BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CRANDON TEACHER'S ASSOCIATION

and

CRANDON SCHOOL DISTRICT

Case 33
No. 70094
MA-14859

(High School Girls Volleyball Head Coaching Position)

Appearances:

Mr. Fred Andrist, Northern Tier Uniserv, Executive Director, P.O. Box 1400, Rhinelander, Wisconsin 54501, appearing on behalf of the Crandon Teacher's Association.

Attorney Steven Garbowicz, Anderson, Burgy & Garbowicz, LLP, P.O. Box 639, Eagle River, Wisconsin 54521, appearing on behalf of the Crandon School District**.**

ARBITRATION AWARD

The Crandon Teacher's Association, hereinafter referred to as the Union, and the Crandon School District, hereinafter referred to as the District or the Employer, are parties to a Collective Bargaining Agreement (CBA) which provides for final and binding arbitration of certain disputes, which CBA was in full force and effect at all times mentioned herein. On August 17, 2010, the Union filed a Request to Initiate Grievance Arbitration and asked the Wisconsin Employment Relations Commission to assign a staff arbitrator to hear and resolve the Union's grievance regarding the alleged failure of the District to hire the Grievant, Karen Lehman, to the position of head volleyball coach and to pay the proper amount of back pay to her. The Parties requested a member of the Commission's staff be assigned as Arbitrator and the undersigned was appointed as the Arbitrator to hear and decide the matter. Hearing was held on the matter on December 9, 2010 in Crandon, Wisconsin, at which time the parties were given the opportunity to present evidence and arguments. This matter is properly before the Arbitrator. The hearing was transcribed and thus becomes the official transcript of this matter. The parties filed initial post-hearing briefs and replies by March 1, 2011 marking the close of the record. Based upon the evidence and the arguments of the parties, I issue the following Decision and Award.

ISSUES

The parties were able to stipulate to the issues to be decided by the Arbitrator as follows:

Did the District violate the Collective Bargaining Agreement, and in particular Article XXV, when it failed to hire Karen Lehman for the Head Volleyball Coach position for the 2010-2011 season? If so, what is the proper remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE II
MANAGEMENT RIGHTS

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

. . .

2. To hire all employees subject to the provisions of law, and to determine their qualifications and the conditions of their continued employment, or their dismissal or demotion, and to promote and transfer all such employees.

. . .

ARTICLE XVI
VACANCIES, TRANSFERS AND REASSIGNMENTS

A. Notices of teacher vacancies shall be given to the president of the Crandon Teacher's Association.

B. Such notices shall contain a description of the vacancy and the date by which it must be returned. Those interested must respond within a period of fourteen (14) calendar days. In the event that a position becomes vacant within thirty (30) calendar days of the start of school, the waiting period can be shortened to five (5) calendar days after notification of the Crandon Teachers' Association.

C. Teachers who desire a change in grade and/or subject assignment or who desire to transfer to another position may file a written statement of such desire with the superintendent no later than April 30th.

D. The Board may, by mutual agreement with the teacher, transfer from one position to another at any time after the last teaching day in May or before the third week in August provided the teacher is notified during that period of time.

E. Bumping can only occur in a layoff situation and then seniority prevails.

F. Any vacancies, transfers, and reassignments would be done using the seniority list, and if more than one person has the same seniority, qualifications will be used. Qualifications shall be defined as teaching experience at a particular level (i.e., Elementary, Middle or High School) and/or subject area; additional college credits in area; number of pertinent workshops and seminars attended; and job performance as determined by previous evaluations. Not withstanding (sic.) the above, the Board shall have the right to deviate from the above criteria once each contract year for good and sufficient cause if the Board desires to hire another qualified employee for the position, provided this deviation is not arbitrary or capricious.

. . .

ARTICLE XXV
EXTRA AND CO-CURRICULAR DUTIES

A. All extra and co-curricular duties shall be contracted separately. Those duties and amounts negotiated for them shall be listed in Appendix B.

B. If a teacher notifies the administration that they do not wish to accept a particular assignment for the coming year, the administration shall make every reasonable effort to find a replacement. If no replacement can be found, the teacher must take the duty for that year with the understanding that from then on that duty shall be strictly voluntary for that teacher.

