the appropriate penalty. Use of alcohol by a coach while supervising students is a serious offense. There is no question that teachers and coaches are role models and as such, are held to a higher standard of behavior when there is a

relationship between the conduct and the position. The District and the Association each called various community members who credibly testified as to their personal opinion of the appropriate penalty and who are indicators of the community standard. I also note that the Grievant's termination was not a unanimous decision by the Board of Education which is also indicative of the community standard. The Grievant is a ten-year teacher and eight-year coach with an unblemished work record up until the 2001-2002 basketball season. This is the first instance in which Grievant has been disciplined for anything in his employment with the District, although the record establishes that the Grievant and the District have a history of disagreement.

Accordingly, I am ordering reinstatement of the coaching contract of Robert P. Schneider to the Peshtigo Girls Varsity Basketball Coach position effective the 2003-2004 basketball season. This decision should not be viewed as an exoneration of the Grievant's bad judgment and inappropriate behavior. It simply means that the penalty of termination of his contract is too severe when two of the three bases for termination are removed.

Having found that the District violated Article XII and the just cause standard when it terminated the Grievant, I do not address the Association's allegations of anti-union animus.

AWARD

1. Yes, the Peshtigo School District violated the collective bargaining agreement when it terminated Mr. Robert P. Schneider from the Girls Varsity Basketball Coach position on May 9, 2002.

2. The appropriate remedy is to reinstate the Grievant to the extracurricular position of Girls Varsity Basketball Coach effective the beginning of the 2003-2004 basketball season, but no back pay or benefits are awarded. The 2002-2003 basketball season shall be reflected in his employment record as a disciplinary suspension.

3. I shall retain jurisdiction for a period of not less than sixty (60) days to resolve any questions involving application of this Award.

Dated at Rhinelander, Wisconsin, this 27th day of October, 2003.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator

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