C. The contract to be signed by teachers for duties above and beyond the individual teachers' contract shall be as set forth in Appendix E.

D. The Board will post as vacancies by May 1st of each year, all extra curricular positions occupied by non-certified personnel.

BACKGROUND

Grievant is a 20 plus year teacher and currently teaches in the Crandon School District where she has taught for over 15 years. She is "certified", meaning she was licensed by the State to teach. In early 2010 several "in-house" positions became vacant. These positions, including the head volleyball coaching position, were posted on or about April 20, 2010 inviting the submission of a written application by anyone interested in a listed position. The Grievant submitted her written application on or about April 28, 2010 for the head volleyball coaching position.

For a period of between 4 to 6 years prior to the posting of the above mentioned position, Tammi Sprenger had been the head volleyball coach and was still, in fact, the head coach at the time of the posting and of the Grievant's application. Ms. Sprenger was not a certified teacher and was not a member of the Union. She was employed by the District as non-certified employee.

Following her application Grievant was rejected by the District on the basis that she needed more experience before coaching the high school team. She was offered the position of head middle school coach but turned that position down.

This grievance followed.

THE PARTIES' POSITIONS

The Union

The Union maintains that the language of the Collective Bargaining Agreement (CBA) is clear and provides that non-certified personnel are posted as vacancies and, as such, must be filled by Union employees pursuant to the CBA. Because Grievant was a Union employee, she should have received the appointment over Ms. Sprenger providing she was otherwise qualified. It makes no sense to post vacancies if certified employees have no chance of getting them. Furthermore, if these positions are real vacancies then the seniority provisions of the contract should apply and, if this is true, Grievant should be awarded the position as the only certified person to apply.

The District has not required experience in the past. A prior head volleyball coach held the position with no experience other than having played high school volleyball and she received the position in favor of another experienced and certified teacher. It is disingenuous of the District to now cite experience as a determining factor. As a result of this experience the District changed its hiring practices but did not tell anyone about the change other than the assistant coach who failed to get the job. Thus, argues the Union, the applicant cannot be held to a standard to which she was unaware and , since she was aware of the past actions in hiring a lower qualified applicant that's the standard which should apply to her.

The District

Article II (A)(2) should be considered. This is the Management Rights Provision providing the District with the right to determine the qualifications and the conditions of employment for its employees. It has not been modified in any way so as to dilute the provisions of Article II.

Article XXV does not give the employee the right to be hired on the basis of being certified. It merely provides that a non-certified staff member or individual is to be contracted separately (as is a certified staff member) and sets forth what is to happen in the event a teacher chooses not to continue with a particular assignment. It also provides that Appendix E sets forth the details of the required contract. Appendix B sets forth the amount of the pay for the extra-curricular contracts

The District did not violate any provisions of the CBA when it hired a non-certified person to coach the head volleyball position. It is obvious that Article XXV does not provide any guidance as to what the District must do when a non-certified individual applies along with a certified individual, nor does it give any guidance on any other issue relating to this matter. Furthermore, the experience level of the incumbent Sprenger far exceeds that of the Grievant.

The WIAA (Wisconsin Athletic Association) representative testified that she was the person who reviewed qualifications and said that it was the School who ultimately made decisions about coaches. She only required that certain classes relating to teaching student athletes and first aid be completed in order to qualify as a coach and the incumbent had taken both courses.

The AD, Andy Space, testified that the District was interested in hiring the most qualified coaches it could find and the incumbent filled that bill. Her vision for the future of the program was superior to that of the Grievant. She was dedicated to the program and had been for a number of years. Coaching experience became a major factor in looking at head coaches following the hiring of a former inexperienced coach.

It is the position of the District that the specific language in the Management Rights Article is a specific grant of authority which has not been modified or taken away in any other part of the CBA. As for the prior hiring of a less qualified coach, this was a one time occurrence and should not be given effect as a binding past practice. The evidence of past practice is not sufficient enough to support it as binding.

The Union's Reply

The Management Rights Clause in the CBA is limited by the contract language so as to prevent the District from relying on the Management Rights Clause. The Union says that it has pointed to two different Articles where the District has limited its rights and that this is a fundamental contract interpretation case and it presumes that the Arbitrator is well versed in the interpretation of contract language and so does not expound.

It says that the WIAA allows the District to hire a non-certified person if "a certified teacher is unavailable or unnacceptable." (Union emphasis.) The Grievant was certified so the question then becomes "was she acceptable." The Union disagrees that "acceptable" means "most qualified" but rather, in reference to Article XVI (Vacancies, Transfers and Reassignments), means "most senior."

The District has hired coaches with no experience in the past and hence suggests that it has a past practice of doing so and apparently should be bound by that past practice in this instance. In trying to minimize the extent of the Grievant's qualifications the District attempts to argue that she was not qualified. This conclusion is belied by the fact that the District did offer her a job as head coach in another volleyball position.

The District's Reply

The relative experience of Ms. Brownell, the former head volleyball coach with less experience that the Grievant's, and Ms. Sprenger was never an issue because there is no evidence that Ms. Sprenger ever applied for the job. Ms. Brownell and the other individual who applied for the job were both certified teachers.

While the Union seems to argue that it had no notice that experience was an important factor in filling the extra-curricular positions, the AD testified that in the four years of his tenure as AD experience has been a primary concern.

DISCUSSION

The Union argues that the contract language is clear and requires that non-certified personnel must be posted as vacancies. While the Union does not cite a particular CBA provision, the Arbitrator believes it refers to Article XXV. The Union believes that this means that positions are to be filled by CTA (Union/Certified) employees. The undersigned does not agree with this interpretation of the CBA. Article XXV does not speak to certified versus non-certified personnel and does not provide for the exclusive hiring of certified personnel as the Union argues. The Arbitrator agrees with the Union's assertion that clear and unambiguous contract language must be applied by the Arbitrator. In this instance, the clear and unambiguous language does not prevent the hire of a non-certified person (if otherwise qualified) and, thus, the actions of the District did not violate the CBA relative to the hiring of a non-certified person versus a certified one.

The Union also argues that the fact that a former volleyball coach (Jodie Resch Brownell) had been hired in favor of a more experienced person with virtually no prior experience aside from playing high school volleyball sets a precedent which should be followed here. The Union, although it does not specifically say so, is arguing the existence of a binding past practice. There is no question that Ms. Brownell was hired and that she had little experience, but that is not the test of whether a past practice is binding upon the parties. The test is whether a past practice is (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties. CELANESE CORP. OF

AM., 24 LA 168, 172 (Justin, 1954). A number of arbitrators have modified the CELANESE analysis slightly but the core elements required amount to essentially the same concept. The practice must be clear, consistent and accepted by both parties. In short, the practice must be mutually accepted and agreed upon. These are the accepted elements arbitrators use when referring to a past practice as an aid to contract interpretation. In the instance, like here, where contract language is clear and unambiguous the use of custom and practice is generally irrelevant. Plain language is an undisputed fact and past practice is not required to aid in its interpretation.

The simple facts in this case as they relate to the contract language do not allow both sides to advance plausible contentions for conflicting interpretation of Article XXV. In short, the language is clear and unambiguous and is not capable of alternative meaning. It is a stretch, indeed, for the Union to argue that the language here means that a certified person must be hired as the head volleyball coach. No such conclusion may be reasonably drawn by this language.

In addition to the above, the Management Rights Clause is clear and gives the District the right to hire all employees and establish the requirements for hire. Nothing in the contract has modified or altered that right, which, of course, is necessary to overcome the plain language of the Management Rights Clause.

The language in Article XVI is clear and applies to "teacher vacancies". It does not apply to "extra curricular" vacancies such as coaching positions. The Article which applies to extra curricular positions is Article XXV. Seniority is not an issue in this case.

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

AWARD

The District did not violate the Collective Bargaining Agreement, in particular Article XXV, when it failed to hire Karen Lehman as the Head Volleyball Coach position for the 2010 - 2011 season.

This matter is dismissed in its entirety.

Dated at Wausau, Wisconsin, this 22nd day of March, 2011.

Steve Morrison /s/
Steve Morrison, Arbitrator

SM/gjc
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